

[2020] PBRA 193

Application for Reconsideration by Douglas

Application

1. This is an application by Douglas (the Applicant) for reconsideration of a decision of a single panel member of the Parole Board dated 10 November 2020 not to order the release of the Applicant.
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 a dossier consisting of 344 pages, a decision letter dated 10 November 2020, a document from the Applicant's solicitor dated 27 November 2020 and headed Appeal of Parole Board Decision.

Background

4. The Applicant is serving an extended sentence of imprisonment. The custodial period of the sentence is 7 years and extension is 3 years. The Applicant was sentenced on 22 January 2018. His parole eligibility date was 29 July 2020, his conditional release date is 28 January 2024, the sentence expires on 12 January 2027. The reference from the Secretary of State requested the Parole Board to consider whether it would be appropriate to direct the Applicant's release. This was the Applicant's first review.
5. The Applicant was aged 37 at the time of sentence. He was aged 40 at the time of the oral hearing decision.
6. The index offences were two robberies, the Applicant went to bookmakers' shops in December 2016 and January 2017 on separate occasions, armed with a large knife. Members of staff were threatened, and cash stolen on each occasion.

Request for Reconsideration

7. The application for reconsideration is dated 27 November 2020. The application was not made on the published Reconsideration application form CPD2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well grounded and focused. The application form explains how to look for evidence to sustain the complaints and, reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, the application was validly made.



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8. The grounds for seeking a reconsideration are as follows:

- (a) That the panel should have made clear its concerns about the risk management plan in the hearing and allowed the Applicant to apply for an adjournment;
- (b) That the panel should have commissioned a psychological risk assessment prior to the hearing;
- (c) The Applicant challenges the decision to screen him into a regime to help people recognise and deal with their problems because the prison Offender Manager (POM) was not an expert and the Applicant has not been diagnosed as having a personality disorder;
- (d) The Applicant did not have an '*adverse response*' (within the hearing) to a licence condition relating to future relationships. He was merely questioning the necessity of it; and
- (e) That an incident described in the hearing relating to the Applicant reportedly being '*heavily under the influence*' should not have been interpreted as inferring the Applicant had taken illicit drugs because he was not tested or medically examined at the time.

Current parole review

9. The matter originally came before a member case assessment (MCA) member on 7 April 2020 to await the outcome of information relating to the completion of a programme. The matter came back before an MCA member on 28 May 2020 and was directed to an oral hearing. An oral hearing was listed for 16 July 2020. That date was adjourned in advance of the hearing, for various reasons. The prison were unable to facilitate a hearing because of prior room bookings. It was also noted that because of the COVID 19 problems, the prison Offender Manager (POM) had not had an opportunity to complete assessments. There were further delays for the matter was finally listed on the above date.
10. The hearing took place before a single panel member. The hearing was initially scheduled to be heard by two panel members, for an unrecorded administrative reason the matter came before a single panel member. No objection was raised by the Applicant.

The Relevant Law

11. The panel correctly set out in its decision letter dated the test for release.

Parole Board Rules 2019

12. Pursuant to 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 (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.
15. The Applicant did not argue irrationality in the application.

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.

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

18. 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."*
19. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been



before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined.

20. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

21. The Secretary of State made no representations in response to the application for reconsideration.

Discussion

22. In the grounds at paragraph 8 (a) and (b) above the Applicant complains that the panel itself should have adjourned the hearing to secure further evidence or should have invited the Applicant to apply for an adjournment. The Parole Board is a decision-making body. The duty of the Parole Board is to assess the evidence presented at a hearing and apply the statutory test as appropriate. As indicated above, and in earlier decisions, the omission to consider evidence not presented at a hearing cannot amount to procedural unfairness.
23. This is the case even where the information, had it been before the panel would have been capable of altering its decision. This is because procedural unfairness under the rules relates to the making of the decision by the Parole Board at a hearing and when making the decision the panel is required to consider the evidence that was before them at that hearing.
24. A Parole Board panel may, in exceptional circumstances, conclude that a matter presented at a hearing cannot be resolved without further evidence, which may require the commissioning of a report or further evidence. However, the reconsideration mechanism is not an opportunity for parties disappointed by decision of the Parole Board to seek to put fresh evidence before it or to request the commissioning of further reports. 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 that panel.
25. In this case the panel made it clear that it remained concerned about the Applicant's commitment to applying the learning from the training course addressing the tendency to use violence he had undertaken; about an incident where it was suspected that there had been drug relapse since completing the intervention programme; and about the Applicant's response to the possibility of a licence condition involving future relationships. These concerns linked directly to key risk factors. The basis of the decision and the concerns relating to risk were set out by the panel member in the decision letter. I therefore determined that there was no procedural irregularity relating to the complaint set out in paragraph 8 (a) and (b) above.



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26. In paragraph 8 (c) above, the Applicant raises concern about the fact that it was felt that he should be screened into the regime to help people recognise and deal with their problems. The complaint being based on the fact that the POM was not qualified to make such a decision.
27. The POM was a probation officer, had been working in that role since 2001 and had known the Applicant since 2018.
28. The regime which supports probation officers in their work to help people recognise and deal with their problems is a resource used by supervising officers in the community to support the work that they are undertaking in managing those subject to licence conditions. The decision to use the resources is commonly made by probation officers with or without a formal psychological diagnosis of personality disorder.
29. The POM in this case was a highly experienced probation officer. The acceptance by the panel of the evidence of the POM does not in my estimation amount to procedural unfairness. The panel had before it a substantial dossier of evidence relating to the Applicant's personality, including the index offence details themselves, a substantial list of security issues from the early part of the Applicant's sentence, his previous convictions list and evidence in an assessment report of risks and their origin relating to domestic violence concerns. In the light of this evidence, I determine it was not unusual or unfair to accept the views of an experienced probation officer as to the support that might be required by the Community Offender Manager (COM) in the community relating to personality.
30. In 8 (d) above, the Applicant complains that the panel member misinterpreted his response to the suggestion that a particular licence condition would be appropriate in his case.
31. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it, having regard to the fact that they saw and heard the witness, it would be inappropriate to direct that a decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the conclusion. In this case the panel member made it clear that he was concerned that the response of the Applicant to the suggestion of a particular licence condition may have been an indication of a lack of insight into his own risks and therefore, a factor relating to risk. Although the Applicant challenges the conclusion of the panel member, the panel member was at liberty to reach this conclusion, having heard all the evidence. I do not find that reaching this conclusion can amount to a procedural irregularity.
32. In 8 (e) above, the Applicant complains that an incident where he was reported to be under the influence of illicit drugs should not have been interpreted as such because of the lack of a medical examination or drugs test.
33. The nature and quality of any particular aspect of evidence in a Parole Board hearing is a matter for the panel to assess. In this case, the panel member reported in the decision letter that the Applicant was described by those present as being '*heavily under the influence*' (by inference of illicit drugs). Healthcare staff had been called. The Applicant had been placed in the recovery position. The Applicant had eventually recovered but became aggressive with staff. The Applicant gave an explanation at the



hearing that he had reacted in this way because he was suffering a panic attack relating to the Covid- 19 infection risk.

34. The panel member considered all the evidence relating to this incident, including the explanation offered by the Applicant, and concluded that the Applicant's evidence was not credible. Again, it is for the panel to exercise its judgement based on the evidence before it, having regard to the fact that the panel member saw and heard the witnesses and heard the Applicants explanation. 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.
35. I find that there is no evidence of unfairness (or indeed irrationality) in the conclusion reached by the panel on the basis of the evidence before it in this case.

Decision

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

HH S Dawson
17 December 2020