

[2022] PBRA 7

Application for Reconsideration by Bhad

Application

1. This is an application by Bhad (the Applicant) for reconsideration of a decision of an oral hearing dated the 15 November 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 amounting to 738 pages (including the decision letter) and the grounds in support of the application amounting to 20 pages.

Background

4. On the 7 November 1987, the Applicant was sentence to life imprisonment with a minimum tariff of 11 years for the murder of his wife.
5. At the time of sentencing, the Applicant was aged 27 and had a previous court appearance for breach of the peace.
6. The tariff expired on the 20 June 1997. This was the Applicant's 12th review and he has served 34 years in prison. He is now aged 60.

Request for Reconsideration

7. The application for reconsideration was received on the 16 December 2021.
8. The application is based on irrationality. The grounds for seeking a reconsideration are as follows:
 - a. The assessments of risk by the professionals are arguably over inflated in terms of risk of serious harm.
 - b. The panel did not give sufficient weight to the evidence of the Prison Offender Manager or the independent psychologist as to the lack of risk of serious harm posed by the Applicant.



- c. The panel did not balance the Applicant's failure to undertake offending behaviour work with evidence of positive change and protective factors.
- d. The panel failed to take account of relevant obstacles, barriers or disadvantages which would hinder the Applicant's ability to benefit from further intervention.
- e. The panel gave insufficient weight to the evidence of the independent psychologist and gave inadequate reasons for preferring the evidence of the forensic psychologist .
- f. The decision letter did not demonstrate a thorough exploration of the risk management plan, because it placed emphasis on risk reduction as opposed to the manageability of risk in the community.
- g. The panel did not consider the effectiveness of community-based interventions.
- h. The panel referred to unsubstantiated allegations and religious membership which are prejudicial.
- i. The panel based its decision on the fact the Applicant has outstanding risk reduction work to complete. The decision letter does not explain why the failure to complete the outstanding risk reduction work means that he cannot be safely managed in the community.
- j. The faulty reasoning shown by the panel places the Applicant at risk of a breach of his Article 5 (4) rights.
- k. The panel's decision was irrational because there is little likelihood the Applicant's risk can be further reduced in custody and no clear evidence to suggest it cannot be managed in the community.

Current parole review

- 9. On the 18 February 2019, the case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct the Applicant's release or, alternatively, his progression to open conditions.
- 10. The case was adjourned on the 18 February 2021 for the preparation of a psychological risk assessment and adjourned again, shortly before the 26 August 2021, following a late submission of an independent psychological report.
- 11. The hearing took place by way of video link on the 9 November 2021 before a four-member panel, including two psychologist members.
- 12. The panel heard evidence from the Applicant, who was taken through his evidence by his legal representative, the Prison Offender Manager, the Community Offender Manager, forensic psychologist and independent psychologist.

The Relevant Law

13. The panel correctly sets out in its decision letter dated the 15 November 2021 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

14. **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)).
15. 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

16. 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."

17. 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.
18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
19. 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."*

The reply on behalf of the Secretary of State

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20. The Secretary of State responded to this application on the 5 January 2022. He submitted the Community Offender Manager had confirmed the sentence planned conformed with current policy; that the Applicant's literacy levels had not been a hindrance to the completion of the sentence plan objectives and the Applicant's treatment needs could be addressed by one to one work.

Discussion

21. It may be helpful to set out the essentials of this case.
22. Whilst in prison, the Applicant had completed a number of interventions, the last of which was in 2017.
23. After 2017, it was considered he needed to do consolidation work as he had not made sufficient progress.
24. The Parole Board panel in 2018 agreed that there was outstanding risk reduction work which had to be completed in closed conditions. That has yet to be done.
25. The Applicant declined to do further work and said that in his view he had completed all necessary work.
26. In February 2021, the Applicant told the panel that he would engage in one-to-one work.
27. The Applicant declined to do the one-to-one work when it was offered to him, giving no explanation for his refusal until the day of the hearing.
28. At the hearing neither the Prison Offender Manager or the Community Offender Manager supported release. Both recommended progression to open conditions. The Applicant's view was that he had been there twice before and that open prison offered him nothing apart from "*drugs and criminality*".
29. In the course of the hearing, the Prison Offender Manager altered her position and said the Applicant needed to complete work on his emotional management before progressing.
30. The forensic psychologist completed a psychological risk assessment. She concluded the Applicant needed to remain in closed conditions and complete core risk reduction work. She maintained this position during her evidence.
31. The Independent Psychologist did not complete a risk psychological risk assessment because he had not been asked to do that. He concentrated on the suitability of the Applicant for release and concluded that the Applicant could be released safely with a robust risk management plan. The Independent Psychologist did not rule out the possibility of progression to open conditions.
32. The exercise of balancing relevant considerations is primarily a matter for the panel. The reconsideration mechanism can be used to interfere with that decision only if there

is a need to correct a manifest imbalance where disproportionate weight has been accorded to one or other relevant consideration or an irrelevant consideration has been taken into account.

