

[2022] PBRA 158

Application for Reconsideration by Moon

Application

1. This is an application by Moon (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 21 September 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 21 September 2022;
 - b) A request for reconsideration from the Applicant in the form of legal representations dated the 9 October 2022;
 - c) The dossier, numbered to page 538, of which the last document is the Decision Letter. The panel had a dossier numbered to page 519.

Background

4. The Applicant is now 38 years old. On 9 March 2007, when he was 22 years old, he received a sentence of imprisonment for public protection following his conviction for arson, being reckless as to whether life is endangered (the Index Offence). The sentencing court imposed a minimum term of 27 months, less time spent on remand, and the Applicant first became eligible for consideration of release by the Parole Board on the 14 February 2009.
5. The background to the Index Offence is that the Applicant had argued with his partner which led to him being locked out of the house. The Applicant set fire to a blanket from the garden shed which he pushed through the bathroom window. Fortunately, his partner was able to put out the fire before any serious damage was caused. The Applicant had claimed to have acted on the spur of the moment, although he knew that his partner and his two children were in the property. His partner had said that the Applicant had threatened to kill her and his children immediately before the Index Offence.
6. The Applicant has been released and recalled three times on this sentence. He was first released on the direction of the Parole Board in June 2015 but was recalled three months later. The Parole Board directed his re-release in January



2017 and he was recalled around two months later, remaining unlawfully at large for over three months. The last release was in February 2020 following an oral hearing by the Parole Board, and the Applicant was recalled less than three months later, remaining unlawfully at large for two weeks.

7. Prior to the first release, the Applicant had spent two periods in an open prison (in 2012 and 2013), however, he had been returned on both occasions to a closed prison due to concerns about substance misuse, his association with negative peers and his failure to alert staff to difficulties.
8. Soon after the first release, the Applicant entered into an intimate relationship. He was recalled to custody when he was reported to have made threats to his partner and caused damage to her car when he lost his temper. The matter was not pursued by the police because the Applicant's partner did not wish to make a statement.
9. Prior to the second release, the Applicant had married his partner. The marriage ended following his release when the Applicant's partner suspected that he had been unfaithful to her. This was because the Applicant had made calls to another woman, with whom he later developed an intimate relationship when unlawfully at large. The Applicant was recalled on the second occasion when he failed to return to his designated accommodation. It was reported that while he was unlawfully at large, the Applicant harassed his wife and he was later convicted of a course of conduct amounting to harassment. In his evidence to the panel, the Applicant also spoke about another encounter with a woman who later gave birth to his daughter. The Applicant's new partner had also been pregnant with his child.
10. The third release saw the Applicant placed in designated accommodation. There were concerns reported about his level of engagement, his breach of Coronavirus restrictions and his association with negative peers. There were also concerns about the Applicant's contact with women, aside from his partner. On the day he was allowed to move from the designated accommodation, the Applicant was collected by a woman who was not his partner and, as he drove away, another woman was seen by staff to be screaming at him and crying hysterically. It was believed, at the time, that the Applicant had entered into a new relationship and he was warned by Probation for not disclosing this relationship. It was also established that the Applicant had breached the exclusion zone on his licence.
11. The Applicant was recalled on the third occasion after reports that he had made threats to his partner and had sent threatening and abusive text messages. The police later decided not to take any action against the Applicant in respect of this allegation.
12. On the 4 June 2020, the Secretary of State referred the Applicant's case to the Parole Board for it to determine whether or not his re-release could be directed. In the absence of any direction for release, the Secretary of State asked the Parole Board to provide advice on the Applicant's suitability for a place in an open prison.



