

[2023] PBRA 42

Application for Reconsideration by Agbogun

Application

1. This is an application by Agbogun (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated 13 December 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 written decision reasons dated 13 December 2022 (although it was clear from the dossier that it was not actually issued on 13 December 2022 and was issued sometime in January 2023 as the Panel Chair was delayed in writing the reasons); a request for reconsideration in the form of written representations from the Applicant's legal representative dated 25 January 2023; and the dossier, now numbered to page 438, of which the last document is the written decision.
4. Furthermore, due to specifics in the application, I have listened to the recording of the hearing. However, the Panel Chair cannot be heard at all on the recording (likely due to a technical issue where the Panel Chair has not switched on their microphone within the recording software) and so not all matters were clear from that recording.

Background

5. The Applicant is now 35 years old. On 4 January 2013, when he was 25 years old, he received a sentence of imprisonment for public protection following conviction for attempted murder. The offence involved a sustained violent attack including the use of weapons on his then partner.
6. His minimum term was set at 5 years and 323 days and expired in November 2018.
7. The Applicant did have previous convictions but not for offences as serious as the index offence.
8. The Applicant's case was initially referred to the Parole Board by the Secretary of State in December 2021 and this was the third review of his case. The referral specifically excluded the panel from considering a recommendation for



open conditions due to the fact there was a deportation order served on the Applicant.

9. The oral hearing for this review took place by video link on 13 December 2022. The Applicant indicated that he hoped to be released as a result of the parole review. The panel heard evidence from the Applicant's Community Offender Manager (COM), his Prison Offender Manager (POM) a psychologist employed by the prison service. The Applicant also gave evidence to the panel. The Applicant was legally represented.

Request for Reconsideration

10. The Applicant's grounds for reconsideration are:

- i. The decision was procedurally unfair as the panel did not directly address the written closing submissions which were submitted following the hearing.
- ii. The decision was procedurally unfair because it was at odds with some of the evidence heard and the panel did not provide cogent reasons for departing from that evidence.
- iii. The decision was irrational as it references the Applicant wanting to reconcile with the victim when the Applicant gave evidence to say that this comment had been taken out of context.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 13 December 2022 the test for release.

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. 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."

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.

Procedural unfairness

16. 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.

17. 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.

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

19. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. However, if a panel were to make 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, per **R (Wells) v Parole Board 2019 EWHC 2710** and **Stokes [2020] EWHC 1885 (Admin)**.

The Reply on behalf of the Secretary of State

20. The Secretary of State confirmed by way of email dated 23 February 2023 that he did not wish to make any representations in response to the application.

Discussion

Ground i)

21. With regards to the first ground, I note that the panel made it clear on the face of the decision that further pages were added to the dossier post hearing, including the closing submissions. It is apparent from the dossier that this was



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the agreed way forward in the hearing, namely an adjournment for licence conditions and exclusion zones to be clarified and then closing submissions to be produced. It is clearly important that the panel consider the closing submissions, but it is not a requirement to address them point by point unless there were to be further applications made (such as a request for an adjournment) which would require a specific response.

22. Given the dossier included those closing submissions, I have been able to consider them. Helpfully, they address the three main concerns raised during the oral hearing in a succinct way. All of those concerns are then covered in the panel's written reasons. Whilst the panel does not specifically say it has considered the submission, one can infer from the fact the panel references receiving them, and addresses the relevant concerns in its decision, that they were considered in full.

23. Accordingly, I am not satisfied that there was any procedural impropriety and therefore any unfairness to the Applicant.

Ground ii)

24. The Applicant quotes three parts of the decision and submits that it is "*arguable*" they each contradict the evidence given at the hearing. Whilst the Applicant then accepts that the panel is able to disagree with evidence, he submits that it must provide "*cogent reasons if departing from the unanimous concerns at the hearing*".

25. The first quote is from paragraph 2.2 of the decision and relates to the security and behavioural evidence and the panel's interpretation of the same. In essence, there were concerns that the Applicant was choosing to isolate himself and that there were issues around low mood, frustration, paranoia and grievance thinking. The Applicant himself in his closing submissions accepted he was choosing to isolate and that witnesses considered this to be a "*fundamental issue to progression*". I am therefore not at all sure whether the conclusions drawn by the panel were actually at odds with the evidence received from witnesses. In any event, the panel has explained how it interpreted the evidence in the dossier which included other information, in addition to the security reports, regarding the issues around isolation and paranoia.

26. The second quote is from paragraph 4.3 of the decision and is the panel's conclusion that there is outstanding work for the Applicant to complete around his use of avoidance, coping skills and the areas of his thinking. The final quote is the panel's conclusion at paragraph 4.5 (although incorrectly identified as 4.4 in the application) that the risk management plan is unlikely to manage risk and links to the previous paragraph. The Applicant submits that these two paragraphs (and 2.2) contradict the evidence from witnesses that "*many of the key risk factors leading to the index offence were not active*". The application does not set out which risk factors it was referring to, but the closing submissions for the hearing said these included drugs, debt and violence. It seems to me that this submission has '*cherry picked*' from the decision and not considered it as a whole. Looking at the full reasons, the panel accepted some of the



positive points raised on the Applicant's behalf and took full account of his evidence during the hearing. The panel specifically agrees at paragraph 2.6 that there is no recent evidence of the use of violence and no recent concerns regarding drugs or debt. The panel states within its decision that it is other risk factors that it remains concerned by and provides clear examples from the evidence as to why, including from the Applicant's own evidence. The panel does not directly disagree with the interpretation of some aspects of the Applicant's thinking by the professionals, but highlighted the need for further assessment and understanding, which appears to me to be a rational conclusion given some issues were due to more recent developments.

27. In my assessment, cogent reasons for the panel's conclusions were given and accordingly, this ground fails.

Ground iii)

28. The final issue relates to paragraph 2.9 of the decision regarding the Applicant's hopes of reconciliation with the victim. The Applicant submits that he gave evidence to explain his comments to the Probation Service with regards to this. I have listened to the Applicant's full evidence and could not find where he was asked about this or offered the evidence described in paragraph 2.9. However, as noted above, the recording was not a full recording as the Panel Chair's questions and interventions were not recorded at all. During the Applicant's evidence, he was asked by a panel member, "*is there still some hope of reconciliation with your family?*" and in response he went on to talk about his children and his hopes with regards to them, and his evidence regarding those issues is accurately recorded in that same paragraph by the panel. The Applicant did say during his evidence that he had no plans with regards to a relationship but accepted he could change his mind in time. He also talked about the victim's forgiveness. The legal representative did not ask any questions of the Applicant and noted all matters were covered, and this issue was not addressed in closing submissions. Therefore, I cannot be sure whether the Applicant was asked about his hopes with regards to the victim specifically and what his response was. There is certainly a chance that the Applicant's answer with regards to reconciliation with his children was misinterpreted as a hope with regards to their mother. However, this issue is not included as a main consideration or reason for the panel for its decision. The panel relies on other matters including the need for further work and his immigration status which affected the panel's ability to assess risk in another country (a matter conceded in closing submissions).

29. 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 am satisfied that this particular conclusion (which may well be a misinterpretation of evidence or mistake by the panel) did not materially affect the panel's decision given the detail it sets out in section 4 of its written decision. Therefore, it does not amount to a compelling reason, and so this ground fails.

Decision



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30. For the reasons I have given, I do not consider that the decision was procedurally unfair or irrational and accordingly, the application for reconsideration is refused.

Cassie Williams
13 March 2023



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