33. The function of the panel is simply and accurately described by Sir John Saunders in the case of **Benson [2019] PBRA 46**,

"There are two matters which apply generally to these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in a case where every witness is supporting release, it is for the panel to make their assessment taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly a decision letter is directed at the prisoner. While it has to descend to sufficient detail so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision".

34. On the face of it, the oral hearing decision letter, which runs to 13 pages, is a very thorough and comprehensive account of the hearing and the decision-making process.

35. The legal submissions in this case have been drafted with great care and pellucid clarity. However, repeatedly, a great deal of the argument on behalf of the Applicant is to review the quality of the evidence of individual witnesses and in effect invite this panel to substitute its assessment of the evidence for that of the oral hearing panel. It should be firmly kept in mind that the oral hearing panel had two great advantages over this panel, the first is it saw and heard the evidence and the second is it included two psychologist members.

36. Turning to the individual grounds in support of the application,

Ground a. The weakness in this ground is illustrated by the use of the word "*arguably*". The ground is an invitation for this panel to accept the Applicant's assessment of the evidence as set out in the decision letter and the dossier and to prefer it to the assessment reached by the oral hearing panel. The ground is more a disagreement with the oral hearing panel's conclusions than with irrationality as described earlier in this decision.

Ground b. This submission involves a degree of cherry-picking. The Prison Offender Manager agreed there were no instances of the Applicant causing serious harm in prison, but she still did not support release and considered the Applicant's current risk to the public as high. The independent psychologist chose a different approach and looked at suitability of release rather than risk reduction and came down in favour of release. All the other witnesses appeared to take the approach that suitability for release depended at least to some extent on effective risk reduction and the panel agreed with that approach.

Ground c. The decision letter clearly acknowledges the positives. Among other achievements the Applicant had Enhanced status on the Incentives and Earned

Privileges Scheme and the significance of his improved behaviour on a particular wing was examined in the decision letter.

Ground e. I have read the decision letter very carefully and I am satisfied that the panel gave adequate reasons for preferring the evidence of the prison psychologist to that of the independent psychologist and I also bear in mind that the other two professional witnesses were unpersuaded by the evidence of the independent psychologist. I accept that the sentence "*The panel questioned both psychologists closely and reached the conclusion that [the prison forensic psychologist] was able to explain more clearly how her conclusions had been reached and to present evidence to support her recommendations and therefore they favoured her assessment*" is succinct but it has to be read against the background of nine substantial paragraphs between pages six and eight of the decision letter where the panel reviews very carefully the points being made by each psychologist.

Ground d. The forensic Psychologist evidence on this was set out at length in the decision letter. She had wondered what was driving the Applicant's problematic behaviour. She thought the Prison Offender Manager had captured it well: the Applicant was stubborn, set in his ways, with a tendency for grievance and retribution thinking. She thought he might benefit from one-to-one Cognitive Behavioural Therapy or a period in a regime designed and supported by psychologist. She also said his progression might rely on understanding what lies behind the progress he had been making on the wing mentioned in paragraph 40.

Ground f and g. It is clear the panel concluded on the preponderance of the evidence before it that the Applicant needed to do further work before he could be released safely. A risk management plan provides external controls; those go only so far in providing the necessary protection for the public. What is required is an effective combination of external and internal controls. The panel's conclusion was the Applicant's internal controls were insufficient to enable his risk to be managed safely in the community and that would remain the case until he had completed successfully additional work. In those circumstances, the panel gave adequate consideration to the risk management plan and community-based interventions.

Ground i. The evidence of three of the professional witnesses was to the effect that the Applicant could not be safely managed in the community until he had completed the outstanding work. The independent psychologist disagreed but even he conceded that progression to open conditions rather than release was a live consideration. In those circumstances, I am satisfied the decision letter makes it clear why the panel came to the view it did.

Grounds j and k. These grounds stand or fall on whether the panel decision was irrational.

37. I have concluded that all these matters were for the judgement of the oral hearing panel and that coming to a different conclusion from that argued on behalf of the Applicant is not irrational. The panel took an entirely correct approach and its conclusion that the Applicant was not safe to be released into the community without completing further work was justified by the evidence. I take the view the panel explained in some detail its reasons for that conclusion. The panel did not take into account irrelevant material, nor did it fail to take into account relevant material, nor did it misunderstand the

evidence and its conclusion, and it cannot be argued successfully that its conclusion was one to which no reasonable panel could have come to on this evidence.

38. Neither taken individually nor collectively do the matters put forward raise an issue about the irrationality of the decision for this.

Decision

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

James Orrell
12 January 2022