

[2021] PBRA 86

Application for Reconsideration by Sellwood

Application

1. This is an application by Sellwood (the Applicant) for reconsideration of a decision of a Parole Board member not to direct his release following a consideration on the papers.
2. The decision itself was dated 26 February 2021 and was provisional by virtue of Rule 19(6) of the Parole Board Rules 2019.
3. A prisoner may apply within 28 days to the Duty Member to request an oral hearing. Such an application was made (by way of representations dated 1 April 2021) in this case. This was considered by a Duty Member of the Parole Board on 15 April 2021 where no direction for an oral hearing was made.
4. 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.
5. I have considered the application on the papers. These consisted of the dossier running to 176 pages (that included the decision letter) and the representations for reconsideration.

Background

6. The Applicant was sentenced to an indeterminate sentence on 7 March 2007 for sexual offences against children. The tariff was set at 6 years (with allowance for time on remand) and expired on 29 January 2013.
7. The Applicant was released on licence in 2016 and recalled on 11 January 2021. This was the first review since his recall.

Request for Reconsideration

8. The application for reconsideration is dated 13 May 2021.
9. The grounds for seeking a reconsideration consist mainly of submissions as to why the Duty Member was wrong to decline to direct an oral hearing in the Applicant's case.



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Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board on 10 February 2021 to consider whether his release should be directed. If not, then the Panel was invited to advise the Secretary of State on whether a transfer to open conditions could be recommended.
11. The case would then have been allocated to a Parole Board member with the date of 26 February 2021 being fixed to allow for the Applicant to make representations (either himself or through a legal representative). No representations were submitted.
12. The Parole Board member noted the view of the Offender Manager (OM) that the circumstances of the recall led to the conclusion that there was still core risk reduction work outstanding. It appears that this view was accepted by the Parole Board member.
13. Given that, no direction for release could be made. For similar reasons it was concluded that it was not appropriate to recommend a move to open conditions.
14. An application for an oral hearing under Rule 20(2) dated 1 April 2021, was made. At one point there was an issue as to whether this was in time, but this has been resolved.
15. This was drafted by the Applicant's lawyers and set out the Applicant's account of events leading to the recall and subsequently. Reasons are given as to why, with reference to **Osborn, Booth & Reilly v The Parole Board [2013] UKSC 61**, an oral hearing should be held.
16. The Duty Member considered the case on 15 April 2021 in light of the representations but declined to direct the case to an oral hearing.

The Relevant Law

17. The panel correctly sets out in its decision letter the test for release.

Eligibility under Parole Board Rules 2019

18. 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. The question of whether to make a recommendation to the Secretary of State for a progressive move to open conditions is outside of the scope of the reconsideration mechanism.
19. It is important to remember that the effect of the Rules is that whether or not an application for an oral hearing is made, it is the original decision of the Parole Board member that I must consider.



20. The decision of the Duty Member under Rule 20(5) to decline to direct an oral hearing is not one that is in scope.
21. For that reason, however irrational or unfair the decision of the Duty Member may be (I should stress that I am not saying that it was in this case), that is not something that I can consider as part of the reconsideration mechanism.
22. The Applicant has submitted further evidence in the representations. However, the reconsideration mechanism is *'not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it'*. There is a duty on the parties to put before the Parole Board member all the relevant evidence. If that evidence is not available, and a party considers that the decision maker should have it, then an application to adjourn or defer should be made (**Nightingale [2019] PBRA 40**, at para 37).
23. The fact that material evidence was not put before the decision maker does not mean that there is procedural unfairness, even where that evidence could have made a difference to the outcome of the case (**Williams [2019] PBRA 7**).
24. There will be cases where representations submitted, either for the Duty Member or on an application for reconsideration, highlight matters in the dossier before the original Parole Board Member that would suggest that an oral hearing should have been directed.
25. In such circumstances, it may be that these can be taken account of at the reconsideration stage. However, it is not suggested that this is such a 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 (see **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 properly informed of the case against them;
- (c) they were prevented from putting their case properly; and/or
- (d) the panel was not impartial.

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

The reply on behalf of the Secretary of State

32.The Secretary of State has stated that he does not wish to make any representations.

Discussion

33.As stated above, the grounds for reconsideration focus on the decision of the Duty Member not to grant an oral hearing.

34.The matters raised in the request for reconsideration may well have been enough, taken with the previous representations, to persuade a Parole Board Duty Member that it was appropriate to direct that an oral hearing be held.

35.However, they do not, in my view, undermine the original decision of the Parole Board member.

36.I note that in considering whether to direct an oral hearing, the Parole Board Member stated '*The panel has considered the principles set out in the case of **Osborn, Booth & Reilly [2013] UKSC 61** concerning oral hearings. It did not find that there are any reasons for an oral hearing as there has been no substantial change since [the Applicant's] last review. Therefore, an oral hearing is declined*'.

37.In fact, the Applicant's last oral hearing was in 2016 and since then the Applicant has been released and recalled. It is hard to say that there have not been substantial changes. However, there was nothing before the Parole Board Member to indicate that any of the **Osborn, Booth & Reilly** reasons applied in his case.

38.In any event, the Applicant does not take issue with this aspect of the reasoning. It is not suggested that there was material in the dossier to suggest that the Applicant disputed the factual basis of the reports of the professionals such as to require an oral hearing to resolve them.

39.The submissions on irrationality as they apply to the Applicant's case (paras 13-18) again do not attack the original decision.

40.It may be that it would have been preferable for eligible decisions under Rule 20(1) to have been included in the scope of the reconsideration mechanism.

41.In such cases there is an air of artificiality as the grounds of challenge are often against the refusal to direct an oral hearing. This is especially where the first decision was made without the benefit of legal representations.

42.However, whether or not that is the case, it seems to me that the terms of Rule 28(1) are clear.

Decision

43.For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

44.Accordingly, the application for reconsideration is refused.

Daniel Bunting
23 June 2021