

[2022] PBRA 120

Application for Reconsideration by Brown

Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision dated the 15 July 2022, following an oral hearing which took place on 6 July 2022, not to direct his 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 337-page dossier provided by the Secretary of State; the Panel's written decision; the application for reconsideration submitted by the Solicitor representing the Applicant and an email from PPCS on behalf of the Secretary of State dated 18 August 2022. I have also listened to the audio recording of the oral hearing.

Background

4. The Applicant was sentenced in October 2017 to an Extended Determinate Sentence, comprising a custodial sentence of 6 years with an extended licence period of 3 years, for an offence of robbery. No separate penalty was awarded for an offence of possession of bladed article. The Applicant was 29 at the time of sentence and was 33 years of age at the date of the oral hearing.
5. The Applicant became eligible for Parole on 20 September 2021. This is his first review by the Parole Board.

Request for Reconsideration

6. The application for reconsideration is dated 03 August 2022.

7. The grounds for seeking a reconsideration are as follows:

Ground 1: The decision was irrational as the panel did not delay the Applicant's



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review further in order for the Applicant to undertake periods of overnight Release on Temporary Licence (ROTLs).

Ground 2: The decision was irrational as all professional witnesses recommended the Applicant's release.

Current parole review

8. On 16 December 2020, 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. The case was directed to an oral hearing after consideration by a Parole Board Member as part of the member case assessment process on 5 May 2021. An oral hearing was due to take place on 15 October 2021, but was deferred on the day of the hearing for a period of 6 months "to access development opportunities."
9. The oral hearing took place before a two-member panel of the Parole Board on 6 July 2022 with all parties attending by way of video link; in addition to hearing from the Applicant, who applied for release, the panel heard from the Prison Offender Manager (POM), the Community Offender Manager (COM) and a Prison Psychologist. The panel also considered the contents of the dossier which ran to 333 pages. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

The Relevant Law

10. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.
11. The panel correctly sets out in its decision letter dated 15 July 2022 the test for Release.

Parole Board Rules 2019

12. 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)).

Irrationality

13. **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."



14. 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.
15. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
16. 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."

Procedural unfairness

17. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

The reply on behalf of the Secretary of State

18. The Secretary of State confirmed, by way of email dated 18 August 2022 from PPCS on his behalf, that he did not wish to make any representations in response to the application.

Discussion

Ground 1:

19. It is submitted that the oral hearing panel note that overnight ROTLs would be required before release is directed, and that the Applicant's original oral hearing date was deferred for a period of 6 months to allow for overnight ROTLs to take place. The deferral period was, in fact, 8 months before the oral hearing was listed and no overnight ROTLs had taken place during the deferral period. It is submitted that the decision is irrational because the panel did not delay the Applicant's case any further.
20. The deferral directions dated 16 October 2022, contained within the dossier, explain that "*it was agreed that his hearing was deferred for a period of 6 months to access*



development opportunities." It does not appear that the review was deferred in October 2022 specifically for overnight ROTL's to take place, as submitted by the Applicant, although I accept that ROTL's, both day release (RDR) and overnight release (ROR), are likely to have been encompassed within the anticipated "*development opportunities*" referred to in the deferral directions, along with the then outstanding Enhanced Behaviour Monitoring Assessment, and other development opportunities such as potential employment.

