

[2023] PBRA 8

Application for Reconsideration by Kenny

Application

1. This is an application by Kenny ("the Applicant") for reconsideration of a decision of the Parole Board dated 24 November 2022 following an oral hearing on 15 August 2022. The panel declined to release him.
2. Rule 28(1) of the Parole Board Rules 2019 (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) 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: (1) the dossier, now running to some 363 pages including the decision letter; (2) and the application for reconsideration dated 14 December 2022. I have also listened to part of the recording of the hearing: see paragraph 25 below.

Background

4. On 25 June 2007 the Applicant was sentenced to imprisonment for public protection ("IPP") with a minimum term of 3 years less time served on remand. This minimum term expired on 9 May 2009. On 19 September 2016 the Applicant was released on licence; but he was recalled on 15 April 2018 after committing a further offence. For this offence he was sentenced on 23 February 2019 to a determinate sentence of 6 years' imprisonment. He became eligible for release again on 21 February 2022 at the half-way point of that sentence.
5. The index offence for which the Applicant was sentenced to IPP was wounding with intent; a concurrent sentence was imposed for affray. The victim was a partner with whom he had been in a relationship for a few weeks. He subjected her to a protracted attack over 4 days in which he prevented her from leaving, punched her in the face several times, attacked her with a machete, causing injuries to her face and foot, bound her and gagged her, and burned her body with a lighted cigarette a number of times. He behaved in this way because he believed her to have been unfaithful. Although he pleaded guilty to the offences he has since denied committing them; and this appears to be his current stance.
6. The offence committed on licence was an offence of causing grievous bodily harm with intent; he attacked a doorman with a glass when in drink. He



pleaded not guilty to this offence and continues to deny his responsibility for it.

7. The Applicant is now 46 years of age; he was 29 when he was sentenced to IPP. He already had a substantial record including convictions for racially aggravated assault, possession of an offensive weapon, assault with intent to resist arrest, affray and robbery.

Request for Reconsideration

8. The application for reconsideration has been completed on the Applicant's behalf by his legal representative. The overall ground relied on is irrationality. It is always helpful if the detailed grounds are numbered and precise; in this case the grounds are discursive in nature, returning to similar themes at different points, but I believe I can summarise them fairly under the following headings.

(a) Future relationships. The panel failed to take into account that the Applicant was not in a relationship and had made his intentions clear about future relationships. Risk was therefore not imminent.

(b) Matters referred to by the prison psychologist. The prison psychologist placed unjustified weight on comments made by the Applicant to her and on his description of a relationship between himself and a woman with whom he corresponded while in prison. To the extent that the panel explicitly or implicitly adopted this approach, it was irrational to do so.

(c) Disclosure of future relationships. The panel's concern that the Applicant would not disclose any developing relationship, and that his behaviour might change when he was released, was not justified by the evidence. It did not take account of his behaviour when previously released or his good relationship with his community offender manager ("COM"), who did not raise significant concerns on this head.

(d) Alcohol. The panel was not justified in regarding alcohol as a key risk factor, given that (1) he had not consumed alcohol for 19 months when released on licence, (2) he had confirmed his intention to remain abstinent and (3) alcohol monitoring would be part of his licence conditions. Risk was not imminent by reason of this factor.

(e) Cannabis. The panel wrongly stated that use of cannabis was a factor within the commission of the index offence; this misconception had a significant impact on the panel's assessment of the risk of serious harm.

(f) Further work in custody. The prison psychologist was wrong to recommend that further work in custody was required prior to release. Any further work was not core risk reduction work. To the extent that the panel accepted the prison psychologist's view it was wrong to do so.



(g) Further work in the community. The panel was wrong to conclude that work in the community recommended by the independent psychologist “*appeared to be largely unavailable or uncertain.*” Such work would have been available by a variety of means, such as a PIPE AP, the Personality Disorder Pathway, Mentalisation Therapy or Dialectical Behavioural Therapy provided by the NHS, specialist charities and/or one to one work with the COM.

(h) Solitary lifestyle. The panel misunderstood or misapplied the evidence when it criticised the Applicant’s intention to “*live like a hermit.*” He intended to keep in touch with family and professionals; and he had lived a solitary lifestyle during his release on licence.

