

[2022] PBRA 29

Application for Reconsideration by Hands

Application

1. This is an application by Hands (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 25 January 2022 not to direct 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 decision of the OHP dated 25 January 2022, the Application for Reconsideration drafted by the Applicant's legal representative, the dossier consisting of 781 pages.

Background

4. The Applicant was sentenced to a sentence of imprisonment for public protection. He pleaded guilty at trial to the offence of the rape of a child under 13. The minimum tariff imposed by the judge was 3 years and 33 days. The tariff expired on 22 November 2010. This was the seventh parole review. The Applicant was 19 years old when he was sentenced, he is now 33 years of age.
5. A panel of three Parole Board members considered the Applicant's case at two adjourned oral hearings. Both the hearings were conducted remotely, by video link, due to restrictions on entry to prisons during the COVID-19 pandemic.

Request for Reconsideration

6. The application for reconsideration was submitted by the 23 February 2022.
7. The grounds for seeking a reconsideration are as follows:
 - a) That too much weight was placed on an incident, observed on CCTV, where the Applicant and another prisoner were observed to be punching each other. In particular it is submitted that it was irrational to conclude that on the evidence of the Applicant himself he showed "*poor decision making skills*" and "*it is of concern that during the incident he used violence whatever the provocation may have been*". It is submitted that the evidence regarding the "fight" was not tested, the Applicant was not convicted or adjudicated in relation to fighting or



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



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info@paroleboard.gov.uk



@Parole_Board



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assault although he was adjudicated for possession of the article described as a weapon;

- b) That the Applicant's last adjudication for violent behaviour had been in 2012;
- c) That the panel appeared to be concerned about the Applicant's ability to manage change; and
- d) That he had completed all core intervention work and that his behaviour towards staff and in prison generally had improved.

Current parole review

- 8. As indicated above, the OHP panel consisted of 3 members. Two members were independent and the third was a psychologist member. Evidence was given at the hearing by a Prison Offender Manager (POM), a Community Offender Manager (COM) and a prison psychologist.
- 9. The hearing had been adjourned on earlier occasions to secure a psychological risk assessment and on a further occasion to secure further information relating to the Risk Management Plan (RMP) and information relating to a project offering psychological support in prison and in the community.

The Relevant Law

- 10. The panel correctly sets out in its decision letter 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.

Parole Board Rules 2019

- 11. Pursuant to 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 if made by an oral hearing panel after an oral hearing (Rule 25(1)).
- 12. 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

- 13. 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."

14. 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.
15. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

16. 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.
17. The Applicant does not submit that the hearing was procedurally unfair.

Decisions

18. 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.*"
19. In the case of **R(Pearce) v Parole Board and Anor [2020] EWHC 3437 (Admin)** Mr Justice Bourne reviewed the principles of cases where a Parole Board panel took account of allegations - he determined (*paragraph numbering below is retained from decision*)

Principles decided by the cases

It is possible to pull together a number of strands and answer a number of questions.

In a parole review, the Board must "*balance the hardship and injustice of continuing to imprison a person who is unlikely to cause serious injury to the public against the need to protect the public against a person who is not unlikely to cause such injury*", and in the final balance must "*give preponderant weight to the need to protect innocent members of the public against any risk of significant injury*": **R v Parole Board ex parte Watson [1996] 1 WLR 906 at 916H per Sir Thomas Bingham.**

In doing this, the Board will examine all the available evidence. It is not the role of the Board to determine guilt in respect of further allegations, but "*evidence*



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of other offending” can be “considered as part and parcel of a global risk assessment”: **DSD**.

When finding facts, the Board applies the civil standard of proof. It is not determining a criminal charge: see **R (West) v Parole Board [2003] 1 WLR 705**.

Finding facts logically comes before assessing risk. It is when the Board ultimately assesses risk that “*the burden of proof has no real part to play*”: **R (Sim) v Parole Board [2003] EWCA Civ 1845 at [42] per Keene LJ**.

When making its evaluation, the Board is not limited to material which would be admissible in criminal or disciplinary proceedings: see **R v Hull Prison Visitors ex parte St. Germain [1979] 1 WLR 149**. It can have regard to hearsay evidence: see **Sim at [52]-[55]**. It should however be alert to any limitations or shortcomings in the evidence: **Coyle v Parole Commissioners of Northern Ireland [2018] NIQB 29**.

More generally, the Board’s procedure must be fair. The requirements arising from that duty will depend on the circumstances of each case. For example, the evidence in question may be “*so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross examination before it is taken into account at all*”: see **Brooks at [37]**, though in that case the Court upheld a decision by the Board which found that an allegation of rape was probably true despite the complainant declining to attend to give evidence at the hearing.

In a judicial review challenge, the Court will decide the question of procedural fairness by objective test, rather than merely reviewing on rationality grounds: **Osborn v Parole Board; Booth v (the same); In Re. Reilly [2014] AC 1115 at [65] per Lord Reed**.

If an allegation is neither proved, nor disregarded as irrelevant, what use can be made of it?

The answer in my judgment is that the Board will find such facts as it can and then consider the logical effect of those facts on its risk assessment. Take the example of a domestic violence case in which it is alleged that the prisoner assaulted his partner during an altercation. If the Board can only conclude that there might have been an assault, that conclusion may be of little assistance to it. But if it is satisfied that there was an altercation which led to the police being called, it could find that participating in the altercation (even without any assault) was behaviour which was relevant to the assessment of future risk.

