

[2020] PBRA 86

Application for Reconsideration by Nobes

Application

1. This is an application by Nobes (the Applicant) for reconsideration of the decision made by a Panel of the Parole Board (the Panel) dated 29 May 2020 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 running to 375 pages, the provisional Decision Letter, the application and grounds drafted by the Applicant's legal representative dated 16 June 2020, the undated written submissions consisting of 91 paragraphs drafted by the legal representative which were received on 22 June 2020, a letter from the legal representative to the Parole Board dated 5 May 2020 and handwritten submissions made by the Applicant personally dated 3 June 2020.

Background

4. On 15 October 2010, following his conviction after a trial, the Applicant was sentenced to a total of 19 years in prison for a wide range of serious sexual and other offences. The offences were committed over a period between 1982 and 2010. The Applicant maintains his innocence.
5. The Applicant became eligible for parole on 25 February 2019 and is entitled to be released in any event on 26 June 2020 on his Non-Parole Date.

Request for Reconsideration

6. The application for reconsideration is dated 16 June 2020.
7. The Applicant seeks a reconsideration both on the basis of procedural unfairness and that the decision was irrational.
8. The grounds for seeking a reconsideration on the basis of procedural unfairness are as follows:

(a) The application had been subjected to significant and avoidable delays;



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



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



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

- (b) The hearing was listed after the date upon which the Applicant would be released in any event;
 - (c) The hearing was listed when final reports were outstanding; and
 - (d) The Panel, having directed an oral hearing, concluded it on the papers.
9. The grounds for seeking a reconsideration on the basis that the decision was irrational are as follows:
- (a) The Panel wrongly took into account the Applicant's deficits in respect of victim empathy and lack of remorse when assessing his risk of serious harm if released;
 - (b) The Panel placed insufficient weight on the fact that the Applicant had completed a training course addressing sex offending and should not have refused to release him because he had not completed a training course addressing the use of violence and sex offending; and
 - (c) The Panel "sought to distance itself" from the static risk assessments which indicated the Applicant posed a low risk.

Current parole review

10. In August 2018, 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.
11. The case has been beset by delay. I will deal with this later in the decision. On 6 February 2020, a Parole Board member directed the case should proceed to an oral hearing; however, on 29 May 2020, the matter was concluded on the papers by a single member panel.

The Relevant Law

Irrationality

12. The well known test in **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)** paragraph 116 is,

"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."

Procedural unfairness

13. 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 focus.



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

Other

15. In the case of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. The Supreme Court did not decide that there should always be an oral hearing but said there should be one if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one.

The reply on behalf of the Secretary of State

16. On 24 June 2020, the Secretary of State filed representations dealing exclusively with the Applicant's personal submissions.

Discussion

17. Although I have come to the conclusion that this application cannot succeed, in deference to the industry shown by the Applicant's legal representative, I shall deal in summary form with at least some of the allegations.

18. Dealing with ground (a), regarding the delay, as early as September 2014, the need had been identified for the Applicant to undergo a personality assessment because it was said he exhibited a number of problematic personality traits.

19. The Secretary of State referred his case to the Parole Board in August 2018 and in August and October respectively, the Offender Supervisor and the Offender Manager recommended the personality assessment should be completed.

20. Later, the Applicant's legal representative filed undated submissions resisting the suggestion the Applicant needed to do further offending behaviour work on the basis he had already completed two programmes.

21. On 26 October 2018, a Parole Board member deferred the case until 25 January 2019 for the personality assessment to take place and to await the assessment of the Applicant's suitability to do further offending work.

22. On 15 January 2019, a member rescinded the direction for the personality assessment, having received information from the Psychologist allocated to do the piece of work that the Applicant had stopped cooperating with his Offender Supervisor and was refusing to meet the psychologist unless she met his conditions which he found unacceptable.

23. In February 2019, the Parole Board received further information from the Psychologist that the Applicant was effectively refusing to cooperate with the personality assessment.

24. However, the Applicant's legal representative wrote to the Parole Board saying the Applicant had formed a satisfactory working relationship with an independent



psychologist and asked that the case be deferred for that Psychologist to carry out the assessment.

