

[2023] PBRA 62

Application for Reconsideration by Morris

Application

1. This is an application by Morris (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 29 November 2022 not to direct his 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) with a minimum term of 1 year, 8 months and 7 days (taking time on remand into account) on the 7 July 2006 for an offence of Robbery.
5. His tariff expired on the 13 March 2008. The Applicant was released from prison by a panel of the Parole Board in August 2017 but recalled back into prison in November 2019, following allegations of being involved in an assault against his partner. The Applicant was acquitted at trial of this matter. Prior to the alleged assault the police had attended at the Applicant's address on two separate occasions following domestic violence call outs.
6. The Applicant has remained incarcerated in closed conditions since his recall. The Applicant's case was last considered by a panel of the Parole Board in August 2020 at which time no direction for release or recommendation for progression to open conditions was made.
7. The Applicant was 27 years old at the time of sentencing.

Request for Reconsideration

8. The application for reconsideration is dated January 2023 and has been drafted by solicitors acting for the Applicant.
9. The application sets out several grounds on which it submits the decision was irrational. These submissions are supplemented by written arguments to which



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

reference will be made in the **Discussion** section below. No submissions were made regarding error of law or in relation to the decision being procedurally unfair.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2021 to consider whether to direct his immediate release. If the Board did not direct immediate release, it was asked to consider whether the Applicant was ready to be moved to open conditions.
11. On 30 September 2021, a single member panel reviewed the case and directed an oral hearing. At that time, several directions were set, including the commission of an updated Psychological Risk Assessment (**PRA**).
12. The case has a protracted history and was adjourned on three separate occasions ahead of the substantive hearing in November 2022. The case was adjourned in February 2022, June 2022 and September 2022. On each occasion the case was adjourned for further information in relation to serious allegations of sexual assault made against the Applicant. The allegations were investigated but a decision was made not to prosecute due to insufficient evidence. Ahead of the hearing in November 2022 the panel directed a significant amount of additional information in relation to these allegations and also the attendance of a dedicated prison investigator at the oral hearing.
13. The case proceeded to an oral hearing on the 29 November 2022, before a three-member panel consisting of three independent members. It was held remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), a prison forensic psychologist and a dedicated prison Investigator. Written closing submissions were provided after the hearing dated 'November 2022'.
14. On the 20 December 2023 the panel made no direction for release and no recommendation for open conditions.

The Relevant Law

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 oral hearing decisions.

Parole Board Rules 2019 (as amended)

16. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment,



or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

17. 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)).

18. 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

19. 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."

20. 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.

21. 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

22. 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.

23. 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;



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



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

 info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

- (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.

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

The reply on behalf of the Secretary of State

25. The Secretary of State (the Respondent) offered no views in response to the Applicant's reconsideration application.

Discussion

26. Those instructed submit that the panel's decision in refusing to direct the Applicant's release is irrational.

27. It is stated that the panel's decision is irrational in that:

- (1) All professionals recommended release into the community;
- (2) Too much attention was given to historical factors;
- (3) Undue weight was placed on unproven allegations of sexual assault; and
- (4) A disproportionate amount of weight was placed on security intelligence.

28. In relation to point (1) that all professionals were recommending release, I note that the Applicant's hearing took place in November 2022 at a time when the Parole Board was specifically precluded by the Secretary of State from seeking recommendations from professionals and, as such, the decision does not refer to any recommendations being made by professionals. To do so would have been contrary to Parole Board guidance at the time. It is right that the COM did recommend release in her earlier PAROM report of June 21, and again in her PAROM+ report of January 2022, but thereafter no further recommendations are provided within professional reports within the papers, including Ms T's PRA addendum report (of August 2022) either. As such technically no explicit recommendations were provided to the panel at the hearing.

29. Turning now to 'implicit' recommendations, in my assessment the decision does provide a very balanced analysis of professionals views and opinions throughout the hearing, including in relation to the Applicant's manageability in the community and risk. The decision sets out a careful and detailed analysis of the professional evidence taken, which in my assessment is balanced and fair. The decision notes that professionals consider the risk management plan to be sufficient to manage risk and that risk is not considered to be imminent upon release. This evidence is carefully considered by the panel when completing its own risk assessment and is specifically noted at *paragraph 4.1.13* of the decision as one of the positive factors that it assessed. It states in terms that the panel 'took into account the assessments of the professional witnesses of the manageability of risk'. As such I am not persuaded that the panel failed to take account of professional views.

30. Furthermore, in line with the principles set down in **CCSU v Minister for the Civil Service [1985] AC 374** the panel is entitled to rely upon its expertise



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



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

✉ info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



in coming to its own risk assessment, which may be contrary to the views of others.

