

[2020] PBRA 204

Application for Reconsideration by Mashozhera

Application

1. This is an application by (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 17 November 2020 not to order the release of the Applicant. The panel consisted of 2 independent members and a psychiatrist member.
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 654 pages, a decision letter dated 17 November 2020, a completed CPD2 and a document from the Applicant's solicitor dated 7 December 2020 and headed Application for Reconsideration.

Background

4. The Applicant is serving a sentence of life imprisonment. The minimum term set by the sentencing judge was 12 years and 6 months. The Applicant's tariff expired on 10 November 2018. This was the third review. The reference from the Secretary of State requested the Parole Board to consider whether it would be appropriate to direct the Applicant's release, if release was not directed, the Parole Board were asked to consider a recommendation for transfer to open conditions.
5. The Applicant was aged 25 at the time of sentence. He was aged 40 at the time of the oral hearing decision.

Request for Reconsideration

6. The application for reconsideration is dated 7 December 2020.
7. The grounds for seeking a reconsideration in brief are as follows:
 - a. That the panel acted irrationally in failing to obtain further information about support which might be available to the Applicant when he was in the community.
 - b. In the alternative that it was procedurally unfair to conclude the review without seeking further information by adjourning to receive further information.



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Current parole review

8. This was the Applicant's third review. A decision letter dated 2 February 2017 was on the dossier. This review was a pre-tariff review and recommended a transfer to open conditions.
9. The current parole review took place on 5 November 2020. The hearing was conducted by way of a video conference in the light of the problems relating to the pandemic. The Applicant was represented at the hearing. Evidence was given at the hearing by the Applicant's Prison Offender Manager (POM), and the Applicants Community Offender Manager (COM). The Applicant himself gave evidence.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

11. 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)).
12. 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

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 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.

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

18. 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 a further hearing where the new information and its effect on any risk assessment could be examined. 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.

The reply on behalf of the Secretary of State

19. The Secretary of State has made no representations.

Discussion

20. The essence of the complaint in this case is that the panel, rather than reach a conclusion on the evidence that was before it, should have adjourned the hearing and sought further reports and information which would bolster the Applicant's case for release. It is argued that support for this proposition can be found in paragraph 9 of the panel's decision where the panel set out indications of 'next steps' which might assist future panels. Among those next steps were the results of exploration of eligibility for accommodation through various provisions. The background to the difficulties being the fact that the Applicant was subject to a deportation order and that his appeal rights had been exhausted in February 2005. He therefore had limited rights to housing and benefits in the community.

21. A Parole Board panel is a decision-making body. However, panels are empowered to seek reports independently (often psychological and psychiatric reports in advance of an oral hearing) and to request the attendance of witnesses.



22. It is not, however, the role of the Parole Board panel to embark upon detailed case preparation. The panel's role is to consider the evidence that is presented to it, and to reach a conclusion upon that evidence. The panel may consider applications by parties to adjourn cases in order to secure more information, however, the decision as to whether to make the application lies with the party.
23. If a panel have reasonably and fairly considered the evidence that has been presented to it and has reached a fair and just conclusion on that evidence, the absence of information or the failure to place information before a panel cannot be grounds to argue irrationality.
24. In this case the panel considered the evidence that was presented to it. Neither professional was supportive of release, although both supported a recommendation for open conditions. The panel clearly indicated that the major consideration in the Applicant's case was the fact that there was no clear plan as to the availability of stable accommodation and support in the community beyond the provision of designated accommodation for a limited period on release. The panel concluded that the test for release could not be met because the risk management plan was not able to make sufficient provision for the Applicant's support in the community beyond the period of living in designated accommodation. The panel were obliged to consider the Applicant's risk in the long-term.
25. Equally so far as procedural unfairness is concerned, the panel clearly set out its reasons for reaching the conclusion that it did. The evidence was tested within the hearing itself. No application was made for an adjournment by the Applicant. I reject the submission that unfairness occurred because the panel concluded the review on the basis of the evidence presented to it. The panel's duty was to consider the evidence before it and to reach a conclusion upon that evidence. The panel appropriately fulfilled that role.

Decision

26. 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.

HH Stephen Dawson
14 January 2021

