

Application for Reconsideration by Marsh

Application

1. This is an application by Marsh (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 26 January 2023 not to direct his release. The decision was made following a review by way of oral hearing on 17 January 2023.
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 Application for Reconsideration with representations and supporting documents; the Decision Document; the Case Dossier; and the letter from the Public Protection Casework Section (PPCS) of HM Prison & Probation Service on behalf of the Secretary of State.

Background

4. On 11 July 2007, having been convicted of conspiracy to cause explosion likely to endanger life or property, the Applicant was sentenced to Detention for Public Protection (DPP). The minimum custodial term was set at 18 months less time served on remand and the Applicant's tariff expired on 2 January 2008. No separate penalty was imposed for the associated offence of conspiring to destroy or damage property recklessly so as to endanger life.
5. The Applicant was 19 at the time of the index offence which was committed on 25 June 2006. The victim was a woman who [the Applicant] has described as the "*neighbourhood pest*". At the behest of his drug supplier who was seeking revenge against her, he recruited two others who threw a brick through her window and then threw a 200 chambered firework into the property. This caused significant damage as well as shock to the victim herself.
6. The Applicant was said to be under the influence of drugs at the time. The pre-sentence report referred to him spending £1000-£2000 per week on illicit substances. He had previous convictions for criminal damage and for



affray. The latter offence was committed when the Applicant was in residential care. He had been asked to give back a file which he had obtained by deception and after he refused a scuffle broke out during which members of staff were injured. He had also been formally cautioned by the police for an offence of battery on his partner.

7. A psychological assessment in 2015 concluded that the Applicant definitely met the criteria for an anti-social personality disorder and probably for paranoid personality disorder and borderline personality disorder.
8. On 5 October 2018, the Applicant was sentenced to 6 months imprisonment for sending a letter conveying a threatening message to his MP. It was motivated by his obsessive belief that the DPP Sentence was unjustified. The letter contained a threat to grab a target, slit them from ear to ear, pull them into his cell and prevent anyone from helping them. He also threatened to pay someone to kill the MP. He later sent a letter of apology.
9. In accordance with the decision of the Parole Board panel which conducted his review in June 2019, the Applicant was released into the community on DPP licence on 5 August 2019. He was required to reside in PIPE (Psychologically Informed Planned Environment) designated premises. His Community Offender Manager (COM) and the two Psychologists who gave evidence to that panel supported his release on the basis that his aggressive behaviour was verbal rather than physical in its manifestation. The COM expressed the view that a return to substance misuse would have a negative impact on the Applicant's mental health, emotional well-being and probably his compliance. The panel concluded that he had the potential for behaviour which might end in serious harm but that it was not imminent. There was no evidence that his verbal aggression would quickly translate into serious physical harm in the community.
10. Within two days of release, there were reports that the Applicant had started to use Spice, was heavily under the influence of illicit substances and he was also suspected of drinking alcohol. His placement was withdrawn, his licence was revoked on 12 August 2019 for breaching the conditions (1) to be on good behaviour and not behave in way which undermines the purpose of the licence; (8) to confine himself to designated premises between the hours of 19.00 and 17.00 daily; and (9) to report to designated premises' staff at 13.00 and 15.00 daily. He was returned to custody.

Request for Reconsideration

11. The application for reconsideration is dated 10 February 2023 and contains detailed representations by the Applicant.



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



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



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

12. The grounds for seeking a reconsideration are firstly that the Decision was procedurally unfair because key witnesses, namely his probation officer at the time of recall and the psychologist who had prepared a report on instructions from his legal team were not called to give evidence. He submits that the case should have been adjourned for that purpose.
13. The Applicant further submits that the decision not to grant release was irrational because the reason for recall was his lateness in reporting; there was no evidence that he had used drugs, and the Panel considered information such as alcohol use as a risk factor which has never been evidenced or proven. He maintains that the Panel failed to take into account his reasons for lying earlier in the sentence and failed to recognise evidence of his prospective employment and of his improvement since recall.