13. The case was first considered by the Parole Board on the papers on the 25 June 2020. The Applicant had indicated a wish for his case to be considered at an oral hearing and the paper review directed that an oral hearing should be listed.
14. The panel first considered the case at an oral hearing on the 21 December 2020. At that hearing, the Applicant asked for the case to be adjourned because he had wanted to engage with recommended individualised work in custody. It was expected that the work would be completed over a number of weeks. However, the Applicant would first need to transfer to another prison.
15. The restrictions in the prison estate due to the Coronavirus pandemic led to delay in the prison transfer and in the completion of the individualised work. On the 11 February 2021, noting the extended delay, the Applicant's legal representative applied for the case to be concluded on the papers, which would see him remain in prison to complete the individualised work.
16. On the 3 July 2021, the panel reviewed matters and at around that time it had asked for further legal representations because it had been advised that the Applicant's referral for individualised work could not be made in the absence of a direction from the Parole Board, and because Coronavirus lockdown restrictions were being lifted in the prison estate. The panel was then advised that the Applicant was seeking a further adjournment rather than the conclusion of his case on the papers. The panel agreed to that revised application.
17. On the 2 September 2021, the panel reviewed the progress in the case. The Applicant had moved prisons on the 15 September 2021 and the panel further adjourned the case, setting a review of that adjournment for January 2022. The Applicant subsequently began the individualised work in December 2021 and completed it in March 2022.
18. An oral hearing took place on the 19 May 2022. The Applicant was legally represented and he gave evidence to the panel. The panel also heard evidence from the Applicant's probation officer in the community, the official supervising his case in custody and from a prison psychologist who had assessed the Applicant's progress in custody. Those witnesses supported the Applicant's release, however, the panel did not accept the recommendations. The panel found that the Applicant did not meet the test for release and instead advised the Secretary of State that the Applicant would be suitable for a move to an open prison.
19. There was a delay between the oral hearing and the issuing of the panel's Decision Letter dated 21 September 2022. However, necessary adjournment notices were issued on 31 May 2022, 12 June 2022 and 22 August 2022. A part of the delay in concluding the review was that the Secretary of State amended his directions to the Parole Board which must be applied when considering the advice to give on the Applicant's suitability for a place in the open estate.

Request for Reconsideration

20. The application for reconsideration is that the panel's decision was irrational, in that:



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- a) The oral hearing process was *'very protracted'*; and
- b) The panel failed to properly apply the test for release and rejected the recommendations of three professional witnesses who supported the Applicant's release.

The Relevant Law

21. The panel correctly sets out in its decision letter dated the 11 September 2022 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.
22. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

23. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
24. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
25. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

26. 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."



27. This test was 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.
28. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1 and others**.

The reply on behalf of the Secretary of State

29. On the 21 October 2022, the Secretary of State confirmed that he did not wish to make any representations.

Discussion

30. I have read, with care, the detailed submissions made on behalf of the Applicant. It clearly took a long time for this case to be resolved and I accept that the Parole Board must ensure timely reviews of detention. However, the initial adjournment of the review was made at the Applicant's request. The further adjournment was also requested by the Applicant, albeit that he had initially requested a paper review at that stage. It was unfortunate that the Coronavirus pandemic led to delay, however, the panel ensured that there was active case management and, soon after the completion of the individualised work, the panel convened an oral hearing. In my assessment, the panel was alive to the need to act fairly in this case and it achieved this by affording the Applicant the opportunity to complete proposed work in custody. The Applicant was not disadvantaged by this approach and had the review concluded at an earlier stage, he may have struggled to access the identified work. Other panels may well have decided to conclude the review on the papers at that earlier stage, although there was nothing irrational about the panel's approach of ensuring fairness to the Applicant and the opportunity for him to engage with work in custody.
31. Much of the Applicant's complaint is that the panel disagreed with the recommendations made by the professional witnesses. In the Applicant's view, there was *'no rational evidential basis for the panel to reject the evidence and conclusions of the three professional witnesses ...'*. The Applicant submits that the panel was wrong in its conclusion that his skills are *'wholly untested'* and he believes that it was clear he had demonstrated his skills in custody. In summary, the Applicant believes that the panel's decision was irrational in light of the evidence presented in the case and he believes that the panel *'failed to properly apply the test for re-release ... particularly given the combination of a robust risk management plan, external controls and a significant increase in [the Applicant's] insight and understanding of his risk'*.

32. I can do no better in terms of explaining the reasoning for the panel's decision not to direct his release than refer to the conclusion of the Decision Letter:



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'...

