

[2023] PBRA 146

Application for Reconsideration by Brown

Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 11 July 2023. The decision of the panel was not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier consisting of 580 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On 15 September 2008 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection in relation to offences of sexual activity with a child, child abduction, offering to supply amphetamine and one offence of escaping from lawful custody. The minimum term fixed by the judge was three years and 78 days.
5. The Applicant groomed a young female child over a period of time. The offending included penetrative sexual offences.
6. The Applicant was noted to have a limited history of criminal offences, prior to the commission of the index offence.

Request for Reconsideration

7. The application for reconsideration is dated the 31 July 2023.
8. The grounds for seeking a reconsideration are set out below.


Current parole review

9. The Applicant had been released by the Parole Board in January of 2015. He was recalled in March of 2016. The current panel were therefore considering release

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following recall. The Applicant's recall occurred in circumstances where he had been in contact with a young person in breach of his conditions of release. He was convicted of a further offence relating to this breach of condition.

Oral Hearing

10. The review was conducted by an independent Chair of the Parole Board, a psychologist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, a prisoner instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by a solicitor.
11. A dossier consisting of 558 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 11 July 2023 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 (as amended)

13. Pursuant to Rule 28(1) of the Parole Board Rules 2019 (as amended) 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)).
14. 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

15. 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."

16. 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.



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

Procedural unfairness

18. 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.

19. 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 given a fair hearing;
- (c) they were not properly informed of the case against them;
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

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

21. 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 Respondent

22. The Respondent offered no representations.

Reconsideration grounds and discussion

Ground 1

23. It was irrational to assess that the Applicant lacks insight into the index offences as he was not asked about the index offences. It was procedurally unfair not to record the entirety of the Applicant's evidence.

Discussion

24. It is the role of a parole panel to receive evidence in the hearing and importantly analyse that evidence and record the conclusion reached upon such analysis. The selection of evidence to be recorded in a decision will vary from panel to panel. The important procedural point is that a panel explains the conclusions they reach and how they reached them. In this case the panel recorded (at paragraph 4.9) that they had



considered the entirety of the evidence. The panel concluded, having heard the evidence, that the Applicant remained a risk to young females and that he lacked insight into that risk. The panel had the advantage of hearing the evidence from witnesses, including receiving evidence from the Applicant. The panel also had reports and a substantial dossier to consider. There was a difference in view expressed by various witnesses in this case as to the risk posed by the Applicant, and whether that risk could be managed in the community. It was a matter for the panel to determine the evidence they preferred. The panel were obliged to ensure that they offered sound reasoning, based on evidence, for their conclusion.

25. The panel indicated that they were not satisfied that the Applicant had sufficient internal controls or mechanisms to manage his own risk and were further concerned that it was unlikely that external controls would be sufficient to safely manage risk in the community.
26. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. I do not find such reasons based upon this ground. The panel set out in their decision, (in particular the concluding remarks at paragraph 4) the fact that they had considered the differing views in this case and the reasons why they accepted some evidence and rejected other evidence.

Ground 2

27. The POM and the prisoner instructed psychologist both took the view the Applicant would be "*transparent*" and "*compliant*" with his probation officer if he were being managed in the community. The panel failed to take into account these views.

Discussion

28. The panel acknowledged (at paragraph 4.3) that this was a case of differing views. The POM and the prisoner instructed psychologist took the view that the Applicant would be compliant if released, other professionals took a differing view. The panel in their decision at paragraphs 4.7 and 4.8 indicated that their decision took into account two important factors.
29. Firstly, the fact that the Applicant had not been open and transparent when in the community and when subject to supervision, in that he had not revealed contact with a young female to his COM.
30. Secondly, the panel noted that an intensive support programme in the community would have relied upon voluntary involvement. The Applicant, in the panel's view, was reluctant to engage in support and indeed had rejected an opportunity to participate in interventions whilst in prison. This reluctance led the panel to conclude that the Applicant was unlikely to engage with voluntary support in the community.
31. In my determination the panel carefully weighed the issues in this case. As indicated, there were differing views, the panel took account all of those views in reaching their



decision. I do not find the panel's decision-making process to be unfair or irrational in the sense set out above.

Ground 3

32. The panel failed to record a view of the prison instructed psychologist relating to licence conditions. By failing to mention the views of both parties, the panel demonstrated unfairness.

Discussion

33. As indicated above, Parole Board panels vary in their approach to recording evidence within a decision. This ground related to the drafting of a licence condition. Panels are obliged to ensure that they consider the totality of the evidence in any particular case. However, there will be occasions when each balancing argument will not necessarily appear within the decision itself. Taken as a whole I am satisfied that the panel acknowledged that there were competing views in this case and took account of those views in reaching their overall decision. This is not a ground which I find to be irrational or procedurally unfair.

Decision

34. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for reconsideration.

HH S Dawson
16 August 2023

