

[2020] PBRA 99

## Application for Reconsideration by Humpherston

### Application

1. This is an application by Humpherston (the Applicant) for reconsideration of a decision at an oral hearing dated 15 July 2020 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 the dossier which was before the Oral Hearing Panel (OHP), the Decision Letter (DL) and the representations in support of the application for reconsideration (reconsideration representations).

### Background

4. The Applicant was convicted on 22 June 1998 of murder. He was aged 19 at the time of the offence. He was sentenced to the mandatory life sentence with a minimum tariff of 15 years' imprisonment. The Applicant, having taken a considerable quantity of alcohol together with a quantity of illicit drugs, attacked a man who was known to the Applicant to be gay and robbed him. The evidence of the Pathologist at the Applicant's trial showed that he had kicked the deceased with a heavily shod foot "*dozens and dozens of times*" and had jumped on him seven or eight times. He alleged that the deceased had made sexual advances to him, causing him to lose control of himself in a manner sufficient to found a partial defence of provocation. The jury rejected his account and convicted him of murder. The Applicant has since admitted that this account was untrue and that the truth was that the motive for the attack was robbery. He denies that the attack was homophobic but admits that he targeted the victim because he believed him to be "*soft*".
5. The Applicant was released in March 2016 but was recalled in October 2017. He had relapsed into alcohol abuse and was alleged to have committed acts of violence against his domestic partner, a woman with significant vulnerabilities. He was released again in August 2018 but was recalled in April 2019. He had again relapsed into alcohol abuse and there was a further allegation of violence against the same partner. He was released for a third time on 2 December 2019 but was recalled on 23 December. He had again relapsed into alcohol abuse. Again there was an allegation of violence against the same person.



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## Request for Reconsideration

6. The application for reconsideration is dated 17 July 2020.
7. The grounds for seeking a reconsideration are that the decision of the OHP was irrational, in particular that:
  - (1) The OHP should have deferred the hearing to allow the completion of consolidation work in custody, thought to be necessary before his release;
  - (2) The OHP overemphasised the significance of the Applicant's alcohol use, failed to give sufficient credit for the insight he had gained into the causes of his drinking, did not give sufficient weight to the work he had done in prison since his recall and wrongly concluded that he had not been open and honest about his alcohol consumption when in the community;
  - (3) The OHP failed to acknowledge or give appropriate weight to the Applicant's improved mental health and his prospects of employment in the community;
  - (4) The OHP were wrong to conclude that the Applicant had demonstrated a pattern of coercive or controlling behaviour within his relationship; and
  - (5) The OHP were wrong to find that the Applicant's risk could increase rapidly if he returned to heavy drinking and failed to factor into their decision that his risk would not be imminent, and that any increase in risk would be quickly noticed by those supervising him in the community.

## Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State on the 30 January 2020 to consider whether to direct the Applicant's release and, if not, whether to recommend transfer to open conditions. The Applicant was 43 years old at the time of this review.
9. The OHP considered a dossier of 204 pages and heard evidence from the Applicant, his prison supervisor, his community supervisor and a psychologist.

## The Relevant Law

10. The panel correctly sets out in its decision letter dated 16 July 2020 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.

### *Parole Board Rules 2019*

11. 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)).



12. 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*

13. 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."*

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.

### **The reply on behalf of the Secretary of State**

15. The Secretary of State has made no representations in respect of this application.

### **Discussion**

16. The grounds on which this application is based are set out above in broadly the order in which they appear in the reconsideration representations. I shall deal with them in what seems to me a more helpful and informative order.

### Ground (2).

17. The DL sets out at appropriate length and in appropriate detail the Applicant's history in relation to alcohol.
18. It may be summarised thus. He was brought up in a family where excessive drinking was commonplace. He was introduced to alcohol at a young age and by the time of the index offence had developed a very serious drink problem. He was also a habitual user of illicit drugs. Over many years he had funded his consumption of alcohol and drugs by acquisitive crime, including offences of robbery. The index offence occurred after he had drunk thirteen or fourteen pints of snakebite (beer and cider combined to increase its alcoholic effect) and had taken a mixture of drugs, apparently to ease the effects of heroin withdrawal.
19. All of the Applicant's previous releases had been preceded by the him doing work in prison designed to help him avoid alcohol once released and by him giving assurances to the panel that he was now determined to avoid alcohol by applying the lessons he had learned in prison to his life in the community and by seeking



help (for example through AA) once released. On each release he relapsed into alcohol use. Each of his recalls involved, directly or indirectly, consumption of alcohol.