4.6 There were several issues which the panel found of concern. First, given [the Applicant's] pronounced history of forming new intimate relationships very quickly, being unfaithful, and engaging in verbally threatening and abusive behaviour to resolve conflict or as a coping strategy, the panel wanted to be assured that [the Applicant] had a good understanding of how he would use his learning and skills to address future relationship issues. While he had gained a good understanding of how his emotions could be an obstacle to him implementing his learning, despite the programmes and interventions he had completed, the panel found that [the Applicant] could only outline a limited range of skills and strategies to manage his risks. These appeared to focus on avoidance techniques such as 'walk away', and he struggled to articulate other strategies and ways of thinking. This suggested to the panel that [the Applicant] would benefit from a thorough testing of his skills in a supportive environment where he would continue to be monitored given his high SARA score and his high risk of serious harm to known adults and potential partners.

4.7. Secondly, the panel was not confident that [the Applicant] was being honest and open about his current relationships with women. He was unable to give a satisfactory explanation of the nature of his relationship with GA and the panel was not confident that the relationship had ended. The panel was also unclear about his relationship with his mother's friend which seemed to have developed since his last recall. He also revealed a negative attitude towards women referring to "random women" and being willing to use GA for his own needs.

Thirdly, the panel was concerned that [the Applicant] placed too much emphasis on alcohol as his key risk factor. This suggested a lack of insight into his attitudes towards woman and his abusive behaviour in relationships, which he had a tendency to minimise. Fourthly, the panel considered that [the Applicant] was over-reliant on his methadone script, which had been increased at [the prison]. The panel was concerned that, according to [the Applicant], it was being used to address chronic physical pain as a substitute for pain-killers. No specific work appeared to have been done to address how [the Applicant] would reduce his methadone dosage, and how he would transition to prescribed pain medication. The panel also felt that being on a methadone script was likely to increase [the Applicant's] contact with



other drug users and negative peers. This was a concern as [the Applicant] had consistently gravitated towards negative peers and substance users when in the community. Fifthly, the panel felt that [the Applicant] had not been candid about his understanding of his licence conditions. Since he had been recalled twice previously and the focus of professionals on relationship issues, the panel would have expected [the Applicant] to ensure that he had a full understanding of his licence conditions, especially a condition relating to relationships. Finally, [the Applicant's] social support network was limited. He would need to build a pro-social circle of friends, which would take time, and would be mainly reliant on professional support, which historically [the Applicant] had not used for support or been open with.

4.8. The risks [the Applicant] presents to former and future intimate partners is high. The panel agrees with the Psychologist that initially harm is likely to be psychological but [the Applicant] can be impulsive and reckless and the harm could develop into physical aggression and violence. It is important therefore that [the Applicant] has not only a good understanding of his risks and is prepared to be honest with himself about them but that he is also able to use his learning and skills to manage those risks. He has consistently failed to do that in the community and significantly and worryingly his failures have been very rapid.

4.9. The panel acknowledges the work that [the Applicant] has undertaken since his last recall and his motivation to carry out the work, however whether he can put those skills into practice is wholly untested. The panel believes that reintegration into the community will be challenging for [the Applicant] and he will find it difficult not to enter into a new relationship. The panel considers that [the Applicant's] behaviour and response to being in the community needs to be carefully monitored and his thinking and self-management skills discussed with him, possibly alongside completing an emotion management and coping diary. While this could be done in the community, in the light of his history and his risk to intimate partners, the panel consider that this should be tested while [the Applicant] is still in a restrictive and supportive environment.

4.10. For the reasons outlined in this conclusion, the panel does not agree with the professionals that the test for release is met. The panel is not satisfied that



it is no longer necessary for the protection of the public that [the Applicant] remains confined and therefore makes no direction for release.

...'

33. Panels are not obliged to follow the recommendations of witnesses, in fact they must undertake their own assessment of a case and would be failing in their duty if they did not do so. Having decided that it did not agree with the recommendations made in the Applicant's case, the panel was required to provide an explanation so that the Applicant (and others) could be sure of the reason for that disagreement.
34. As noted from my reference to the Decision Letter (above), the panel did exactly that. The panel may have disagreed with the witnesses, however, it was entitled to do so and it gave detailed reasons for reaching an alternative view. In my view, the Decision Letter makes it clear to the reader as to why the panel arrived at the decision that it did.
35. The Applicant's submission that the panel failed to apply the test for release properly is simply another way of arguing that he disagrees with the panel's decision. He may disagree but, as I have already explained, it does not make the decision irrational.

Decision

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

Robert McKeon
04 November 2022

