

[2021] PBRA 143

Application for Reconsideration by Cunliffe

Application

1. This is an application by Cunliffe (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 13 September 2021 (the Decision Letter).
2. I have considered the application on the papers comprising:
 - a) A dossier of 454 numbered pages, including the Decision Letter; and
 - b) Written submissions by the Applicant's solicitors dated 24 September 2021 in which reconsideration is requested (the Applicant's Submissions).

Background

3. In April 2008, the Applicant received an indeterminate sentence for public protection for a series of robberies of vulnerable older women, causing serious injury and falling within a pattern of similar violent offending over many years in order to fund Class A drug addiction.
4. The minimum tariff for the indeterminate sentence was set at two-and-a-half years, less time spent on remand, and expired in July 2010.
5. The Applicant was released in November 2016 but was recalled to custody in April 2017. He was released again in January 2018 but was again recalled in January 2020.
6. The Applicant was aged 34 when he received the sentence and is now aged 48.

Current parole review

7. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release.
8. The Decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing in May 2021 and at an oral hearing in September 2021 (the Panel). The oral hearings were conducted remotely.



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Application and response

9. The Applicant's submissions assert that the Decision is marred by irrationality.
10. By an email dated 6 October 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

11. 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.

Irrationality

12. 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."

13. 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.
14. 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 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

15. 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.

Consideration

16. I address the grounds relied on by the Applicant in the order in which they appear in the written submissions by his representatives.
17. The Applicant notes that his release was recommended by all four professional witnesses. It is important that a panel should explain clearly a decision that is contrary to the opinions and recommendations of professional witnesses. That is especially so in the case of unanimity among professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, the Parole Board is not obliged to adopt

the opinions and recommendations of professional witnesses and it is a panel's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example.

18. The Decision Letter reveals that the Panel did not treat the Applicant as guilty of sexual offending, nor did it give undue weight to the historic allegations of sexual offending or of the alleged abuse and robberies of sex workers, as he has asserted. The Panel noted that there was a lack of any pattern of sexual offending before or since and the Panel made no findings of fact as to whether the alleged abuse and robberies of sex workers were true. The Panel did however note that the Applicant admitted to associating with sex workers during the most recent period of release on licence.
19. The Applicant does not dispute the record of the evidence in the Decision Letter that the Applicant accepted when it was put to him that he had driven a van filled with barrels of diesel without regard for the danger of doing so.
20. There is no reasoned basis for the Applicant's challenge to the assessment by the forensic psychologist in training nor for his assertion that the Panel should have preferred the assessment by the forensic psychologist due to the relative levels of the psychologists' qualifications and experience. The Panel can be assumed to have been aware that the forensic psychologist in training was in training, and it is confirmed in the report that the forensic psychologist in training was supervised by a fully-qualified forensic psychologist. In any event, the assessment of risk was ultimately for the Panel.
21. The Applicant asserts that he has not committed further offences that are in any way similar to the index offences that led to the indeterminate sentence. However, the Panel expressly had regard to the absence of convictions for further violent offending and the acquisitive offences committed by the Applicant while on licence were similar to the index offences in that the motivation for acquisition was to fund the Applicant's admitted relapse into heavy drug use.
22. The Applicant asserts that motivation to abstain from drugs is evidenced by his recent drug free lifestyle in prison. However, the Panel expressly had regard to the Applicant's good progress in recent months on a drug recovery unit, and his claimed motivation to remain abstinent in future and to seek support in a new area away from his past offending. The Panel balanced against the pattern of relapse and dishonesty both in open prison conditions and while on licence on multiple occasions over the last decade.
23. The Panel found the Applicant to have dishonestly minimised the risks inherent in his criminal lifestyle and behaviour. The Panel was expressly aware of the Applicant's explanation that he had travelled outside of his home area to purchase drugs in order to benefit from a lower price for larger quantities. However, the Panel also had regard to the assessment of police that the Applicant was involved in drug supply and had considered documentary evidence and oral evidence over two hearings. I do not accept the Applicant's assertion that the Panel could only reasonably have reached a different view on that evidence.

24. The assertion that the weight of oral evidence given at the hearing by the professional witnesses that risk could be managed is overwhelming, is a bare assertion that is not particularised and does not address the Panel's reasoning.
25. The Applicant asserts that his abstinence from drugs in prison should have been given greater weight by the Panel. However, the weight to be given to any relevant factor is a matter for the expert Panel, and due deference must be given to that expertise.
26. Ultimately, the Panel considered that the Applicant's resolve to remain abstinent and to do so in a less restrictive and structured regime had not been adequately demonstrated at the time of its assessment, which led the Panel to recommend the Applicant's transfer to open prison where he would be afforded a better opportunity to do that and to develop his internal controls and resettlement plans. The Decision Letter provides clear and rational reasons why the Board considered that further testing of that nature was necessary in the Applicant's case in order to be sufficiently confident that the level of risk he posed to the public had reduced to a level that was manageable.
27. Therefore, I am not persuaded by the assertion in the Applicant's Submissions that the Decision is irrational.

Decision

28. The Decision is not marred by irrationality and the application for reconsideration is accordingly refused.

Timothy Lawrence
8 October 2021