In **R (Broadbent) v Parole Board [2005] EWHC 1207 (Admin)**, Stanley Burnton J (as he then was) said at [26] that “*...the fact of a charge and a pending prosecution alone cannot without more justify a conclusion that there is a risk of reoffending*”. However, any proven collateral facts about such a case may be highly relevant to risk. It is always for the Board to consider the facts and make the assessment.

The reply on behalf of the Secretary of State

20. The Secretary of State made no comment.

Discussion

21. The panel in this case had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it is plainly a matter for the panel to determine which opinion they prefer. Provided the reasons given by a panel are soundly based on evidence, as well as rational, and reasonable or at least not so outrageous in the sense expressed above. It would be unlikely that Reconsideration of that decision would apply.
22. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.
23. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
24. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
25. I set out below the relevant issues and response to the grounds of challenge:
26. Too much weight was placed upon incident involving the Applicant and another prisoner punching each other. (7 a) above
27. Applying the principles set out in **Pearce** above. The panel in this case were, in my opinion entitled, and indeed obliged, to assess the information and evidence relating to the "*punching*" incident. The Applicant's history indicated that he had convictions for offences of common assault, threatening behaviour and robbery in the past. The risk areas identified by the panel were (among other issues), emotional arousal, Not being able to control extremes of emotion, not being able to solve life's problems well enough and acting on the spur of the moment without thinking adequately about the

consequences making all of which were relevant to risk. I am satisfied that an assessment of the 'punching incident' was clearly relevant to an assessment of risk.

28. The OHP were not able to view the CCTV evidence. The OHP took evidence from the POM who had viewed the evidence. The Applicant was represented and had an opportunity to test the hearsay evidence. I am satisfied that accepting hearsay evidence, namely the viewing of the CCTV by the POM, was reasonable in the circumstances. Clearly it would be preferable for such evidence to be observed at first hand, however it is unlikely that the applicant's POM would deliberately misdescribe the viewed evidence.
29. In brief the incident was described in the OHP decision as "*[The Applicant] was with friends when approached by the other prisoner and after a brief conversation [the Applicant] lunged at the other man who steps back and then both parties are seen to punch/attempt to punch each other on more than one occasion. It is not possible to see a weapon. [the Applicant] has given a consistent account to the hearing and other professionals, alleging that the other man produced a weapon and that he stepped towards him to attempt to remove it, and does so, and that this is when the other man's hand was cut. The other man punches him, and he accepted that he also punched him but describes this as trying to defend himself. During this struggle the other man sustained a wound to the stomach, which [the Applicant] says happened unintentionally during the incident and that when he saw the blood he put the weapon in his pocket.*"
30. The incident was assessed by the OHP. The panel made no finding of fact as to the origin of the weapon, who started the altercation or how the injuries to the other prisoner were caused. Citing the question posed in Pearce above - *If an allegation is neither proved, nor disregarded as irrelevant, what use can be made of it?* In this case the OHP indicated that the incident showed the Applicant demonstrating not being able to solve life's problems well enough and not being able to control extremes of emotion when faced with frustration arising from the other prisoner's approach. The OHP also note the Applicant used violence in this situation rather than nonviolent alternatives (calling for help, leaving the scene, or possibly approaching staff).
31. In the light of this assessment and explanation by the OHP I am satisfied that it was reasonable for the panel to take account of the incident and that the panel made a careful and measured assessment of the relevance of the incident in terms of assessing risk.
32. That the Applicant's last adjudication for violent behaviour had been in 2012. (7b)
33. That the panel appeared to be concerned about the Applicant's ability to manage change. (7c)
34. That the Applicant had completed all core intervention work and that his behaviour towards staff and in prison generally had improved (7d).
35. I take these three grounds together as they all appear to indicate a complaint that the panel failed to take account of the positive progress that the Applicant had made. The OHP acknowledged in their decision that the Applicant had made considerable progress

since his return from an open prison. His ability to trust staff and be open had improved. He had completed intervention work. It was noted that various support agencies would assist him in the community (were he to be released). The panel took full account of positive changes that had been demonstrated by the Applicant. However, the panel concluded that in a difficult situation it was possible that the Applicant would act on the spur of the moment without thinking adequately about the consequences and not seek help. It was concluded that these situations would be likely to happen without warning signs. The OHP therefore concluded that, although it was accepted that the Risk Management Plan was robust, the risk posed by the Applicant could not be safely managed.

36. It is noted that the COM was not recommending immediate release. The Prison psychologist took the view that the risk might be manageable in the community, but also supported a view that transfer to open conditions could address some outstanding issues.

37. The support for release (as well as a recommendation for transfer to an open prison) by the prison psychologist was not specifically cited as an issue in this request for reconsideration. Where an OHP makes a decision contrary to that of a professional witness it is incumbent on the OHP to explain their reasoning. I am satisfied in this case that the reasoning was clear. The prison psychologist indicated some ambiguity in her recommendations. The OHP set out with clarity their reasons.

38. The OHP also noted that the Applicant had been in custody for a considerable period of time. Also noted was the fact that an earlier transfer to an open prison had broken down, possibly indicating the difficulty that the Applicant found in coping with change and with coping in a less restrictive environment. I determine that it was reasonable for the OHP to conclude that a direction for immediate release, could trigger difficulties in coping and thus elevate risk. I conclude that the OHP correctly and appropriately applied the statutory test for release in this case.

Decision

39. I have carefully considered the submissions in this case, for the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

HH S Dawson
1 March 2022