

[2023] PBRA 121

Application for Reconsideration by Faircloth

Application

1. This is an application by Faircloth (the Applicant) for reconsideration of a decision of an oral hearing panel dated 24 April 2023 not to direct release or recommend his transfer to open conditions.
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 the 359-page dossier provided by the Secretary of State which included the Panel's written decision and written submissions dated 1 February 2023 submitted by the solicitor representing the Applicant. I have also considered the application for reconsideration submitted by the solicitor representing the Applicant dated 7 June 2023 and an email from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) dated 14 June 2023.

Background

4. The Applicant is now 41 years old. In 2010, when he was 28, he received an indeterminate sentence of imprisonment for public protection with a minimum term of 6 years, less time spent on remand, resulting in a tariff expiry date of 25 January 2016. The Applicant pleaded not guilty but was convicted of an offence of attempted murder. The victim was the Applicant's estranged wife's new partner. It is documented that on 1 January 2010, whilst intoxicated with alcohol, the Applicant attended his estranged wife's home. Upon seeing the victim asleep in the property, the Applicant selected a knife from the kitchen and stabbed him twice in the back. As he made his way out of the room, the Applicant is then said to have stabbed the victim in the back of his arm and caused a cut to his face. The Judge accepted that *"this was not a premeditated attack"* but concluded it was a *"vicious jealousy-fuelled attack on a defenceless man lying asleep and an attack carried out in the presence of [the Applicant's wife], who [the Applicant] also assaulted and in a flat where [the Applicant's] sleeping children were."*
5. At the time of the offences, the Applicant was on licence for an offence of wounding and possession of an offensive weapon. His previous convictions date from the age



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of 14 and include a pattern of violent offences, drug offences and issues with compliance.

6. The Applicant has completed extensive offence-focussed work during his sentence and has progressed to open conditions three times but on each occasion has been returned to closed conditions. The most recent period in open conditions was in October 2020 for approximately 5 weeks before the Applicant's return to closed following being under the influence of an illegal substance and numerous amounts of illicit items were said to have been found in the Applicant's room.

Request for Reconsideration

7. The application for reconsideration is dated 7 June 2023.
8. The application was made on the published form CPD2. It is succinct and very clearly sets out the issues.
9. The grounds for seeking a reconsideration are as follows:

Irrationality - That the Parole Board's decision not to direct release is irrational in light of significant and substantial changes since the Applicant's last oral hearing in October 2021. It is submitted that his behaviour has changed for the better and that this change has been continuous and has not been fully acknowledged by the Panel or given sufficient enough weight when reaching their decision to refuse release.

Current parole review

10. The single member panel completed a Member Case Assessment and issued a paper decision on 24 April 2023. The panel had considered a dossier of evidence paginated to 346 pages which included written submissions dated 1 February 2023 from the Applicant's solicitor, in which *"Instructing Solicitors respectfully submit on [the Applicant's] behalf that he can, with the robust risk management plan in place be returned to and managed safely and adequately in the community... We therefore urge the board to direct our client's matter to be heard by way of an oral hearing so that oral evidence can be presented to show he can be managed in the community."*
11. The paper decision declined to direct an oral hearing, the panel stated that: *"The panel has considered the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 concerning oral hearings. It did not find that there are any reasons for an oral hearing. There has been no substantive change since the last review which was conducted at an oral hearing. Therefore an oral hearing is declined. However, if [the Applicant] believes that his case should proceed to an oral hearing he is invited to submit further representations to the parole board within 28 days of receipt of this decision."*
12. No further representations were received by the Parole Board within 28 days of the decision.



The Relevant Law

13. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.
14. 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.
15. 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 both written and oral hearing decisions.
16. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss: *"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."* Parole Board Rules 2019 (as amended).
17. Where a Parole Board panel makes a no release decision on the papers under rule 19(1)(b) of the Parole Board Rules 2019, the decision is provisional, and the prisoner has 28 days to request (under rule 20) for their case to be considered at an oral hearing. If no such application is made within the 28-day window, the decision remains provisional for a further 21 days, within which the Applicant may submit a reconsideration request.
18. The grounds for applying for an oral hearing taking into account the principles set out in **Osborn, Booth and Reilly (2013) UKSC 61** is to demonstrate that fairness requires an oral hearing. The Applicant had the opportunity to request for their case to be considered at an oral hearing following the paper decision and no such application had been received within the 28-day window.
19. The test for the reconsideration mechanism is very different to that of a request for an oral hearing.
20. 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)).
21. 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)).