25. On 13 March 2019, the Parole Board directed that the personality assessment should take place, followed by further reports from the Offender Supervisor and the Offender Manager which should have been filed by 9 August 2019.
26. The assessment by the Independent Psychologist had been due by 12 April 2019. On 6 June 2019, the Applicant's legal representative applied for an extension of time because the first Independent Psychologist had fallen ill. The legal representative also complained that there were unnecessary problems with the production of the Applicant's medical records to the Psychologist.
27. The Parole Board extended the time for filing the personality assessment until the 31 July 2019.
28. The difficulty with the production of the Applicant's records was still alive in September 2019 when the Parole Board required an explanation from the prison. The prison explained it had received the request for the records on 30 August 2019 and had processed that request by 4 September 2019. The information in the dossier simply does not permit any more detailed investigation of this dispute.
29. The assessment by the Independent Psychologist is dated 23 January 2020; I cannot ascertain why it appears to have been filed six months late.
30. Be that as it may, on 6 February 2020, it was directed that the case should be listed as an oral hearing with a time estimate of five hours.
31. In the normal course of events, one might have expected the oral hearing to have been listed after about April 2020; unfortunately, shortly after the direction, the COVID-19 pandemic entered the United Kingdom and listing hearings became extremely difficult (with face to face hearings having been suspended).
32. Dealing with grounds (b) and (c), it is perfectly correct that the oral hearing when it was listed was listed after the date when the Applicant would be released in any event. When the error was realised, the Parole Board was rapidly running out of time. The direction that the matter be set down for oral hearing plainly raised a legitimate and reasonable expectation that that is what would take place. However, in the unprecedented and extremely unusual circumstances of the listing difficulties thrown up by the pandemic and the Applicant's looming release date, the decision was made to conclude the matter on the papers, notwithstanding the absence of the reports from the Offender Supervisor and the Offender Manager.
33. As I see it, there is a *fatal lacuna* in the Applicant's case, in that the connection has not been made out between the very long delay and the listing error on the one hand and on the other, the basic argument put forward on behalf of the Applicant that on all of the information, he should have been released.
34. Dealing with ground (d), the single member panel who concluded the case on the papers set out the correct test, namely the Parole Board has to be satisfied that it is no longer necessary for the protection of the public that the Applicant should be



confined. Whether the public is protected is ascertained by assessing the risk a prisoner poses and the likely effectiveness of his risk management plan following release.

35. Whether the case is dealt with swiftly or very slowly does not on the face of it affect the question whether the public would be protected if the prisoner is released.
36. This is not to say that delay and administrative error are not extremely frustrating to a prisoner. There are, however, nonjudicial remedies; there are complaints procedures in respect of the Prison Service, the Probation Service and there is a Parole Board complaints procedure. Ultimately, the actions or omissions of any of these bodies can be challenged in judicial review proceedings but the court will usually expect the complaints procedures to be used before proceeding to litigation. In the instant case, the complaints procedures have not been followed.
37. I now turn to the Applicant's complaint that the decision was irrational.
38. As to ground (a), *"the Panel wrongly took into account the Applicant's deficits in respect of victim empathy and lack of remorse when assessing his risk of causing serious harm if released"*.
39. The deficits were identified in the independent psychological assessment of the Applicant dated 23 January 2020 at paragraphs 8.4 and 8.5.
40. The Applicant's legal representative does not dispute the existence of the deficits. The complete list comprised lack of empathy and guilt, failure to take responsibility, viewing himself as a victim and absence of remorse.
41. Paragraph 8.6 of the assessment specifically stated that its results were relevant to re-offending and future violence.
42. The legal submissions do not deal with this paragraph. Looked at fairly and sensibly, it provided the Panel with a complete justification for taking the deficits into account.
43. As to ground (b), *"the Panel placed insufficient weight on the fact that the Applicant had completed a [training course addressing sex offending] and should not have refused to release him because he had not completed a [training course addressing the use of violence and sex offending]"*.
44. The Applicant had completed a training course addressing decision-making and better ways of thinking in 2012 and the training course addressing sex offending in 2014. An assessment of risk of reoffending and outstanding needs dated September 2014 highlighted four factors relevant to this particular submission. First, there was an absence of a change to the Applicant's dynamic risk sufficient to reduce his assessed risk of harm. Second, his assessed level of static risk met the threshold for the most intense course of treatment. Third, the programme he had in fact completed in 2014 had limitations which would reduce its effectiveness



for the Applicant. Four, he would benefit from further work to address his treatment needs.

