

[2021] PBRA 15

## Application for Reconsideration by Finch

### Application

1. This is an application by Finch (the Applicant) for reconsideration of a decision of a Parole Board panel at an oral hearing dated the 19<sup>th</sup> January 2021 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier of 586/590 pages including the Decision Letter (DL) under review and the representations submitted on the Applicant's behalf by his legal representative.

### Background

4. The Applicant was sentenced to an Indeterminate Sentence for Public Protection (IPP) in 2012. The tariff portion of the sentence (33 months) expired in 2014. In 2019 the 4<sup>th</sup> review of his case by the Parole Board (PB) recommended that the Applicant be transferred to open conditions. That recommendation was accepted and he was transferred in May of that year.

### Request for Reconsideration

5. The application for reconsideration is dated 2<sup>nd</sup> February 2021.
6. The grounds for seeking a reconsideration are as follows:
  - a) Although neither of the professional witnesses called to give evidence recommended release, they both expressed the opinion that if release were to be directed the Risk Management Plan which had been prepared was a robust plan. The DL's failure to record this opinion in the DL amounted to a procedural irregularity, or, in the alternative, resulted in an irrational finding;
  - b) The speed with which the DL was produced – later on the day of the hearing – suggests that the decision had been made (and perhaps written) in advance of the hearing. This amounts to a procedural irregularity.

### Current parole review



3rd Floor, 10 South Colonnade, London E14 4PU



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



@Parole\_Board



0203 880 0885

7. The case was referred to the PB on 25<sup>th</sup> October 2019. The Applicant was 47 years old at the time of conviction and is now 55.
8. A single member panel conducted the (remote, due to the COVID-19 pandemic) oral hearing on 19<sup>th</sup> January 2021. It considered the dossier then numbering 578 pages and heard oral evidence from the Applicant and his Prison and Community Managers. The Applicant was legally represented.

### **The Relevant Law**

9. The panel correctly set out in its decision letter dated 19<sup>th</sup> January 2021 the test for release.

#### *Parole Board Rules 2019*

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). This decision is therefore an eligible decision.

#### *Irrationality*

11. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

*"the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

12. This test was originally set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

#### *Procedural unfairness*

13. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

14. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

 3rd Floor, 10 South Colonnade, London E14 4PU

 [www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)

 [info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)

 @Parole\_Board

 0203 880 0885

- (a) express procedures laid down by law were not followed in the making of the relevant decision; or,
- (b) they were not given a fair hearing; or,
- (c) they were not properly informed of the case against them; or
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

#### Other

15. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

16. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

#### The reply on behalf of the Secretary of State

17. The Secretary of State has indicated that he does not wish to make representations.

#### Discussion

18. It will be rare, absent some very serious error of fact or procedure, for a decision supported by the professionals who give evidence to a panel to merit reconsideration.

19. As to Ground a) This concerns the Risk Management Plan (RMP) devised by the Offender Manager and others against the possibility that the panel might direct release. At paragraph 7 of the DL the panel dealt with this topic. In particular, it set out the reasons why the professionals were unable to support release and described the details of the RMP proposed in case the panel directed otherwise:

***'Your offender manager and offender supervisor do not support release. They both believe that the targets set for completion of further risk reduction work during temporary releases and the need for a long-term resettlement plan are necessary along with the need***

**for you to be tested on how you respond to real-world situations and stimuli within the controls of temporary release.**

**Although there would be strong external controls provided by a wide range of licence conditions, SOPO conditions, and a restraining order in respect of your ex-partner, there could be no confidence in how you may react and whether had sufficient internal controls to avoid future risky behaviour. Furthermore, your stance of denial in relation to your index offences would make it very difficult to be assured that warning signs would be obvious of any increase in your risk should you decide to sexually re-offend against children.**

**Even with additional external controls in place such as GPS monitoring and Polygraph testing, without the re-assurance provided by your further engagement in risk reduction work and an assessment of the effects of that intervention, the panel found it very difficult to be confident that your high risks of further offending would be safely manageable in the medium to longer term of your indefinite period of supervision.**

**Your risk management plans include initial release to [Designated Accommodation] where a bed would be available within around 16 weeks from the decision date for a 12 week placement. Your case has been accepted by probation and you would be supervised on release or on Release On Temporary Licence from prison by that service. You are screened into the Offender Personality Disorder pathway for additional support although a current formulation has not yet been provided.**

**Your longer term plans are uncertain as you would like to live in but that is not currently realistic. Further work is still needed to give you a long term robust resettlement plan although it is acknowledged that you have the strong support of your own family network to help you when in the community.**

**Many restrictive, but proportionate and necessary licence conditions are proposed, which include no contact with your victims and their family and a wide range of external controls that would normally applied to child sex offenders and which also mirror aspects of your Sexual Offences Prevention Order and indefinite restraining.'**

20.The passage in bold above makes it clear that the panel took full account of the RMP when reaching its decision. In addition it made it clear that one of the factors which influenced the decision not to direct release was the fact that the current restrictions imposed on daily life by the COVID-19 pandemic had been responsible for the Applicant's inability to progress in the way in which all had hoped would be possible following the previous parole hearing.

21.There is nothing in this ground.

22.A reading of the DL reveals that significant parts of it must have been written after the hearing. Part of paragraph 2, the last two sub-paragraphs of paragraph 3, the last two sub-paragraphs of paragraph 4 and the last sub-paragraph of paragraph 7 all refer to

the evidence given at the hearing by the Applicant. If it were the case that much of the text – which simply recorded past events and the expressed opinions of the professionals – had been composed before the hearing that cannot amount to a procedural irregularity.

## **Decision**

23. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Sir David Calvert-Smith**  
**15 February 2021**