

[2022] PBRA 86

Application for Reconsideration by Swalwell

Application

1. This is an Application by Swalwell (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 9 June 2022 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:
 - a) The Decision Letter dated 9 June 2022;
 - b) A request for reconsideration in the form of written representations dated the 27 June 2022; and
 - c) The dossier, numbered to page 317, of which the last document is a panel chair direction amending the start time of the oral hearing. This was the entire dossier before the panel.
4. I am grateful to the Applicant for the focussed approach to the representations seeking reconsideration in this case.

Background

5. The Applicant is now 44 years old. On the 9 December 2005, when he was 28 years old, he received a sentence of imprisonment for public protection (IPP) following his conviction for an offence of aggravated burglary in a dwelling (the Index Offence). In the same sentencing exercise, the Applicant was sentenced for an offence of assault occasioning actual bodily harm and an offence of common assault.
6. The Applicant committed the index offence on the 20 July 2005, whilst subject to bail. He went to a flat shared by his ex-partner and another person, armed with a large knife. He threw a brick or a bottle at the windows of the property causing them to break and kicked in the door to the property. The Applicant was confronted by the other person present at the property and stabbed him in the chest. The Applicant told the panel that he had been drinking alcohol excessively at the time of the Index Offence.
7. The Applicant first became eligible to be considered for release by the Parole Board on the 20 January 2009 and he has been released on three occasions at the direction of the Parole Board. In October 2013 he was released but was recalled less than six months later. In March 2015 he was released but was recalled three months later.



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

His most recent release was in January 2016 and he was in the community for just over fourteen months before his recall.

8. Since the last recall to custody, the Applicant's case has been reviewed by the Parole Board on three occasions (including the present panel's review). Two earlier reviews did not direct his release, although the last review (prior to the present review) did recommend that the Applicant be transferred to an open prison. It seems that the Secretary of State then realised that he had made an error in his referral to the Parole Board and he had not wanted the Parole Board to provide advice on the Applicant's suitability for open conditions because he was in fact ineligible for a place there due to the Secretary of State's policy on absconding.
9. The third review, which is the subject of this reconsideration application, was only asked to determine whether the Applicant should be released. The panel considered the case at an oral hearing on the 6 June 2022 and heard oral evidence from the Applicant, his Probation Officer and the official responsible for the Applicant in custody. The Applicant was legally represented and his representative asked questions of the witnesses, as did the panel. In its decision letter of the 9 June 2022, the panel declined to direct the Applicant's release.

Request for Reconsideration

10. The Applicant's grounds for reconsideration are that the panel's decision was irrational and/or procedurally unfair, in that:
 - a) During the hearing the panel chair admitted that she did not know a great deal about the new alcohol monitoring provisions (the alcohol tag) but the panel determined in its decision that the monitoring would not be sufficient to outweigh the number of other risk factors which were 'live' when the Applicant was last in the community. It is submitted that it was irrational to conclude that the alcohol tag would merely be 'useful' and that it was procedurally unfair to conclude the case without making further enquiry.
 - b) The panel determined that 12 weeks in the identified designated accommodation would be insufficient. It is submitted that 12 weeks, save for exceptional cases, is the longest period allowed in such accommodation and that it was procedurally unfair because the panel failed to make further enquiries about the placement. It is also submitted that it was irrational to conclude that 12 weeks would not be sufficient because it was all that was on offer to the Applicant within the risk management plan.
 - c) It is submitted that the panel's argument that 12 weeks would be insufficient to test the Applicant in the community was wrong because the designated accommodation was in place to provide intensive supervision rather than 'test' released prisoners in the same way as a place in an open prison might do. The Applicant suggests that the panel had been focused on a period of testing which, he submits, would usually apply in cases where a place in an open prison is being considered, and therefore the panel was in error in its assessment.
 - d) The decision not to direct the Applicant's release is not reasoned or justified in the Decision Letter and is therefore irrational.

The Relevant Law

11. The panel correctly sets out the test for release in its Decision Letter dated the 9 June 2022.
12. 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)).
13. In **R (on the application of 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.
15. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA1** and others.
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."*
17. 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.
18. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:

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

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

The reply on behalf of the Secretary of State

20. On the 30 June 2022, the Secretary of State confirmed that he would not be making any representations about the application.

Discussion

21. In its Decision Letter of the 9 June 2022, the panel evaluated the proposed risk management plan which included a bed at designated accommodation for 12 weeks. It raised concerns that a psychological assessment in 2020 had been of the opinion that the Applicant's risk would not be manageable if he was only resident in designated accommodation for 12 weeks. The panel noted that the Probation Officer believed 12 weeks to be sufficient and that the Applicant would be suitable to move on after 8 or 9 weeks if suitable accommodation had been found. The panel stated that a move on plan had not yet been progressed.

22. The panel noted the support that would be available to the Applicant in the designated accommodation and it detailed the proposed licence conditions should his release be directed. Those conditions included a reporting condition in the day to check whether the Applicant had reverted to drinking and there would also be provision for him to be breathalysed at the designated accommodation.

23. In respect of the proposed alcohol tag, the panel had this to say at paragraph 3.8 of the Decision Letter:

"[The Applicant] would be expected to comply with any requirements specified by his supervising officer for the purpose of ensuing that he addresses his alcohol problems. There was a proposal for a sobriety tag. [The Applicant] stated that he would be willing to wear the tag and said he would also be willing to attend AA meetings. It was deemed necessary and proportionate given his previous behaviours."

24. Available support in the community was outlined by the panel and the Probation Officer confirmed that he would be likely to spot warning signs of difficulties, including alcohol misuse, poor emotional wellbeing and disengagement from professionals.