Current parole review

14. By notice dated 23 September 2019, the Applicant's case was referred to the Parole Board by the Secretary of State to decide whether to direct his immediate release. The terms of reference included a request to consider, in the event of release not being directed, whether he was ready to be moved to open prison conditions and to recommend accordingly. Such advice is not within the remit of the Reconsideration Application.
15. There were numerous delays and adjournments, none of which appears to have been the fault of the Applicant. At the eventual post recall review hearing on 17 January 2023, the Panel to whom the case had most recently been referred (the Panel) considered a dossier running to 1458 pages ending with an OASys Report dated 18 January 2023. After the hearing the Panel was provided with closing submissions by the Applicant's Solicitor.
16. The dossier included a Psychological Risk Assessment report dated 13 December 2022 by a Prison Psychologist and updated reports by the Applicant's Prison Offender Manager (POM) and his current COM.
17. Evidence from the POM included reference to threats made by the Applicant to self-harm and of succeeding in doing so, and also of threats to harm others, including a threat to kill the Governing Governor when he receives parole. In December 2022, while on escort to hospital, he took out a razor blade he had concealed in his mouth and made demands for relocation to the segregation unit. He later attempted to slip off his handcuffs. The POM also confirmed that the Applicant had progressed to trusted employment within the prison.
18. According to the Decision document, having considered the reports in the dossier, the oral evidence by the POM, the COM, the Applicant's previous COM, and the Prison Psychologist, the Panel declined to direct his release.



It was satisfied about the allegation of drug use leading to the withdrawal of the designated premises placement and that the recall was justified “*even if that action was somewhat hasty*”. The Panel went on to conclude that the Applicant’s continued threatening behaviour would be likely to cause serious psychological harm if repeated in the community, particularly if he felt a sense of injustice in respect of his supervision on licence. It identified a need for core risk reduction work to be undertaken in custody such as the EMDR Therapy confirmed as currently available to him. At the hearing, the Applicant had expressed resistance to undertaking such work but in the written submissions his Solicitor sought an adjournment for that purpose in the event that release was not directed.

The Relevant Law

19. The Panel correctly set out in its 26 January 2023 Decision Letter the test for release, namely that the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

Parole Board Rules 2019 (as amended)

20. Under Rule 28(1) of the Parole Board Rules 2019 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)).

21. 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)). The Applicant in this case is subject to a qualifying indeterminate sentence.

22. 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 reconsideration application in **Barclay [2019] PBRA 6.**]

Illegality

23. An administrative decision is unlawful under the broad heading of illegality if the panel:



- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

24. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

25. No issue of illegality arises in this case.

Irrationality

26. 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."

27. 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.

28. 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

29. 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.



30. 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;
- (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.

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

Other

32. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.]

33. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

34. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision



by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State (the Respondent)

35. It has been confirmed on the Respondent's behalf that, save for "*the offender's confusion regarding his sentence type*" (Page 6 of written representations), the Secretary of State has no representations to make.

Discussion

36. In his closing written submissions, the Applicant's Solicitor referred to the fact that the supervising COM at the time of the recall was on annual leave and that the designated premises staff did not make contact with the Probation Service to discuss alternative action rather than the decision to withdraw his place. In her Part B report, the COM stated "*Therefore it is very disappointing that the decision to recall [the Applicant] was taken by management so quickly given there was no clear indication of an increase in risk of harm to the public or to [the Applicant]. I am concerned that the decline in his behaviour and ongoing alleged substance misuse was not discussed fully with his probation officer before his bed space was withdrawn*".

37. However, in the Part A Report the COM specifically referred to verbal warnings having been issued on 07.08.19 and 09.08.19 for continual use of illicit substances, namely Spice.

38. It is common ground that the manager of the designated premises was not available to attend the hearing. However, no application for an adjournment was made on the day for that purpose. Nor was an adjournment sought for the attendance of the psychologist instructed on behalf of the Applicant or for a report by them to be put before the Panel. The Probation Service had in fact been informed in January 2021 by the then instructed psychologist that the Applicant had made threats against everyone involved in his sentence, including the judge, MPs, police, probation officers, and members of the Parole Board. He had also spoken about his ability to abscond from prison, most likely during a prison visit following one of his episodes of self-harm.

39. In view of the extensive written and oral evidence before the Panel, including oral evidence from the Applicant himself and which encompassed the full range of issues concerning the circumstances of recall and the Applicant's current risks, I do not consider the Panel was obliged to adjourn for further evidence. It was entitled to make a judgment based on the evidence

before it. Furthermore, the Panel took into account the final submissions made on his behalf.

40. In assessing the evidence relating to the recall decision, the panel was entitled to reach an objective decision about the allegations of drug use which led to it. The lack of drug testing is not conclusive of the issue. There was also evidence of his demeanour.

41. The Panel then undertook a balanced and objective assessment of the Applicant's risks based on the OASys assessments, the evidence of the Prison Psychologist, the evidence of the current and former COMs, the POM and the Applicant himself. The Decision cannot be said to be irrational.

Decision

42. For the reasons I have given, I do not consider that the decision was either irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH Judge Graham White
28 March 2023