9. Although I have prepared this summary to help make these reasons intelligible, I emphasise that I have kept in mind the whole of the application for reconsideration. I have also considered the various different points both individually and cumulatively in deciding whether the decision, or any aspect of it, was reached irrationally.

Current parole review

10. The Applicant’s case was referred to the Parole Board on 15 May 2021. On 31 August 2021 he was transferred to a prison with a PIPE unit; and he remained on this unit at the time of the oral hearing on 15 November 2022.

11. By the time of the hearing risk assessment reports had been prepared on the Applicant by a prison psychologist, Ms A, and an independent psychologist, Dr B. There was a fair measure of agreement between the psychologists. They agreed that further work should be undertaken with the Applicant. They disagreed, however, as to whether the work should be done in custody or in the community. Ms A considered that the Applicant had outstanding treatment needs which should be met in the first instance by one-to-one work in custody in a PIPE unit. She recommended that he remain in closed conditions. Dr B considered that his risk could be managed in the community with a robust risk management plan and further therapy.

12. The panel heard evidence from the Applicant, both psychologists, a stand-in prison offender manager, and the COM. The panel consisted of an independent member as chair, a psychologist member and an independent member.

13. There was evidence before the panel of telephone calls between the Applicant and a woman, Ms T, containing material consistent with a developing relationship – for example, he is recorded as saying to her “*I’ve never felt so sure about you in all my life. I love you your mine forever and always.*” The Applicant, however, did not accept that the relationship was any more than friendship. He was also recorded by Ms A as saying in interview words to the effect “*I can’t wait to put my hands on a woman and have sex when released*” and “*If [Ms T] comes to me after release and we have sex that’s fine*”.



14. It is sufficient for the purposes of this decision to quote the following paragraphs from the conclusions reached by the panel.

"4.2. The evidence presented the panel with several positive aspects and factors in [the Applicant's] favour, marked against significant concerns which could not be reconciled despite the helpful evidence of those who work with [the Applicant], [the Applicant] himself, and his representative. These concerns hinged not only upon the key risk factors of relationships and alcohol, and how quickly these may become an issue and therefore impact upon imminence of risk of harm, but also on other areas such as [the Applicant's] reported cannabis use – a factor in the index offence and yet something [the Applicant] indicated he felt helped to manage his risks by chilling him out. The panel were not persuaded that [the Applicant] would quickly and easily disclose to his COM issues and developing relationships, and although he said he would, and he appeared keen to engage in whatever work expected of him, the panel were concerned this would change when in the community. His disclosure, his motivation, and his engagement were all key to his successful risk management, and there was no sense that this could be guaranteed and/or sustained.

4.3. The panel were further concerned that the work suggested by Dr [B] as potentially beneficial in the community to further address risks appeared to be largely unavailable or uncertain.

4.6. Further, although risk may not be imminent it could quickly become so in the community should [the Applicant] drink alcohol, and more likely, enter a relationship. His comments to [Ms A] indicated he may be seeking to enter some form of relationship, while his suggested plan to live as a hermit did not appear sensible or healthy to either the panel or the witnesses. The evidence before the panel did not mitigate against the concerns outlined and led to the conclusion that [the Applicant] does not meet the test for release .."

The relevant law

15. In its decision letter the panel correctly set out the test for release: the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner be confined.

16. The Applicant was serving an IPP sentence. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28(2)(a) of the Parole Board Rules 2019. For the avoidance of doubt, the panel's decision as to a recommendation for open conditions is not eligible for the reconsideration process.

17. The concept of irrationality is derived from public law. The test is whether the 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."* See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.



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The reply on behalf of the Secretary of State

18. The Secretary of State has informed the Parole Board that no submissions in reply are to be provided.

Discussion

19. I will now return to the grounds of the application, as I have summarised them above, taking them individually at first and then stating a global conclusion.

20. Future relationships. The panel was well aware that the Applicant was not pursuing an intimate relationship at the time of the oral hearing. It did not approach its decision on the basis that risk was imminent: see paragraph 4.6, quoted above. But the panel was not only concerned with imminent risk; it was concerned with the Applicant's risk of serious harm in the medium and long term as well as the short term. I do not believe it was in any way irrational in the manner in which it approached the risk of serious harm in the context of future relationships.