31. Taking all of these matters into account I do not accept the submissions that the panel acted irrationally by not take into account sufficiently the recommendations of professionals.
32. In relation to point (2), the submission that the panel placed too much weight on historical factors, those instructed argue that the panel placed too much reliance on the Applicant's antecedent history and that it was also unduly influenced by the circumstances of the Applicant's recall, including allegations of domestic violence. The Applicant's legal representatives further submit that insufficient weight was attached to the Applicant's positive behaviour on licence prior to recall and his progress in custody since being returned to prison.
33. Having reviewed the decision carefully, and the Applicant's parole dossier, I am again not persuaded that the panel placed too much reliance on historic factors. Firstly, it is accepted that past behaviour is an important consideration when assessing risk. As such the panel is entitled, and indeed expected, to look at past behaviour. In relation to the domestic violence allegation, which led to the Applicant's recall, the panel did indeed consider this matter carefully at the oral hearing. Whilst those instructed rightly highlight that the matter had been scrutinised before by the panel of the Parole Board that sat in 2020 (and that they were unable to make any findings in relation to this allegation) each panel comes to a case afresh and the current panel was perfectly entitled to explore this allegation of its own volition, especially because the Applicant's relationship is enduring and the panel has a duty to considered any future risk to the Applicant's partner. As such I do not accept that the panel acted irrationally in this regard.
34. In respect of point (3) those instructed submit that undue weight was placed on unproven allegations of sexual assault. It is stated that the panel placed too much weight on the evidence of the dedicated prison investigator. Those instructed also question the investigator's capacity/authority to provide a view and argue that the concept of collusion is not properly explored by the panel. Furthermore, the Applicant's legal representatives argue that report writers were aware of the allegations and that they had incorporated the information into their assessment of risk.
35. The issue of the allegations of sexual assault is an interesting one. The panel was plainly exercised by these serious allegations, to the extent that they adjourned the Applicant's case three times for more information. The dossier contains multiple update reports and the dedicated prison investigator was directed to attend to provide oral evidence. A lot of collateral information was provided, alongside comprehensive oral evidence. Given the seriousness of the allegations I am satisfied that the panel's approach was appropriate and balanced, in all the circumstances; the allegations were serious and entirely relevant to the panel's risk assessment.

36. In relation to the prison investigator's evidence I note that although she is not a Police Officer she is '*an investigator on a dedicated prison investigation team*'.



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



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



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

She was the primary investigator in this case and had direct contact with both alleged victims. Although the investigator is supervised by a Detective Sergeant, I am in no doubt that the investigator was well placed to comment on the investigation and provide an opinion. She was able to provide comprehensive evidence based on first hand experienced.

37. In respect of the issue of collusion, having reviewed the decision I am struck by the commentary in the decision which states *'she described his account as a 'carbon copy' of the first complainant but did not find that to be an indication of collusion between them because of their presentation in terms of their apparent distress and anxiety about making a complaint'*. It is clear to me that the panel was alive to the issue of collusion, not least because they have referred to it directly in their decision. In terms of collusion more broadly, the panel tried to obtain further collateral information in relation to the same and sought to explore the issue with the POM at the oral hearing (*paragraph 2.4.9*). It is likely that the panel simply preferred the evidence of the investigator, which is its right.

38. Finally, those instructed submit that all report writers were aware of the allegations at the time of the hearing and that the allegations had not had a material impact on their risk assessments. I accept that this is factually so, although it is noted, in terms, that that panel did not agree with this approach. At paragraph 4.3 of the decision the panel states it *'was concerned that the risk assessments by the professional appears not to have taken account of the allegations of sexual assault and relied upon the lack of prosecution in discounting their relevance. This appeared to the panel to have led to an incomplete assessment of risk'*. It is apparent that the panel considered the allegations to be far more serious than most professionals, to the extent that it felt able to make a finding of fact that the assaults had occurred. This is entirely within the gift of the panel and I am satisfied that in so doing the panel followed relevant Parole Board rules, guidance and the principles set out in the case of **Pearce (2022 EWCA Civ4)**.

39. In summary I do not accept that the panel acted irrationally by placing undue weight on unproven allegations of sexual assault. The allegations were serious in nature, contemporaneous, relevant to risk, and the panel's approach was in line with Parole Board rules, guidance and case law. I do not accept that the panel's approach to these allegations was irrational or unfair.

40. The final ground raised by the Applicant's legal representatives in support of their application is that a disproportionate amount of weight was placed on security intelligence by the panel. Again, having reviewed the Applicant's parole dossier and the decision I find no evidence to support this submission. Whilst security concerns were discussed at the hearing (*see paragraphs 2.6 & 2.8 for example*), the decision sets out the evidence provided by the witnesses in a balanced and appropriate manner in my view. It is clear from the decision that security concerns were just one of the many issues in the case which were explored at the hearing. This is confirmed in the conclusion of the decision at *paragraph 4.1.6* where the panel identifies *'custodial history with a number of intelligence reports suggesting involvement in the drug culture and in intimidating behaviour'* as being one of eight identified *'matters of concern'* which is



then balanced against 6 '*positive factors*'. This includes an acknowledgement at *paragraph 4.1.9* of '*recent positive custodial conduct...*'. Overall, I see no evidence to support the submission that disproportionate weight is placed on security intelligence.

41. In conclusion, I am not persuaded that the decision of the panel can be considered to be irrational. The decision runs to some 20 pages and is comprehensive and detailed in nature and evidence based.

Decision

42. Applying the tests as defined in law, I do not find the panel's decision not to release the Applicant to be irrational. The application for reconsideration is dismissed.

Heidi Leavesley
5 April 2023