21. Completed accompanied and unaccompanied ROTL's are referenced and taken into account by the panel in the written decision and that the Applicant had not had any ROR's for a number of reasons, including a lack of bed spaces at Approved Premises, delays with Children's Services, several changes of COM plus a ROTL suspension.
22. The lack of overnight ROTL's, which, after consideration of the written decision, appears to have contributed in part to the decision not to direct the Applicant's release, as it would potentially provide some evidence of experience in the community, testing, compliance and exposure to public in the community (all of which is discussed in the in the written decision) was not the sole reason for the panel to not direct his release. This will be discussed further in relation to ground 2 below.
23. I have carefully listened to the audio recording of the oral hearing and note that the Applicant's legal representative did not make an application for a further deferral or adjournment of this review to the panel at the oral hearing on 6 July 2022. In closing submissions, the Applicant's legal representative acknowledged that overnight ROTL's had not taken place but submitted that these were not necessary to demonstrate that the Applicant's risk could be managed in the community. An application for release was made.
24. The panel were under a duty to give the prisoner a 'swift' review and any possible adjournment engages **Article 5.4 of the European Convention on Human Rights** which imposes on the court or other body exercising judicial functions the duty:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."
25. An application for an adjournment or deferral in any jurisdiction has to consider the potential delay it would cause and its likely consequences.
26. However, in the present case, the submission is without merit because no application for a further deferral or adjournment had been made.
27. The panel was under a duty to give the prisoner a 'swift' review, in accordance with Article 5(4). They did so on the basis of the information put in front of them. The Applicant, who was legally represented and had equality of arms, did not ask for a



further deferral/adjournment or request the opportunity for further information/steps to be taken prior to a decision being issued by the panel.

28. The oral hearing had already been subject to a substantial deferral period of 8 months since the listing of the first oral hearing, and 18 months had elapsed since the case had been referred to the Parole Board for review from the Secretary of State.
29. I am not aware of any proposition that there is a general duty on panels to wait and allow either party to perfect their case, especially in situations where there has already been plenty of time to do so and no further time was asked for by the Applicant. I do not consider that the panel erred in determining the case and made a swift decision on the basis of information in front of them.
30. Therefore, I do not consider that the conclusion of the case following the oral hearing on 6 July 2022, and the subsequent decision not to direct release was irrational. Consequently, this ground fails.
31. For the avoidance of doubt, no suggestion of procedural unfairness has been raised by the Applicant, however, for the same reasons I do not believe that the process adopted by the panel was procedurally unfair to either party.

Ground 2:

32. It is submitted by the Applicant that the decision not to direct the Applicant's release was irrational, as the Applicant's release was recommended by all professional witnesses in this case.
33. Simply disagreeing with professional recommendations is not sufficient to establish irrationality. If it were, there would be no need for a panel to exercise any judgement in cases where professional witnesses were all in agreement. This would extinguish the panel's purpose as an independent risk assessor and decision-making body.
34. That said, if a panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**.
35. At Paragraph 4.9 of the panel's written decision, the panel expressly noted that the POM, COM and Prison Psychologist all recommended the Applicant's release and had taken this into consideration.
36. The panel explained that whilst witnesses remarked on the Applicant's insight, the panel, who heard evidence directly from the Applicant at the hearing, did not find his evidence persuasive and also commented that the Applicant had not engaged with the matrix produced by the Prison Psychologist with a view to him developing further insight into the stressors that he may encounter within the community and his plans to deal with these.



37. The panel stated that it fundamentally disagreed with witnesses over the lack of Resettlement Overnight Releases (ROR's) which it considered to be essential, not just desirable. The panel had some concern in relation to the lack of breadth of experience and testing given that the RDRs undertaken have been limited in terms of nature and location and the Applicant had also not had any outside employment so there has been no satisfactory exposure to the public in the community.
38. The panel also explained its other concerns that contributed to the conclusion not to direct the Applicant's release, stating "*The panel felt that [the Applicant's] insight into potential stressors in the community and how he would manage these was limited and considered this a relevant factor in the management of his risk*".
39. While the common law duty to give reasons is a matter of procedural unfairness is not raised in the application, the panel nonetheless gives clear and cogent reasons for its disagreement with the recommendations of the professional witnesses. It cannot be said in view of the panel's stated reasons that its decision is outrageously illogical in the sense expressed above. There is no irrationality on this point.

Decision

40. I have considered the specific submissions of the Applicant. I am satisfied that this decision was not 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. I do not consider any of the points raised under Grounds 1 or 2 have succeeded. Consequently, these grounds fail.
41. The application for Reconsideration is refused.

Katy Barrow
1 September 2022