21. Matters referred to by the prison psychologist (Ms A). I have outlined, in paragraph 13 above, the comments recorded by the prison psychologist. The panel took these into account when it expressed concern that he might be seeking to enter into some form of relationship: see paragraph 4.6, quoted above. This was in my view a rational concern for the panel to have, especially against the background of the Applicant's expressed love for Ms T, to whom one of the comments related.

22. Disclosure of future relationships. The panel's concern that the Applicant might not quickly and readily disclose issues and intimate relationships to the COM was a matter of assessment for it to make after seeing and hearing the witnesses, especially the Applicant. I do not think the concern was in any way irrational. To the contrary, it appears to derive specific support from the denial by the Applicant of anything more than friendship with Ms T, notwithstanding what he was recorded as saying to her.

23. Alcohol. The panel's identification of alcohol as a "*key risk factor*" (paragraph 4.2 quoted above) was fully justified by the involvement of alcohol in the offence which led to his recall and to some of his previous offending including an affray. It is true that the Applicant had no other alcohol-related incident while he was on licence in the community, supporting his account that he had been abstinent. But, as the panel noted, his alcohol consumption quickly became an issue when he returned to it. I do not accept that the panel was in any way irrational in its treatment of the alcohol issue.

24. Cannabis. The panel did not say that cannabis use was a key risk factor; but the panel did say that the Applicant's reported cannabis use was a concern and a "*factor in the index offence.*" Neither the judge's sentencing remarks nor the pre-sentence report identified cannabis as a factor in the index offence. At that time, however, the Applicant said only that he used cannabis from time to time (pre-sentence report, dossier page 34). Since



that time he has been more forthcoming about his cannabis use: he has said that his use has been daily and that it can make him "*slightly paranoid*" (dossier page 244). He was questioned about his cannabis use in the course of his evidence: I have listened to his answers in the recording at 00.57 to 01.05 and again briefly at 01.39 and 01.47 to 01.48. In my view there was ample evidence on which the panel could conclude that his cannabis use was a concern: his evidence gave the impression that he might well return to its use, he did not give any real explanation of the reference to it making him "*slightly paranoid*" and he did not show any appreciation of any potential risk in its use. The panel was entitled to draw the inference that it was a factor in the index offence, given the motive for the offence and given what he was now saying about cannabis use; but, more importantly, the panel was entitled to have a concern about future cannabis use and to take it into account in making its risk assessment.

25. Further work in custody. The panel was careful to say, in a paragraph which I have not found it necessary to quote above, that it was not part of its mandate to specify future treatment for the Applicant. The key reasons for which it declined to release the Applicant are in the paragraphs I have quoted above. In any event, I see no irrationality in the view of Ms A that there should be one-to-one work with the Applicant in a prison PIPE unit. It is not unusual for psychologists instructed to report to the Parole Board to disagree about the nature and location of future treatment or work; such professional disagreements do not mean that either is irrational, or that the panel will be acting irrationally if it prefers one to the other.
26. Further work in the community. Although Dr B recommended further therapy in the community, there was no developed plan for the provision of such therapy. Some of her suggestions depended on referral to the NHS, the acceptance of the referral, and the availability of a professional to carry out the work. Experience shows that such referrals do not always bear fruit. The PIPE AP would be of limited duration; and the extent to which the Personality Disorder Pathway and the COM can provide therapy can be highly variable. I do not think the panel's doubts about the availability of such work were irrational.
27. Solitary lifestyle. There are references in the dossier to the Applicant living a solitary lifestyle when he was on licence, and to his having interests which were largely solitary (e.g., pages 218, 243, 244 and 322). The panel's use of the phrase "*live like a hermit*" is, I am sure, a colourful description of what he said was his intended lifestyle. The panel was entitled to be sceptical of this intended lifestyle, which had ended with the commission of a further serious criminal offence. I see nothing irrational in its point of view, which it records was shared by the witnesses.
28. I have looked at the application for reconsideration in the round, as well as looking at its main components. Cases which concern IPP prisoners who are well over tariff are always a matter for particularly careful consideration. But the Applicant had been released on licence and recalled for a further serious offence; I do not think the panel's concerns were irrational, and I do not think the application for reconsideration is made out.



Decision

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

David Richardson
9 January 2023



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