

[2019] PBRA 23

## Application for Reconsideration by Stevens

### Application

1. This is an application by Stevens (the Applicant) for reconsideration of the decision of the panel to not recommend that the Applicant should progress to open conditions following an oral hearing on 13 August 2019.
2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter of the panel dated 15 August 2019, the application for reconsideration dated 5 September 2019 and the response of the Secretary of State by an email dated 12 September 2019. The Secretary of State did not make any formal representations to the Board in response to the application.

### Background

3. The Applicant is 35 and is serving a sentence of Imprisonment for Public Protection imposed in relation to an offence of inflicting grievous bodily harm with intent. The offence was committed in 2007. His tariff expired on the 27 October 2010. He spent 2 ½ years in open conditions and was first released on licence in February 2013. He was recalled In January 2018.

### Request for Reconsideration

4. The application for reconsideration is dated 5 September 2019. The Applicant complains of:
  - (a) Procedural unfairness on the basis that the psychologist member of the panel failed to assist in "*leading the evidence taking by raising and questioning any contentious issue*"; and
  - (b) An irrational decision in that the panel failed to take account of "*a logical inconsistency*" in the evidence adduced by one of the two psychologist witnesses.
5. The Applicant does not challenge the primary decision of the panel not to recommend release.

### Current parole review

6. In March 2018 the Secretary of State referred the Applicant's case to the Parole Board for his 5<sup>th</sup> review.



7. The Applicant was in closed conditions when the panel convened on 13 August 2019. In terms of reference, the Secretary of State asked the panel first to consider whether it was appropriate to direct the Applicant's release. If not, the panel was invited to advise the Secretary of State on whether the Applicant should be moved to open conditions.
8. The panel heard oral evidence from the Applicant's Offender Supervisor, Offender Manager, the prison psychologist, an independent psychologist and the Applicant himself. The panel considered written representations from the Applicant, a post-training course report of 2014; a letter from the Applicant's father regarding employment; and 6 positive references from prison officers. The Applicant was represented by a solicitor.
9. The panel issued its provisional decision letter to the parties on 15 August 2019. It explained in some detail its approach to the evidence of the two psychologists. It noted that both the psychologists had helpfully met in advance of the hearing and had prepared a document which set out the areas of agreement and the areas of difference in their respective reports. In essence, there was relatively little difference in their assessment of risk. Both psychologists had concluded that further work needed to be completed by the Applicant before he could be safely moved to open conditions. The psychologists also set out their thoughts about the delivery of the work and the type of work which would be beneficial.

## The Relevant Law

10. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
11. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair.
12. The decision of the Parole Board at an oral hearing as to whether or not to direct release of the prisoner is one that is eligible for reconsideration under Rule 28(1). This is the combined effect of Rules 25(1), 28(1), and 28(2).
13. However, the remainder of Rule 25 makes it clear that this is the limit of the new avenue of challenge provided by Rule 28. It does not relate to advice. Key to the present case are Rule 25(4) and Rule 25(5).

*"(4) Where a panel receives a request for advice from the Secretary of State concerning whether a prisoner should move to open conditions, the panel must recommend either that—*

*(a) the prisoner is suitable for a move to open conditions, or*

*(b) the prisoner is not suitable for a move to open conditions.*

*(5) Where the board receives a request for advice with respect of any matter referred to it by the Secretary of State, any recommendation made in respect of that request is **final** [emphasis added]"*



14. Thus, the decision not to recommend a move to open conditions, which the solicitors submit was irrational, and procedurally unfair, is not eligible for reconsideration under the new rules.

15. In **R (on the application of 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

### Request for Reconsideration

16. In the application for reconsideration the Applicant's solicitor specifically raises an issue relating to the report of the independent psychologist. In her report she concluded that the Applicant's risk could not be managed as she had confirmed with the Offender Supervisor that the Offender Supervisor could not complete core interventions with the Applicant. The independent psychologist had also contacted the prison anonymously to establish information regarding the availability of psychological intervention work.

17. It is argued on behalf of the Applicant that this enquiry implied that the independent psychologist was accepting that the Applicant could safely be managed in open conditions, because she was asking about the possibility of undertaking the required work in open conditions. Further it is argued therefore that the independent psychologist's final conclusion, that the Applicant could not be managed in open conditions, was logically inconsistent and thus led to an irrational decision by the panel.

18. It is also argued that the hearing was procedurally unfair because the psychologist member of the panel failed to challenge, by questioning, this apparent logical inconsistency.

19. It is further argued that the decision is contrary to the views of both the Offender Manager and the Offender Supervisor.



## Discussion

20. The panel in this case made two decisions: firstly, a decision not to direct release on licence and secondly, a decision not to recommend a move to open conditions.
21. The representations of behalf of the Applicant do not suggest that the first decision was irrational or seek to challenge that decision.
22. As indicated above, the decision not to recommend a move to open conditions is not eligible for reconsideration under the new Rules.
23. That would be sufficient to mean that this application must be refused, however in any event the test for irrationality or procedural fairness is clearly not met.
24. Panels of the Parole Board sit in an inquisitorial forum. The role of panel Board Members in questioning witnesses is to elicit evidence which assists the panel in coming to a conclusion about the issues of risk which are before them. In this case the independent psychologist had, rather unusually, made contact with an open prison, anonymously, with a view to seeking some basic information about the availability of psychological intervention work. It appears that the independent psychologist felt that there may be some avenue for the prisoner to become involved in core behaviour work in open conditions. This would be very unusual; it was not surprising therefore that the answer that was secured was that core work was not available in open conditions. To extrapolate from that unusual enquiry a conclusion that the independent psychologist had accepted that the prisoner's risk could be managed in open conditions was a step too far. It was clear from the independent psychologist's report that she took the view that his risk could not be safely managed until the extra work which was being suggested had been completed, and a further assessment be made as to his risks following that work.
25. It would have been perfectly rational for the panel to have accepted that the final position, based on the reports, of the two psychologists (and their final agreed memorandum); namely that the work to address risk, had to be completed and the only venue for the completion of the work was the closed estate.
26. It was open to the Applicant himself through his solicitor to put to the independent psychologist that her telephone call implied acceptance that risk could be managed in open conditions, and to submit on the point at the conclusion of the hearing.
27. A decision by a panel member about the nature of questions to be put is unlikely, in most situations, to amount to procedural unfairness, and did not in my view amount to procedural unfairness in this case.
28. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of any particular professional (or other) witnesses. It is their responsibility to evaluate the evidence as a whole, make their own risk assessments and to evaluate the likely effectiveness of any Risk Management Plan proposed. In this case there was a clear conflict between the views of the Offender Manager and Offender Supervisor and the views of both the prison psychologist



and an independent psychologist. The role of the panel was to take account of all the evidence and to make a balanced decision based upon the test of protecting the public.

29. The panel were perfectly entitled to conclude that the detailed evidence of two professional psychologists, both of whom were suggesting that further work needs to be completed, could be favoured over the evidence of the Offender Supervisor and Offender Manager.
30. The panel demonstrated in the reasons it's awareness of the test for open conditions and applied it. It acknowledged that there was a difference in view between professionals, and it set out the reasons for preferring the conclusions of the psychologists. Given its assessment of risk, it is not surprising that the panel decided that further work needed to be completed, and that the prisoner's risk could not be managed in open conditions.

## Decision

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

Stephen Dawson  
27 September 2019



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