

[2023] PBRA 51

Application for Reconsideration by Cowell

Application

1. This is an application by Cowell (the Applicant) for reconsideration of a decision not to direct his release dated the 19 February 2023 following an oral hearing on 5 December 2022.
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.
3. I have considered the application on the papers. These are the application for reconsideration, the decision letter and the dossier.

Background

4. The Applicant is serving an extended sentence of nine years and six months the custodial period is five years and four months and the extended licence period is four years and two months. The Applicant was released on licence on 1 November 2021 and recalled on 10 February 2022.

Request for Reconsideration

5. The application for reconsideration is dated 1 March 2023.
6. The grounds for reconsideration are that there was procedural unfairness in that the decision letter was issued well in excess of the 14 days time limit for issuing decisions. Because of the lateness of the decision the panel was not able sufficiently to remember the evidence and had to listen to a recording. Further it is said that the decision was irrational in that any reasonable panel would have concluded on the evidence that the Applicant's risk could be safely managed in the community under the risk management plan which was put forward.

Current parole review

7. This was the first parole review after the licence revocation.
8. This was a hearing by a single member panel on 5 December 2022. The decision was expected on 19 December 2022. The Applicant received an adjournment notice



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

dated 29 December 2022 on 17 January 2023. The reason for the adjournment was given as 'Parole Board member was unavailable'. The adjournment date was set for 27 January 2023. The Applicant was informed that a further 14 days were required to issue the decision so that the decision should have been issued on 10 February 2023 but it wasn't in fact issued until 19 February 2023.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 19 February 2023 the test for release.
10. 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.

Irrationality

11. 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."

12. 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.

Procedural unfairness

13. 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.
14. 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.

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

Discussion

16. Procedural Unfairness: While I have every sympathy with the Applicant who had to wait for a very long time for the decision on his application, it does not in my view amount to procedural unfairness which is concerned with the way the hearing was conducted. Procedural unfairness relates to the way in which the decision was made and is directed to ensuring that the Applicant had a fair hearing. Failure to provide the decision letter in time, although very upsetting for the Applicant, does not involve procedural unfairness in the way it is meant in the rules, in my judgment. The further suggestion is made that because the single member had to listen to the recording in order to make her decision that is procedurally unfair. That is misconceived. Most Chairmen will have to refresh their memories as to what the evidence was at the hearing when writing the decision letter. Often they can do that from notes but if they are not adequate it may be necessary to listen to a recording before making a decision. There is nothing procedurally unfair in that. It is suggested that the Panel got the evidence wrong in that she suggested that the Applicant could not provide a reason why he relapsed. In my judgment that is a misreading of the decision. The Panel sets out the reason that the Applicant gave at the hearing for his relapse. What the panel criticised was the failure of the Applicant to tell his Community Offender Manager about the emotional problems that he was having at or before the relapse.

17. Irrationality: The Panel was in my judgment entitled to conclude that the Applicant did not satisfy the test for release. The Panel was rightly concerned that the Applicant's recall demonstrated that, when under emotional stress, there was still a risk that the Applicant would relapse into drug taking and he has demonstrated that, when this happens, he can be a danger to the public. While it was true that there were no further courses available to him at his present prison that does not mean that he was safe to be released. The Panel concluded, as it was entitled to do, that the Applicant did not have sufficient internal skills to control his ability when under stress and accordingly did not satisfy the test for release.

Decision

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

John Saunders
28 March 2023