

[2023] PBRA 130

Application for Reconsideration by Smith

Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an oral hearing dated 3 June 2023 not to direct 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:
 - The decision letter;
 - The application for reconsideration dated 26 June 2023;
 - The dossier, which now contains 518 numbered pages, the last document being the decision letter.

Background

4. The Applicant is now 60 years old. On 2 April 2001, when he was 38 years old, he received a sentence of life imprisonment for murder, having pleaded guilty. His minimum term of 16 years and 1 day imprisonment expired in May 2016.
5. The Applicant had previous convictions, including robbery, assault, and indecent assault on a young woman. An offence of affray in 1999 arose from an argument with his partner. The judge sentencing the Applicant for his offence of murder reported that what caused the greatest concern was the Applicant's tendency to use violence, particularly to women.

Request for Reconsideration

6. The application for reconsideration is dated 26 June 2023.
7. The grounds for seeking a reconsideration are as follows (I have reorganised and restated them for clarity of discussion):

(1) The approach of the Parole Board to the Applicant's case means that he will never be released. The Applicant is convinced that he will never benefit from



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any further course work to reduce risk. Professionals do not fully understand his risk and it is therefore not fully evident what further interventions might be necessary. The panel found that he has limited insight into his risk and no understanding of why he committed the index offence. This, the Applicant considers, will never change. Professionals are wrong to insist that further core work is done in a therapeutic community or a psychologically informed environment, because this is not practically achievable with him. It is wrong to insist that without doing something he cannot achieve, he cannot be released.

- (2) He meets the test for release because his risks are accepted not to be imminent.
- (3) The panel was wrong to find there has been no reduction in risk. He has not been violent in recent times, he is an enhanced prisoner, compliant with the prison regime, and the evidence is that he would comply with licence conditions. He does not deny the index offence and maintains that he would not do such a thing again. In failing to take proper account of these matters the panel acted irrationally.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board in October 2021 for consideration of release or a recommendation for open conditions. This was the fifth review of his case.
9. The oral hearing took place by video link on 24 May 2023. The panel comprised of two independent members and one psychologist member of the Parole Board. The panel considered a dossier consisting of 498 pages, to which full proposed licence conditions were later added. The panel received evidence from the Prison Offender Manager (POM), two prison-based psychologists, one of which was a neuropsychologist, the Community Offender Manager (COM), and the Applicant himself.

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.
11. 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.
12. 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)

13. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) 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)).
14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (Rule 28(2)(a)).
15. 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**.
16. 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."*
17. 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.
18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
19. 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 Wednesbury ... 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 Secretary of State (the Respondent)

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20. The Respondent has indicated that he makes no representations in respect of this application.

Discussion

21. The duty of the Parole Board is to consider if it is no longer necessary for the protection of the public that the prisoner should be confined. If the risk is more than minimal (as it plainly is in this case, given the Applicant's history of offending), the question is whether the risk can be managed in the community. The fact that the Applicant does not regard any proposed programmes as likely to assist him has no relevance to that issue. Ground (1) raises nothing relevant to the rationality of the panel's decision.

22. As to Ground (2), a finding that risk is not imminent does not automatically mean that the risk is manageable in the community. In the case of a prisoner who, like the Applicant, is serving a sentence of life imprisonment, the Parole Board has to consider an indefinite period of risk. Here the panel found (at Paragraph 4.4 of the decision letter) the following: *"the professionals do not fully understand [the Applicant's] risk and therefore it is not fully evident what further interventions might be necessary; his attitude towards professionals is inconsistent meaning managing him in the community could be problematical; [the Applicant's] insight into his own risks remains very limited and he still has no understanding of why he committed the index offence despite the fact that he does not deny it; he lacks the necessary internal controls and may be over complacent as to his coping mechanisms which revolve around avoidance; his demeanour remains concerning and he still appears to have aggressive and potentially violent attitudes; little has changed since the last oral hearing and there has been no evidence of risk reduction; all the professionals emphasised the need for [the Applicant] to undertake outstanding core risk reduction work by way of a therapeutic community or a psychologically informed environment; the risk management plan is unlikely to be effective until that is completed; and this is all compounded by a lack of supportive and protective factors in the community. [The Applicant's] antipathy towards [the professionals' progressive suggestions] appears to be a significant barrier to progression. None of the professionals recommended release."*

23. The matters the panel thus set out form a proper basis, founded on evidence, for the decision not to release. Ground (2) is not made out.

24. As to Ground (3), the panel was fully aware of these matters, and was entitled to find that the considerations set out above outweigh them.

Decision

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

Patrick Thomas
17 July 2023