22. The decision to decline an oral hearing is ineligible for reconsideration.

Irrationality

23. 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."

24. 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.

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

26. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesday ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

The reply on behalf of the Respondent

27. The Respondent confirmed by way of email dated 14 June 2023 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

28. The Panel concluded:

"The index offence was a serious matter and was part of a pattern of violent behaviour. Although his behaviour has been more stable during this review period, [the Applicant] can struggle to manage his emotions when challenged and has displayed offence paralleling behaviour in custody. This led the panel to conclude that he has outstanding core risk factors which meant that his risks could not be safely managed in the community. [The Applicant] needs to remain



confined for the protection of the public and the panel did not direct release. [The Applicant] is appropriately located in closed conditions as his risks have not reduced to a level where he could be safely managed on ROTLs [periods of temporary leave on licence]."

29. The Applicant submits that:

"[The Applicant's] last oral hearing was heard in October 2021. Since that time his behaviour has changed significantly and for the better. He has not accrued any Adjudications, IEPs, or security issues since May 2021. This change has been continuous and has not been fully acknowledged by the Panel or given sufficient enough weight when reaching their decision to refuse release. [The Applicant] is now in the "pods" at [the prison]. He has been a resident in this D Category, unlocked door environment, for a number of months and has gone from "strength to strength". [The Applicant] has achieved a number of positive entries. He goes out of his way to assist Officers and other inmates. All within his own time. Further, he has had a number of negative MDTs. In light of these significant and substantial changes we say it was irrational not to direct release. It is unfortunate that the legal representations prepared on behalf of [the Applicant] and forwarded on the 01st February 2023 do not appear not to have been considered despite reference being made to them within the Parole Board decision dated 24th April 2023."

30. It is for the panel to determine how much weight to attribute to the evidence before it. It is documented from the written decision of the panel that the Applicant's written submissions provided by his legal representative, were considered by the panel. The Applicant was therefore given the opportunity to provide his account to the panel. The written submissions address the issue of custodial behaviour, stating:

"He has turned his behaviour around and has changed for the positive since his last parole and, importantly the information as set out in the old HCR 20 [- a type of clinical risk-management assessment]"

"Recently he has been offered a job as the prison artist. This enables him to have free flow access to many areas."

"Instructing Solicitors submit that [the Applicant] accepts he has not been "an angel" and that he has fallen short of the mark in terms of his compliance with Good Order and Discipline. However, he wants the opportunity of showing he has turned a corner and is now fully focused on what he needs to achieve to show he can be managed."

31. In addition to the panel's concluding comments that the Applicant's "behaviour has been more stable during this review period," the panel's written decision also documents that:

"Since the last review, there has been little progress. The pattern of mixed behaviour has continued with a number of adjudications in April 2021 but nothing since. [The Applicant] had maintained enhanced status."

32. The panel did therefore acknowledge the Applicant's improved custodial behaviour since the last parole review.



33. Further information has been provided by the Applicant's instructed solicitor regarding the Applicant's custodial conduct within the reconsideration application of 7 June 2023, which was not available to the panel at the time of the review, as it was not included within the written submissions dated 1 February 2023. Specifically, *"[The Applicant] is now in the "pods" at [the prison]. He has been a resident in this D Category, unlocked door environment, for a number of months and has gone from "strength to strength". [The Applicant] has achieved a number of positive entries. He goes out of his way to assist Officers and other inmates. All within his own time. Further, he has had a number of negative MDTs. "* This is provided by the Applicant as examples of *"significant and substantial changes"*. It is submitted by the Applicant that *"In light of these significant and substantial changes we say it was irrational not to direct release."*
34. The Panel could not have been reasonably expected to consider this information and to place weight upon it if it was not provided until after the review.
35. Taking into account all the evidence before the panel at the time of the review, I do not consider that the conclusions of the Parole Board panel not to direct release amount to irrationality.
36. I have considered the specific submissions of the Applicant. I am satisfied that the decision not to direct the Applicant's release was not 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. I do not consider any of the points raised have succeeded. Consequently, the ground of irrationality fails.
37. The application for reconsideration is refused.

Katy Barrow
4 July 2023

