

[2022] PBRA 47

Application for Reconsideration by Wishart

Application

1. This is an application by Wishart (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 ("the 2019 Rules") that the Applicant was unsuitable for release ("the Decision"). The notice by which the Decision was communicated is dated 8 March 2022 (the Decision).
2. I have considered the application on the papers comprising:
 - a) A dossier of 536 numbered pages;
 - b) The letter giving reasons for the decision; and
 - c) Written submissions by the Applicant's solicitors by which reconsideration is requested, dated 28 March 2022.

Background

3. On 21 May 2007, having been convicted by a Jury of two charges of robbery, the Applicant was sentenced to an indefinite period of imprisonment for public protection (IPP) with a minimum tariff of 4 years, ten months and 1 day that expired on 21 March 2012.
4. The Applicant was aged 50 when he received that sentence and is now aged 64.
5. The Applicant has been released on indefinite licence on three occasions, after which he has been recalled to prison. The first such release was on 22 September 2012, with recall being on 29 September 2017. The second such release was on 10 July 2018 with recall being on 6 July 2018. The third such release was on 30 September 2020 with recall being on 11 November 2020. Offences relating to motor vehicles were committed by the Applicant during the first of those periods of release, including driving under the influence of controlled drugs. All three recalls are described as having resulted from poor behaviour and non-compliance. Failure to reside as directed was also a feature in the latter two recalls.

Current parole review

6. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board.
7. The Decision was made by a three-member panel of the Board that considered the Applicant's case after two oral hearings conducted by remote video links in July



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2021 and February 2022. The panel comprised of two Independent Members and a Judicial Member of the Board.

Application and response

8. The Applicant's submissions assert that the Decision is marred by irrationality.
9. The Public Protection Casework Section has stated by email dated 5 April 2022 that the Secretary of State offers no representations in response to the application.

The Relevant Law

10. Rule 28(1) of the 2019 Rules 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.

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 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.
13. 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. 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

14. 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.

Consideration

15. The 28 March 2022 submissions assert that the Board was irrational in its approach to the evidence regarding the Applicant's attitude towards his risk and his need to address his behaviour. It is asserted that the Board's finding that the Applicant sabotaged proposals to undergo a behavioural programme did not reflect oral

evidence during the hearing. An example is given of a two-question exchange between the Applicant's counsel and one of the four professional witnesses. It is not asserted that that example is comprehensive nor that the example is representative of the evidence as a whole, but even if it is the Applicant's choice to prioritise other activities within the prison over the recommended programme is entirely consistent with the Board's finding. The Board expressly had regard to the Applicant's behaviour having generally been good, with no recent adjudications. The Board was entirely reasonable in its assessment that the Applicant's comment that he would complete the programme "*for the sake of ½ a day in the classroom*" if he had to do so in the community upon release was not indicative of willingness or motivation to engage meaningfully in what was considered to be core risk reduction work.

16. The assertions relating to factual inaccuracies concerning a former partner lack clarity, but in any event the Board expressly recognised that there was no evidence that the Applicant actually sought contact with that person and that the concern was that he had fantasised or planned to do so. The ability to take a different view does not equate to irrationality. The Board would have had in mind the role of police in the protection of the public and the Applicant's assertions as to his intentions towards the former partner were properly to be considered in the round with the rest of the evidence before the Board.
17. There is no irrationality in the Board's weighing of the assessments by the professional witnesses in the light of the frequency of their contact with the Applicant. The consideration in the Board's reasons that the witnesses' recommendations were couched with hesitancy is entirely rational and appropriate in that exercise.
18. Regarding the submissions relating to the Applicant's health, the Board acknowledged the Applicant's health significant conditions, but considered that those difficulties did not significantly reduce his potential to cause harm, which is a different issue, albeit related. The Board noted that there was no formal medical evidence, and without such evidence it would arguably be irrational to make a finding that health issues had a significant impact on risk.
19. Regarding the support available to the Applicant in the community, the submissions appear to misunderstand the reasoning stated by the Board that there is no evidence of any potential support in the community other than provided by professional agencies, which it considered to be relatively insignificant in terms of protection of the public because the utility of such support was heavily reliant on the Applicant's motivation to co-operate, which the Board doubted.
20. Taken in the round, the Board's reasons are clear, coherent and adequately detailed, and cannot correctly be described as irrational.

Decision

21. Reconsideration is not directed.

Timothy Lawrence
20 April 2022