

[2023] PBRA 37

Application for Reconsideration by Sharpe

Application

1. This is an application by Sharpe (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 30 November 2022 not to direct his 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, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration. I have also considered various items of email correspondence.

Background

4. The Applicant received an extended sentence on 3 February 2020 comprising a custodial period of four years with a five-year extension period following conviction for sexual assault.
5. His parole eligibility date passed on 8 July 2022. His conditional release date is in November 2023 and his sentence end date is in November 2028. The Applicant was 43 years old at the time of sentencing and is now 46 years old. This is his first parole review.

Request for Reconsideration

6. The application for reconsideration is dated 13 December 2023 and has been drafted by solicitors acting for the Applicant.
7. It sets out two grounds on which it submits that the decision was procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding irrationality or error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in September 2021 to consider whether or not it would be appropriate to direct his release.



9. It proceeded to an oral hearing on 16 November 2022, before a panel consisting of three independent members. It was held remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), and a forensic psychologist commissioned by the Applicant.
10. The decision preamble notes that a victim personal statement (**VPS**) was provided and read by the victim/victim representative at the hearing. It further notes that the reading of the VPS was attended by the panel members.
11. The decision also notes that a list of proposed additional licence conditions was provided after the hearing. It does not say when this additional information was disclosed.
12. The decision (para. 4.1) states that the panel noted "*the index offence, previous offending, progress in custody, evidence of the professionals as well as the submissions from [the Applicant's] legal representative*".
13. The panel did not direct the Applicant's release.

The Relevant Law

14. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

15. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
16. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
17. 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

18. 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."

19. 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.
20. 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

21. 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.
22. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

24. The Respondent has submitted no representations in response to this application.

Discussion

Procedural unfairness: closing submissions

25. The first ground argues that the decision was procedurally unfair as it was made before the panel had seen closing submissions from the Applicant's legal

representative.

26. The application states that, at the conclusion of the oral hearing, the panel requested further information from the COM including police checks, a list of licence conditions and the availability of a bed space at the designated accommodation. The decision preamble refers only to a list of additional licence conditions having been received after the hearing.
27. The decision further states that the Applicant's legal representative requested an opportunity to review the newly directed information before making closing submissions in writing. It is said this was agreed by the panel.
28. I have reviewed various items of email correspondence in order to put together a timeline of events as follows:
- a) 25 November 2022 (12:41) from COM to Parole Board Litigation Team, cc: Parole Board Case Manager and POM: COM provided details of designated accommodation availability.
 - b) 25 November 2022 (14:00) from COM to Parole Board Case Manager, cc: POM and PPCS: COM provided details of designated accommodation availability and a full list of proposed additional licence conditions.
 - c) 25 November 2022 (15:17) from Parole Board Case Manager to panel: Parole Board Case Manager forwarded details of designated accommodation availability and a full list of proposed additional licence conditions. The Parole Board Case Manager also asked the chair if the information should be uploaded to the dossier.
 - d) 30 November 2022 (12:21) from legal representative to COM, Parole Board Case Manager and PPCS: legal representative noted that she had seen no adjournment directions following the hearing, nor any information from the COM. It notes that the information was to be provided "*prior to my providing closing submissions*". Legal representative requested an urgent update.
 - e) 30 November 2022 (12:31) from COM to legal representative, cc: Parole Board Case Manager and PPCS: COM acknowledged telephone conversation with legal representative and provided information regarding police checks. COM also forwarded email of 25 November 2022 (14:00) with details of designated accommodation availability and a full list of proposed additional licence conditions.
 - f) 30 November 2022 (12:37) from legal representative to COM, cc: Parole Board Case Manager and PPCS: legal representative thanked COM and told Parole Board Case Manager '*I will provide closing submissions as soon as possible in order that this can be referred back to the panel for consideration*'.
 - g) 30 November 2022 (12:47) from Parole Board Case Manager to legal representative: '*Thank you for letting me know*'.

- h) 30 November 2022 (18:01) from panel chair to Parole Board Case Manager: attached decision for issue.
- i) 1 December 2022 (10:45) from Parole Board Case Manager: decision issued by email to all parties.