25. In its assessment of the risk management plan, the panel had this to say at paragraph 3.20 of the Decision Letter:

"... The panel was concerned about the short period of monitoring at the [designated accommodation] and the provision of move on accommodation. The move on plan

had not been developed and could be required within a three month period. The panel was concerned about the greater risk for destabilisation once the support and monitoring provided by the [designated accommodation] finished. The panel was not convinced that the risk management plan is sufficiently robust to manage his risk."

26. In deciding not to direct the Applicant's release, the panel identified, amongst other things, the following reasons:

- a) The Applicant had previously been released with a robust risk management plan and support, had been in designated accommodation for 7 months on the last occasion, had told the panel that he had "*felt rushed*" when he was asked to move on, moved into a flat and started to drink alcohol because he did not like where he was living.
- b) The Applicant's alcohol use then escalated and he had not been honest with professionals about this. The panel believed that the Applicant should remain in designated accommodation for as long as was required and did not believe that 12 weeks would be long enough. It noted that a stay beyond 12 weeks was not available.
- c) There appeared to be a strong link to the use of alcohol and the Applicant's use of violence. He had been released and recalled three times, had stated he would not drink on release but had, each time, reverted to using alcohol as a means of coping. The panel did not have confidence that the Applicant would be able to solely drink soft drinks, as he claimed, when out socialising.
- d) Previous psychological assessments in 2017 and 2020 had indicated a need for refresher work on the Applicant's learning from coursework and this had not been offered to him.
- e) The panel did not have the same level of confidence as that expressed by the Probation Officer and the official supervising the Applicant in custody, and questioned whether the Applicant would have the ability to manage his level of risk in the community. The panel noted that he had been able to demonstrate stable behaviour in custody prior to release but had a history of not coping well with stress and using alcohol, which had occurred on each previous release.
- f) The panel noted that the proposed alcohol tag would allow concerns about alcohol use to be followed up more quickly and considered it to be useful for monitoring purposes but did not believe that the alcohol tag, alone, would be sufficient to outweigh the number of other risk factors which were 'live' when he was last in the community.
- g) The panel did not believe the relationship between the Applicant and his Probation Officer was strong enough to ensure a high level of openness and honesty.

27. Noting the detail of the Applicant's complaint, I listened to the recording of the oral hearing which took place over a period of 3 hours and 45 minutes.

The Alcohol Tag

 3rd Floor, 10 South Colonnade, London E14 4PU  www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 @Parole_Board

 0203 880 0885



28. The panel chair outlined that she had not had any involvement in pilot cases which had featured the alcohol monitoring tag. The Probation Officer knew little of the features of the tag or the wording of the proposed licence condition because it would not come into force until a week after the oral hearing, albeit that this would be in time for the Applicant's eventual release, if directed by the panel.

29. In April 2022, the Parole Board published guidance for members about licence conditions and this guidance included detail of alcohol monitoring provisions. Section 17 of the guidance detailed that a pilot had been running in Wales from November 2021 and that there were two available alcohol monitoring licence conditions:

a) Total abstinence for the duration of the licence condition.

b) Alcohol intake being monitored for the duration of the condition.

30. The guidance directs members to an earlier communication produced in November 2021, at the time the pilot in Wales began. That communication detailed the eligibility criteria for alcohol monitoring and provided the following information:

"[Alcohol monitoring] must be imposed for a minimum of 30 days. A single duration of [alcohol] monitoring should not exceed 12 months. [Probation Officers] will be expected to review the condition every three months to ensure that it remains necessary and proportionate. Subsequent [alcohol monitoring conditions] can be requested if risk is such that one should be re-imposed, but this should not result in a single period extending beyond 12 months."

31. An Annex to the guidance details the wording of the alcohol tag condition that should be imposed if the condition is considered by the panel to be proportionate and necessary:

"You are subject to alcohol monitoring. Your alcohol intake will be electronically monitored for a period of [INSERT TIMEFRAME AND END DATE], and you may not consume units of alcohol, unless otherwise permitted by your supervising officer."

32. The Applicant submits that it was irrational to conclude that the alcohol tag would merely be useful and that it was procedurally unfair to conclude the case without making further enquiry.

33. It seems to me that little was known about the provision of the alcohol tag in terms of effective risk management and therefore it is difficult to conclude that it would merely be 'useful' without proper explanation. The panel's concern was that it seemed likely that the Applicant would be at risk of a return to alcohol misuse if he was struggling on licence and that the alcohol tag, alone, would be insufficient.

34. I accept the Applicant's argument that it was procedurally unfair to conclude the review at the point that the panel did without the panel satisfying itself as to the full extent of the alcohol monitoring provision. Guidance was available to the panel but the Decision Letter makes no reference to it, nor is there any reference to it in the oral hearing recording. Therefore, I am led to conclude that the panel was either

unaware of the guidance or had not considered the information within it in reaching its decision.

35. For the avoidance of doubt, I do not accept the Applicant's argument that the decision was irrational in terms of his argument about the alcohol tag. The panel clearly had concerns about the Applicant's ability to manage himself safely on release and it may be, had the panel considered the full detail of the alcohol tag, that it would have reached the same decision not to direct his release. However, for the reasons I have given, it was, in my view, procedurally unfair to conclude the review at the point that the panel did.

36. Given my findings above, I do not propose to deal with the remaining grounds outlined in the Applicant's submissions in any detail as it is unnecessary.

Decision

37. Accordingly, applying the test as defined in case law, I conclude that the decision was procedurally unfair. The application for reconsideration is therefore granted.

Robert McKeon
14 July 2022