20. It is, in those circumstances, unsurprising that the OHP, in common with the professional witnesses, took the view that his use of alcohol was one of his principal risk factors. It underpinned his offending, including the index offence, and his post-release behaviour. The assertion in the reconsideration representations that the OHP gave this matter disproportionate weight is unsustainable.
21. Complaint is made that the OHP failed to give sufficient weight to the Applicant's insight into the causes of his alcohol dependency; it is submitted that his recent realisation that it may have had its roots in events in his childhood had led him to be willing to engage in counselling.
22. The OHP dealt with this specifically in the DL, noting that if the Applicant were able to demonstrate some ability to think through issues around alcohol, this may be protective. But the fundamental point remained that whether or not the Applicant had now come to a point where he could make better progress towards abstinence, there was work still to be done.
23. This complaint is developed on the basis that insufficient credit was given for work done in prison and that the panel fell into further error by finding that the Applicant had not been open and honest about his alcohol consumption in the community.
24. These matters were dealt with clearly in the DL which contained accurate references to the facts that (a) there was evidence that on all of his recalls the Applicant had at times failed to disclose his drinking or the extent of it when asked about it by those supervising him, and (b) the dossier contains abundant evidence that prior to his releases he had done work in relation to alcohol abuse notwithstanding which he was unable or unwilling to maintain abstinence in the community despite his assurances that he would.
25. There is, accordingly, no proper basis on which the findings of the OHP in relation to alcohol abuse can be characterised as irrational.

### Ground (3)

26. This appears to relate to evidence given to the panel by the Applicant that he was feeling less anxious now that he had disclosed some of his early personal history to professionals and that he was making efforts to find employment if released.
27. As to the former, the DL records the fact of his disclosure and his belief that his early experiences were at the root of his drinking. It goes on to deal with the topic in a broader context (see page 7 of the DL) and records the opinion of the OHP that work on this particular matter would be lengthy and complex and unlikely to be the barrier to relapse that the Applicant considered it to be; there were other factors which touched on his reasons for alcohol dependency and his apparent



inability to overcome it. This was a conclusion to which the OHP was entitled to come on all of the evidence before it

28. As to employment, the dossier records that prior to at least one of his releases, the Applicant had made similar assertions to the panel but in the event had not taken up employment. A few days prior to his most recent recall, he had told his community supervisor that he wanted to get employment, had been given a couple of numbers to ring before he was released but had not taken the matter further.
29. In those circumstances, the OHP were fully entitled to give this matter little or no weight.

#### Ground (5)

30. The DL deals with this expressly (at page 7 of the DL) where it is recorded that the OHP shared the concerns of the professionals that risk could rise rapidly if the Applicant were to return to heavy drinking, he is alcohol dependent and he makes promises to be abstinent but does not keep them. Elsewhere, as set out above, the DL observes failures to be open and honest about his drinking.
31. Against that background, the submission in the reconsideration representations that this finding is irrational is unsustainable. I note that it is asserted that "*the witnesses agreed that his risk to the public is not imminent at this time*" and that his probation supervisor "*would be able to identify if his risks to the public were increasing*". As to the former, the OHP were entitled to form their own view and they did so on a clear evidential basis. As to the latter, this could only be so if the Applicant were open and honest with those supervising him. He had not been in the past and the OHP were fully entitled to doubt whether he would be if he were to be released now.

#### Grounds (1) and (4)

32. These two grounds essentially touch on the question of the ability of the Applicant to form relationships and the safety of his partner in an intimate relationship.
33. Before coming to an analysis of the decision of the OHP, it is necessary to set out a little of the relevant history.
34. During his first release while he was living in supported accommodation the Applicant, who had relapsed into alcohol use, entered into a relationship with a woman who was also living there. She is described as having substance abuse and mental health problems. He was recalled when, having been arrested and bailed in relation to an allegation that he had assaulted her, he breached his bail by contacting her; there was a further allegation of assault. In the event, one of the allegations was not proceeded with and the second resulted in a conviction, overturned on appeal.
35. The Applicant was released again in September 2018. He resumed the relationship and began drinking again on the day of his release, despite his assurances to the panel that he would abstain. In due course, he effectively moved in with his



partner. He was removed from her flat after a dispute with her and was made subject to a Domestic Violence Prevention Order, which he breached. There was a further allegation of assault against his partner and he was recalled.

