

[2022] PBRA 49

Application for Reconsideration by Hughes

Application

1. This is an application by Hughes (the Applicant) for reconsideration of a decision, dated 10 March 2022, by a 3 member Parole Board Panel, including 2 psychiatrist members, refusing to direct his release or to recommend that he be transferred to open conditions.
2. The review was conducted by video conference on 8 March 2022 when evidence was given by the Applicant himself (A), his Prison Offender Manager (POM), his Community Offender Manager (COM), a Prison appointed psychiatrist (K) and a Community Psychiatric Nurse/Care Co-ordinator.
3. I have considered this application on the papers. These comprise of the dossier, the decision of the Panel and the application for reconsideration.

Background

4. On 14 May 2004, the Applicant having, at the age of 30, pleaded guilty to a charge of (s. 18) wounding with intent to cause grievous bodily harm received an automatic life sentence with minimum tariff of 6 years 5 months and 2 days and a tariff expiry date of 7 November 2010.
5. On 5 September 2017, he was released following a Parole Board hearing direction but recalled on 11 March 2020.

Request for Reconsideration

6. The application for reconsideration comprises a 7-page document, prepared by the Applicant's Legal Representative.



7. The application seeks reconsideration on the grounds that the decision was irrational and procedurally unfair. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below.
8. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge. It has considered the application on the basis that both limbs are challenged.
9. Any application relating to recommendations as to open conditions is not within the scope of the Reconsideration Mechanism (see **Panasuik [2019] PBRA 2**). The RAP has not, therefore, considered the issues raised in relation to open conditions save in so far as they are relevant to the statutory limbs of challenge. For the avoidance of doubt, however, it is noted that this issue, also, was considered by the Panel.
10. In general terms the application submits:

(a) Irrationality:

- i) The panel's declared concerns that the Applicant had not been open was not shared by the professionals working with him.
- ii) The prison appointed psychiatrist witness (K) had not completed a "standardised risk assessment", that such assessment ought to have been completed by a forensic psychologist. K had, further, failed to cite previously compiled reports. *"In the interests of fairness a full psychological assessment should be undertaken fully to understand risk"*.
- iii) The Parole Board should have made a direction for such assessment although *"due to extensive delays in the review"*, the Legal Representatives *"were not instructed to challenge this at the time"*. Nonetheless, in order to make a fair and rational decision following the evidence, the Board should have made a direction for it.
- iv) The Panel *"did not appear fully to have considered the amount of risk reduction work undertaken."*
- v) That the Panel failed to question witnesses, all of whom supported release, as to A's suitability for open conditions and failed to discuss open conditions *"at any length within the decision letter or formed part of a rational decision making process"*.

(b) Procedurally unfair:

- i) The questioning of professional witnesses, *"at times"* became over assertive. The RAP was asked to listen to the recording to assess the procedural fairness *"due to the conduct of the panel and their approach on the day."*



ii) A repetition of the irrationality submission ground ii above.

11. Further particulars were sought from the Legal Representatives as to Ground (b) i above, resulting in the following additional information:

"Unfortunately, I do not have the times as this was an unusual hearing with unexpected issues through out the day. (unexpected observer at the beginning, a witness leaving the oral hearing without reason, a lunch break and a further break for [the Applicant] to obtain his medication at a specific time as required by the prison.) This was an all day hearing.

We would ask that [K's] evidence is listened to in relation to this point. In a hope to assist the panel, I have provided the order of witnesses.

The evidence from professionals was heard in the following order, Prison offender manager, [the Applicant], [K], CPN, Community Offender manager.

I can only apologise for not having more specific timings."

Response from the Secretary of State

12. The Secretary of State (the Respondent), by e-mails, indicated that no representations were made in response to the application or to the further submissions.

Current parole review

13. The Panel considered a dossier of 947 pages and, in a comprehensive decision, dealt in detail with the index offence, with the issues leading to recall, the Applicant's personal, offending and medical history, the evidence of witnesses and, over almost a full page, that of A.

14. Particular detail was given in relation to the evidence of K with a precis of his evidence relating to the compilation of 3 separate reports leading, finally, to a recommendation for release. Specifically, he had said that if provision were made for psychological and mental health support together with sustained compliance, openness and wellbeing, A could be managed in the community but that if that level of provision and engagement deteriorated or A did not receive help immediately and on demand, risk would be imminent.

The Relevant Law

15. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.



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16. In **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".

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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

18. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

19. Under the principles expressed in **Osborn**, the key test is whether the fairness to a prisoner requires an oral hearing, bearing in mind the facts of the case and the importance of the issue at stake. Factors to be considered include:

- Whether the evidence can be considered without the need for it to be tested orally or in person;
- Despite the duty of the Parole Board to provide a swift review, the test is not the likelihood (or otherwise) of release or the need to save time, expense or trouble;
- All evidence must be given the appropriate scrutiny with particular care in relation to issues of fact which may be disputed or open to explanation or mitigation;
- Whether the prisoner wishes to have an oral hearing and the legitimate interest in being able to participate in a decision which has important implications for him;
- The evidential effect of the conclusion of pending criminal proceedings;
- Whether there are psychological issues which need to be tested;
- The decision is not confined to a determination of whether or not to direct release (or recommend a transfer to open conditions) but includes other aspects, such as comments or advice in relation to the prisoner's treatment or offending behaviour work which may be required, which will, in practice, have a significant effect on his management in prison or on future reviews.

20. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.



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Discussion

Irrationality

21. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier gave a clear and reasoned decision, on that basis, and adopted a correct test for its decision:

- a. Openness. It was for the Panel to make its own assessment as to the credibility of the Applicant during the course of his evidence and the long hearing. It was entirely a matter for the Panel having given a fair outline of the views of the other witnesses.
- b. HCR-20 (Clinical guide for violence risk assessment). In the decision, this aspect was referred to, having been discussed in detail during the course of the evidence of K, the recording which the RAP heard. It was clear that K and the Panel Psychiatrist Members were fully familiar with the purpose and procedures of HCR-20 and the lack of a formal HCR-20 was of no significance in relation to K's findings. The RAP considers that there would have been no additional benefit from a direction for a specific Forensic Psychology report. In any event, A was professionally represented and no application was made, if necessary by adjournment, for such a report either before or at the conclusion of the evidence.
- c. The "failure" of K to cite the previously compiled reports was of no significance. All relevant issues were discussed during his evidence.
- d. The Panel acknowledged that all professional witnesses recommended release. This was acknowledged by the panel which, in those circumstances, is under a duty to consider the recommendations with care and to give reasons for a decision to take a different view. The RAP is satisfied that this was done.
- e. Failure to question witnesses in detail as to suitability for open conditions. A gave evidence at an early stage in the proceedings and the decision makes it clear that his evidence was that he did not wish to go to an open prison. The issue was discussed by the Panel, no witness supported it and the reference to it in the decision was adequate.

Procedural Unfairness

22. The sole separate submission in relation to procedural unfairness centres around the questioning of witnesses and, specifically, of K. The RAP has listened to a recording of K's evidence, lasting for over 1½ hours. It finds that evidence and questioning and replies were conducted with absolute professionalism, skill and courtesy by all concerned. All issues were carefully examined and concessions made by K as to the basis on which his recommendations had been made. The RAP can find no basis for any complaint on this ground.



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Decision

23. For the reasons that have been given, the RAP does not consider that the panel's decision was irrational or procedurally unfair and accordingly, the application for reconsideration is refused.

Edward Slinger
21 April 2022