

[2021] PBRA 44

Application for Reconsideration by Duxbury

Application

1. This is an application by Duxbury (the Applicant) for reconsideration of a decision of an oral hearing dated 2 March 2021 (issued 12 March 2021) not to direct 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, consisting of 252 numbered pages, now including the Oral Hearing Decision Letter but otherwise identical to that considered by the Oral Hearing Panel (OHP), which included a copy of the domestic call-out reports supplied to the OHP after the hearing but before their decision; and
 - The Application for Reconsideration.

Background

4. The Applicant, then aged 20, was sentenced to 12 years' imprisonment for an offence of wounding with intent to do grievous bodily harm on 30 April 2012. The sentence was made up of a 7 year custodial term and a 5 year licence extension period. He was released on licence (his second release on licence) on 11 September 2019 and recalled on 5 February 2020, when his licence was revoked. His sentence expiry date is in November 2023. His case was referred to the Parole Board for consideration of release.
5. There had been an earlier release on 1 May 2015, from which the Applicant was recalled on 21 March 2019 following alleged offences against his then partner (B), which did not result in any convictions except a conviction for obstructing a police officer when he was arrested. His recall following his second release was as a result of further allegations of violence against B, but the only conviction following those allegations was for possession of cannabis, with a 28 day sentence of imprisonment.

Request for Reconsideration

6. The application for reconsideration is dated 29 March 2021.



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7. The grounds for seeking a reconsideration are as follows:

- (1) The OHP acted irrationally in not concluding that there was no imminent risk to the public and that therefore the Applicant's risk is manageable in the community;
- (2) In coming to its decision the panel unfairly assessed the evidence of all professional witnesses and disregarded their recommendations; and
- (3) The Applicant was disadvantaged by his decision not to give evidence, notwithstanding that it was his right not to do so.

8. There is no suggestion of any procedural unfairness, which is expressly disclaimed in the application.

Current parole review

9. The Applicant is now 29 years old.

10. The hearing took place by telephone, because of the COVID-19 pandemic, on 24 February 2020. The Applicant makes no complaint of the hearing being a remote one. He was represented throughout the proceedings. He indicated before and confirmed at the beginning of the hearing that he did not wish to give evidence as he felt uncomfortable in social situations and would have felt anxious and uncomfortable. Evidence was given by a stand-in Prison Offender Manager (POM), the Community Offender Manager (COM), a psychologist based at the prison and a police officer.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 2 March 2021 the test for release.

Parole Board Rules 2019

12. 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)).

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

The reply on behalf of the Secretary of State

16. The Secretary of State has not made any representations in respect of this application.

Discussion

17. The real issues here in respect of Grounds (1) and (2) are, first, whether the OHP was obliged to follow the recommendations of the professional witnesses, and, if not, whether its decision not to do so is properly justified.
18. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
19. However, if a panel does make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.
20. Here the OHP carefully analysed the evidence.
21. The Applicant's POM had never met him, and she said that her views were heavily reliant on those of the other two witnesses.
22. The COM said the Applicant found it difficult to talk about his multiple "*loose relationships*" with several women but did not attempt to conceal them. He had, however, concealed from her an arrest for possession of cocaine just before he was recalled, though he told her about his arrest for possession of cannabis. She felt that conflict in relationships was part of his history, which could be dealt with by a programme in the community. No programmes are available in the Applicant's current prison. She was confident she could pick up warning signs that his risk was increasing.
23. The psychologist thought the risk management plan was adequate and the necessary risk reduction work could be done in the community. She thought that the risk becoming imminent depended on substance misuse and relationship difficulties. In

her opinion everything depended on his motivation to engage with treatment: the plan was heavily reliant on external controls and on the Applicant's relationship with his Community Offender Manager. Her recommendation was finely balanced, but she did think he could be managed unless further risks came to light.

24. The panel did not agree that the risk of serious harm could be managed by licence conditions and the release plan on offer. They placed no weight on the allegations that led to recall, other than the admitted possession of cannabis. But they considered that the evidence supported that the Applicant had consistently struggled to appropriately manage his emotions in relationships, which resulted in the police being called out on numerous occasions. The witnesses agreed there is risk reduction work outstanding in this area, and all expressed the hope that the Applicant would go on to undertake this work in the community.
25. The Applicant is still in a relationship, which on the evidence was not an open and honest one, and the panel assessed him to present a medium risk of serious harm to this partner. The only reference to his not giving evidence in the decision letter is in this context, commenting that the panel could not question the Applicant further about his plans for this relationship.
26. The panel were concerned that the Applicant had previously failed to notify his COM of an intimate relationship (in breach of his licence) and that prior to his recall on this occasion he had not disclosed to her his arrest for possession of crack cocaine. Although the last evidence of violence was many years ago, the Applicant was at the time of his recall in possession of a baton for fear of B's father. Possession of weapons is a risk factor for him.
27. The panel noted that the Applicant had continued to use substances on each release into the community and had breached his licence conditions by further offending. The panel had concerns about compliance in the community. The panel concluded that there was evidence that he needed to conclude risk reduction work, specifically work on relationships, in closed conditions. He has failed on licence twice, for different reasons, but with emotional and behavioural instability at the heart of his behaviour. All this brought his ability to comply with licence into question. The panel considered the recall appropriate for behaviour which was becoming increasingly unstable and offence paralleling.
28. On that analysis, the panel considered that the Applicant's continuing confinement was necessary for the protection of the public.
29. I am satisfied that the panel had proper grounds for disagreeing with the opinions and recommendations of the professional witnesses, and that their analysis of why they did so (which I have set out in some detail) was a full, fair and properly balanced one which they explained appropriately. The panel did not disregard anything: it weighed the evidence and came to reasoned and evidenced conclusions which cannot be said to be irrational.
30. Ground (3). As I have noted, apart from the fact that he did not wish to give evidence there is only one comment on the absence of evidence from the Applicant, which I have set out in context above. There is no indication that the Applicant was unfairly disadvantaged by his decision not to give evidence. The panel was obliged to, and

did, decide the case on the evidence there was. Nothing is specified in the Application apart from the Applicant's feeling that he has been disadvantaged. The objective evidence does not support that feeling.

Decision

31. For the reasons I have given, I do not consider that the decision was irrational. It is not suggested that it was procedurally unfair, and there is nothing to indicate that it was. Accordingly, the application for reconsideration is refused.

Patrick Thomas
13 April 2021