

[2023] PBRA 97

Application for Reconsideration by Sheriff

Application

1. This is an application by Sheriff (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 22 February 2023 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.

Background

4. The Applicant received a sentence of imprisonment for public protection on 9 January 2009, following conviction after trial for rape (two counts), attempted rape, assault by penetration (two counts) and kidnap/false imprisonment with intent to commit a sexual offence. The tariff was set at five years and six months (less time spent on remand) and expired in December 2013.
5. The Applicant was 27 years old at the time of sentencing and is now 42 years old. This was his sixth parole review.

Request for Reconsideration

6. The application for reconsideration is dated 9 May 2023 and has been drafted by solicitors acting for the Applicant.
7. It argues that the decision was irrational and/or 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 error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in May 2022 to consider whether or not it would be appropriate to direct his release.

9. The Applicant was not eligible to be considered for transfer to open conditions as a deportation order had been served and the Applicant was appeal rights exhausted.
10. The matter proceeded to an oral hearing on 22 February 2023 before a three-member panel. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, his Prison Offender Manager (**POM**), and his Community Offender Manager (**COM**).
11. The review was adjourned for further clarification from the COM on how the Applicant would be processed by the immigration authorities if released on licence.
12. The COM responded by a report dated 21 March 2023. She noted that her report was informed by a Home Office Specialist Foreign National Offender Probation Officer, but the Home Office has not yet confirmed the identity of the Applicant's new immigration caseworker (the previous caseworker now being on secondment elsewhere).
13. On 22 March 2023, the Respondent sought a short extension on behalf of the COM. The application noted that the COM has not received a response from the Home Office caseworker. It appears the extension request and the report 'crossed in the post' as there was no further report from the COM after that dated 21 March 2023.
14. Closing legal submissions on behalf of the Applicant were made in writing on 3 April 2023 and note that the updated reports had been disclosed as directed.
15. The panel did not direct the Applicant's release.

The Relevant Law

16. 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

17. 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)).
18. 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)).

19. 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

20. 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."

21. 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.

22. 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

23. 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.

24. 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.

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

The reply on behalf of the Secretary of State

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

Discussion

27. It is argued that the panel placed insufficient weight on the Applicant's progress in custody and undue weight on his immigration status.
28. The Applicant is maintaining his innocence. However, after some reluctance in the earlier part of his sentence, he has undertaken some 1:1 intervention work in custody as well as the Horizon programme (a moderate intensity accredited programme for men convicted of sexual offences) in 2017. It appears he has not completed any further work since then. Witnesses took the view that there was no core risk reduction work outstanding. Similarly, his risk was not assessed as imminent.
29. His custodial progress was acknowledged explicitly in the panel's decision (para. 4.1). It cannot be said that the panel disregarded the work he had done, his (now) good behaviour, or his trusted employment.
30. However, the panel balanced that against the risks arising from the Applicant's immigration status. It considered that his immigration status impacted negatively upon the risk management plan.
31. The panel took the view that the risk management plan, which it acknowledged was "*well thought through*", could not be finalised with certainty. The Applicant would be detained on release, but it was highly likely that he would be given bail. It was unlikely that he would be deported in the near future. Although he may be eligible for a place at designated accommodation for three months if granted immigration bail, there was no certainty around move on. Addresses he had provided as potential move on were unsuitable. He would have no recourse to public funds. If he was deported, there would be no means of monitoring him.
32. These appear to me to be the primary competing factors in this case.
33. It is a matter for the panel to weigh them as it wishes, provided that its weighting is not outrageously defiant of logic. While the Applicant may well disagree with the panel's weighting, I do not find it to be irrational. It was not unreasonable for the panel to conclude that an uncertain risk management plan would not be suitable for an indeterminate sentenced prisoner facing deportation, even if he had made good progress in a custodial setting.
34. The panel's decision is not irrational.
35. It is further submitted that the decision was procedurally unfair as the Applicant's COM has not discussed the case with his immigration caseworker.
36. The closing legal submissions did not raise any concerns about this point before the panel made its decision. It was clear by then that the Applicant's immigration caseworker was not known, but the questions regarding immigration status had been addressed by a member of staff connected with the Home Office.
37. If the Applicant was dissatisfied with the evidence before the panel at this point, it was open to him to seek a further adjournment. The panel was satisfied it has enough evidence before it to make its decision, and it did so. It was entitled to do so, and there is no procedural unfairness on this point.

Decision

38. The panel's decision is not procedurally unfair or irrational and the application for reconsideration is dismissed.

Stefan Fafinski
25 May 2023