29. Analysing this correspondence leads me to the following findings:

- a) In adjourning the hearing for further information, the panel acknowledged that the Applicant's legal representative would be afforded the opportunity to make closing submissions in writing once the new information had been disclosed. I have not listened to the recording of the hearing as I have no doubt that the legal representative would have asked to provide written submissions and the panel would have agreed: it would be highly unusual for this not to have been the case.
- b) I have not seen any evidence that formal adjournment directions were set. This is regrettable, since doing so would have enabled some formal tracking of the direction for new information (including adding it to the dossier to be seen by all parties), as well as setting a clear date on which the adjournment was to be reviewed by the panel.
- c) It appears that the panel worked to the 14-day rule for issuing its decision provided by rule 25(6)(a).
- d) The panel was aware of the designated accommodation availability and a full list of proposed additional licence conditions on 25 November 2022. The chair was asked if this information should be uploaded to the dossier, but there is no record of a reply, and, in any event, the information was not uploaded.
- e) The Applicant's legal representative was not aware of the designated accommodation availability or full list of proposed additional licence conditions until 30 November 2022, five days later.
- f) At this time, the Applicant's legal representative was also made aware of outcome of the police checks. The Parole Board Case Manager was informed at the same time, but there is no record of the police checks being disclosed to the panel.
- g) The Applicant's legal representative informed the Parole Board Case Manager of their intention to submit written representations. There is no record of this intention being passed to the panel before the decision was issued.
- h) It is therefore not unreasonable for me to conclude that the decision was made with the panel being aware of the designated accommodation availability and the full list of proposed additional licence conditions (but not the directed police checks) and that the panel did not consider written representations on the Applicant's behalf (since the decision was

issued before any such representations were submitted).

30. There are two main areas of concern. First, that the panel appears to have made its decision without having seen the police checks that it directed. Second, and more importantly, that the panel made its decision without considering legal representations on behalf of the Applicant, despite knowing (at the end of the hearing) that these were anticipated. The legal representative made the Parole Board aware that such submissions were forthcoming, and, even if this message was not conveyed to the panel, the panel were on notice (from the time of the adjournment) that submissions were expected.
31. Moreover, the panel's decision refers to the panel noting '*submissions from [the Applicant's] legal representative*'. No closing submissions were made. It may be that the panel is referring to any oral representations made during the hearing, but if this were the case, the decision should be explicit in stating that the panel did not see any closing written representations (for which the opportunity to submit was requested at the hearing).
32. I therefore find that the Applicant was prevented from putting his case properly as a result of a combination of procedural errors, which compounded each other: the failure to issue adjournment directions to provide procedural clarity and certainty, the failure to direct that the new information should be added to the dossier, the failure to consider the totality of the new evidence directed, the failure of the Parole Board Case Manager to remind the panel that written submissions were forthcoming, the issue of the decision prior to any such submissions having been received (despite them being requested), and the reference in the decision to the panel having considered legal representations when no closing submissions had been made.
33. This amounts to procedural unfairness and the application for reconsideration is granted.

Procedural unfairness: victim personal statement (VPS)

34. The second ground argues that the decision was procedurally unfair as the VPS was heard by the panel without the Applicant or his legal representative being present.
35. Having already found sufficient procedural unfairness for the application to be granted, I do not need to consider this ground for reconsideration.
36. However, for completeness, I also find procedural unfairness on this ground.
37. There were three VPS' in total. Two were subject to non-disclosure and they were not read before the hearing. The VPS disclosed within the dossier was read before the hearing by its author. Only the panel was present.
38. Although rule 23(2)(c) provides that a hearing can proceed in the absence of a prisoner without notification if neither the prisoner nor their legal representative is present, in this instance neither the prisoner nor their legal representative knew that a VPS reading was taking place, and they had a right



to decide whether or not to attend. This could give rise (however unfairly) to suspicions of impartiality which could have readily been avoided by properly informing all parties to the arrangements being made.

Decision

39. Applying the tests as defined in case law, I find the decision not to release the Applicant to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel at an oral hearing.

Stefan Fafinski
13 March 2023