36. He was released again on 2 December 2019. He was recalled on 23 December 2019 when he failed to return to the premises he was required to live in. Instead he was at his partner's home. She reported that he had been drinking, had made her buy him alcohol, had persuaded her to drink despite it being contra-indicated because of her medication and had assaulted her by putting his hands round her neck. She later withdrew the allegation and took the blame for his failure to return on the basis that she did not give him the taxi fare.
37. After his recall, the Applicant telephoned her about ten times a day, speaking to her for only a few minutes on each call.
38. Against that background, the psychologist who gave evidence to the OHP, whilst noting the absence of any extant conviction in relation to violence against his partner, acknowledged the concerns of professionals about the suspected assaults, particularly whilst the Applicant was under the influence of alcohol. The psychologist agreed that he posed a medium risk of serious harm to her and that imminence would likely be a significant issue if the relationship was volatile and unstable.
39. Likewise, it was clearly open to the OHP on the evidence that I have summarised to have concerns that the Applicant had displayed coercive and/or controlling behaviour in the relationship.
40. None of these findings depended on a determination that the Applicant had committed any specific assault. The panel (and the professionals) would, however, have failed in their public duty if they had not recognised that this was a problematic relationship, in some ways protective but in other ways involving risk to the partner, and that work relating to successful relationships was necessary before the Applicant's release to manage that risk.
41. The important question relates to the nature of the necessary work. There was no issue about whether it should take place or where it should take place. There was universal agreement that it would have to be done in custody, pre-release.
42. In the present difficult circumstances and given that the Applicant, if released, would have to spend the first part of his time in the community in accommodation where he could be monitored but where such accommodation would not be available for about three months, the question as to the nature of the necessary work assumed particular significance.
43. If the work amounted to no more than consolidating previous learning, then it was agreed by the professionals that it could be completed within three months.
44. In those circumstances, it is submitted that the correct course would have been for the OHP to defer the hearing with a view to reconvening within three months and then to make a decision as to whether release should be directed. The OHP



would then be able to make an informed judgment as to whether the work had been sufficiently carried out and/or been effective in reducing risk.

45. I recognise the considerable force of that submission. It is certainly at the very least arguable that a failure to defer the hearing would have been wrong, whether as a matter of irrationality or of procedural fairness.
46. If, on the other hand, the necessary work went beyond mere consolidation but amounted to necessary core risk reduction work, then different considerations applied.
47. The view of the psychologist was that the work already done with the Applicant in relation to general violence was linked to emotional management and his thinking styles. It would be beneficial to the Applicant for him to complete structured work and discussions with his community supervisor about healthy relationships, which of the skills he had previously learned he could utilise in his relationship and how he might avoid violence in relationships.
48. His community supervisor reported to the OHP that if the Applicant were able to fulfil his expressed determination to address his alcohol misuse, his relationship would be less volatile and all risk areas would be significantly reduced. Release was supported.
49. The Applicant's prison supervisor reported that he had done no offence focussed work since his recall other than to be issued with a workbook for him to complete. He had been referred to mental health services which was thought to be possibly beneficial, given that while on licence he did not appear to have taken on board any aspects of learning with regard to compliance and consequential thinking. Nonetheless and for no easily discernible reason, the prison supervisor also supported release.
50. In the context of the evidence which I have sought to summarise, the OHP had to make a determination first as to whether there was significant risk that if released the Applicant would pose a risk of serious harm. It is not suggested that, in general terms, there was not such a risk. They had to decide whether amongst those at risk were people with whom he might enter into an intimate relationship. Here again, there is no suggestion that such a person was not at risk of serious harm, assessed by the psychologist as a medium risk but considered by the OHP to be higher. The next, and critical, question was whether that risk could be sufficiently managed in the manner proposed by the psychologist or required to be addressed by a more fundamental approach on the basis that this was core risk reduction work which had thus far not been addressed.
51. The Applicant had a longstanding and apparently entrenched alcohol dependency. The index offence was directly linked to alcohol and substance abuse. Despite his assurances to three previous panels that he would abstain, he had failed to do so. He had entered into a problematic relationship with a vulnerable woman. His recalls had been associated with heavy drinking and allegations of domestic violence. There were powerful indications that the relationship was unhealthy and put her at risk. The risk was at least medium and probably higher. It was likely to be imminent if the relationship was volatile or unstable; there was good evidence



that this was a probable scenario. There were strong indications that the Applicant had failed to apply important aspects of his learning in significant areas and that however sincere his expressions of intent as to future behaviour, he was not at present able to fulfil them.

52. Against that background, the OHP had a proper evidential basis for their determination that work needed to be done with the Applicant to address the specific risk of intimate partner violence before it was safe for him to be released. The panel was fully entitled to determine that the consolidation work proposed by the psychologist was insufficient to address that risk. It was common ground that whatever treatment was appropriate, it had to be completed before release.
53. In those circumstances, the OHP were not in error in not deferring the hearing nor in determining that core risk reduction work was necessary in custody prior to release.
54. More generally and apart from the matters so far considered, it should be noted that the OHP plainly gave careful thought to whether release was possible.
55. For example, they considered the risk management plan and the move-on plans and found them unsatisfactory. They considered whether the Applicant's risk could be managed in the community by the community supervisor with the help of psychologists but that remained uncertain and in any event would have required the Applicant to spend further time in custody.
56. In short, there were reasons given by the OHP other than those which are discussed above as to why they were unable to direct release. The matters complained of were an important part of the overall decision making process but were by no means the whole of it.
57. In those circumstances, for the particular reasons I have given and more generally, I do not consider the decision of this OHP to be irrational or procedurally unfair.

## Decision

58. For the reasons I have given, the application for reconsideration is refused.

**Alistair McCreath**  
**7 August 2020**