45. I have read all the professional reports, including subsequent reports from the Psychologists, and it is plain that those four factors still subsisted at the time of the direction to set the matter down for an oral hearing. It is simply unrealistic to suppose that those entrenched traits had diminished to any significant degree by the time the matter was concluded on the papers. In those circumstances, the Panel was entitled to place the weight it did on the fact that the Applicant had done no further work as recommended.
46. As to ground (c) *the Panel "sought to distance itself"* from the static risk assessments which indicated the Applicant posed a low risk.
47. As I understand it, a static risk is an assessment of the risk of future reconviction which takes into account factors that cannot change, such as age or history of offending.
48. The Decision Letter clearly sets out that three static risk assessments were low. However, the Panel also noted that the other assessments indicated that the Applicant posed a high risk of sexual offending or violence to children and the public and a medium risk to known adults. A further comprehensive assessment of risk reoffending in the Applicant indicated that the Applicant posed a very high risk of sexual offending. The Panel concluded, as it was entitled to, that in the context of all the assessments, those three static assessments underestimated the Applicant's risk.
49. The Applicant's handwritten submissions reflect his frustration at the lack of progress with his case but contain no acknowledgement that his own conduct may be partly responsible. The submissions are not easy to follow.
50. He argues that the assessment of risk of reoffending and outstanding needs dated September 2014 contains unlawful recommendations because of a change in the law, but does not say what that change was. He further argues that because the Offender Supervisor based her reports in part on that assessment, her recommendations are invalid. He also accuses her of factual inaccuracies and poor professional methodology which he would have wanted to challenge in an oral hearing.
51. The Applicant appears to accept that he has to be considered a high risk, but on a more limited evidential basis than that used by the professional witnesses.
52. It follows that I do not regard the Applicant's case to be as strong as it has been represented. In particular, the delay is plainly excessive but it has been caused in part by the Applicant's lack of cooperation with the professional witnesses. This attitude may be connected to personality problems afflicting the Applicant.
53. However, the real problem with this application is one of jurisdiction.
54. The reconsideration process is, to a degree, intended to reduce the number of unnecessary applications for judicial review and, as far as is practicable, it adopts



the law and procedure of judicial review. Its powers, however, are governed by the **Parole Board Rules 2019, rule 28**.

55. Relief in judicial review claims are discretionary and the court may refuse relief in cases where there are good grounds if, for example, the relief is likely to be academic or where the claimant has failed to use an alternative complaints procedure or where the relief would not bring tangible benefit to the claimant. In addition, the **Senior Courts Act 1981** requires the High Court to refuse to grant relief if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
56. Rule 28 of the Parole Board Rules confines the power of the assessment panel (i.e. the reconsideration assessment panel) to directing that the provisional decision should be reconsidered or dismissing the application – rule 28(6).
57. There is no power to make a declaratory judgement and if the assessment panel directs a decision should be reconsidered, the panel reconsidering the matter under rule 5 is confined to the terms of the Secretary of State’s reference, which in the instant case is to consider whether or not it would be appropriate to direct the Applicant’s release.
58. Unsurprisingly, the panel has no jurisdiction to recall a prisoner who has been released because the custodial part of his sentence has expired.
59. Thus, the panel in this case would hear the evidence and either direct that the Applicant should be released which is an exercise lacking all utility because the Applicant will be released or direct that the Applicant remains confined which is a futile exercise because the Applicant cannot. It is noted that since the submission of this application for reconsideration, the Applicant has been released.
60. In short, to ask a panel to adjudicate upon a prisoner who has already been released is an abuse of the process and unfortunately the present application for reconsideration is misconceived.
61. It follows that, if it is an abuse of the process for a panel to consider whether or not to direct the release of a prisoner already at liberty, it must also be an abuse of the process to ask an assessment panel to direct reconsideration in circumstances where a second panel could not, with due diligence, be convened prior to the prisoner’s release.

Decision

62. 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.



James Orrell
10 July 2020

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

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

 info@paroleboard.gov.uk

 [@Parole_Board](https://twitter.com/Parole_Board)

 0203 880 0885

