

[2020] PBRA 47

Application for Reconsideration by Edgar

Application

1. This is an application by Edgar (the Applicant) for reconsideration of a decision of an oral hearing dated the 23 February 2020. The decision of the panel was not to direct 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 dossier of 698 pages – this included the documents provided to the panel on the day of the hearing and the decision of the panel which is subject to reconsideration;
 - The application for reconsideration from the Applicant's Solicitors sent by email on 11 March 2020.

Background

4. The Applicant is an automatic life sentenced prisoner. His tariff, set at 8 years, 11 months and 29 days, expired in April 2012. He was sentenced on two counts, one count of attempted murder and one for possession of a firearm with intent. The victim was shot at during a planned drive by shooting in a residential area.
5. The Applicant was first released on licence in April 2013 and became out of contact, travelling abroad on a number of occasions in breach of his licence. He was unlawfully at large until his return to custody on 6 September 2016. A panel of the Parole Board reviewed this recall in January 2017 and directed his re-release on licence. This actual release was delayed and he was released in June 2017 for a second time. He breached his licence conditions again, and was recalled on 5 January 2018, but was unlawfully at large (again some of the time abroad) until his arrest in December 2018. He was convicted of further matters during both periods of release in the community, the first time for criminal damage and police assault. He was also made subject to a non-molestation order in June 2017.

Request for Reconsideration

6. The application for reconsideration was sent by email dated 11 March 2020.
7. The grounds for seeking a reconsideration from my understanding of the representations are of procedural unfairness (and not irrationality) as follows:
 - That the panel should have adjourned to direct a personality assessment before concluding their decision; and
 - That the decision was unfair because the panel made their assessment of risk without considering the outcome of any personality assessment.

Current parole review

8. The Applicant's case was referred to the Parole Board in January 2019 to consider whether it was appropriate to direct the Applicant's release, and if release was not directed, to consider whether to make a recommendation for a transfer to open conditions.
9. The case was sent to an oral hearing on 18 February 2019 and listed for a hearing on 7 August 2019. It was adjourned on the day because the Applicant's Offender Manager, who was considered a key witness, was unable to attend and also because the panel, having had preliminary discussions, decided that they would be assisted by a psychological risk assessment. An independent psychological assessment was also obtained by the Applicant's representatives.
10. The adjourned panel then re-convened to hear the Applicant's case on 11 February 2020. They considered a relatively large dossier of reports, including updates from the Offender Manager and the Offender Supervisor, psychological risk assessments prepared by the Prison Service and Independent Psychologists, and any additions to these assessments. Oral evidence was taken from all the above report writers and the Applicant. The Secretary of State was not represented and had provided no submissions. The Applicant was represented by his legal representative.
11. In its decision letter of 23 February 2020, the panel declined to release the Applicant or to recommend a move to open conditions. Whether or not a move to open conditions was recommended is not within scope of the reconsideration mechanism.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 23 February 2020 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

13. 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)).



14. 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**.

Procedural unfairness

15. 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.
16. 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.

Other

17. 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."

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 an oral 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. 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



19. The Secretary of State offers no representations in response to the application for reconsideration.

Discussion

20. The Applicant submits that the panel has an underlying responsibility to assess risk at the oral hearing and quotes the decision letter as noting that both Psychologists recommended that a further personality assessment would be beneficial.

21. The Applicant further states that in response to his representative's questions to the Psychologists with respect to how the personality traits identified could be potentially managed or mitigated in the community, the decision letter records that "*neither psychologist was able to provide recommendations until more details about the nature and significance of the personality traits had been assessed.*"

22. The final paragraph of the decision letter that indicates what would be beneficial to a future panel states that a personality assessment would be beneficial in order to provide "*insight into your personality traits, recommendations and any treatment and or risk management needs.*"

23. That there had been a previous adjournment to obtain a psychological report, and that the Applicant could "*reasonably have expected agents for the [Secretary of State] to have instructed a prison based psychologist in good time prior to [the Applicant's] adjourned hearing on the 07th August 2019. (arts 6 and 5(4) HRA respectively)*"

24. That, taking all the above into account, the fairest way to proceed for the Applicant was to direct an assessment of personality traits or disorders.

25. I will first discuss the issues about 'reasonable expectation' of the Secretary of State (see paragraph 23 above). It is not the role of the reconsideration mechanism to make a judgement on what the Secretary of State or his representatives do or omit to do. In any event the adjournment directed a psychological risk assessment as that was what the panel considered they needed. There was no suggestion for a personality assessment.

26. I have considered the Application in relation to the limbs of procedural unfairness as outlined above in paragraphs 15 and 16. There is no obvious sub-paragraph that the application may fall under, in my view, other than the wider one regarding not having a fair hearing (16 (b)).

27. The key issue here is whether, in concluding the hearing without a personality assessment made the proceedings *fundamentally flawed*. To this end, I have very carefully looked at the decision letter. The decision letter is very detailed when reporting the evidence taken from the two Psychologists at the hearing.

28. It is pertinent to this discussion to look at the recommendations of the psychologists.

29. The Independent Psychologist instructed by the Applicant's legal representatives had initially not recommended release but a transfer to open conditions. She then changed her recommendation in her addendum report to the panel dated 22



January 2020, having assessed the Applicant's recent progress on completion of the training course addressing the tendency to use violence. She now assessed that the Applicant's risk of future violence to be 'moderate' and of 'low imminence' if released into the community.

30. The Prison Psychologist had reported in January 2020 and indicated that the Applicant posed a 'high' risk of future violent offending. There is no evidence that she changed her assessment of risk at the hearing and recommended a transfer to open conditions cautiously due to her concerns surrounding the risk of the Applicant absconding.
31. The decision letter states that during the hearing the Independent Psychologist, on listening to the Applicant's evidence, became concerned about the '*personality traits*' he was presenting with. She now recommended that a personality assessment be undertaken. The Prison Psychologist agreed with this recommendation.
32. The decision letter indicates that the panel made a clear decision that, having taken into account the evidence before them, they preferred the assessment of the Prison Psychologist that the risk of future violent offending was high. The panel references concerns about the Applicant's possible impression management and likelihood of internalising any meaningful learning from the training course.
33. Following taking evidence from all witnesses and the Applicant, the panel determined that "*...if released at present you would present an imminent risk of serious harm to the public and your partner*".
34. I note that the Applicant's representative was given, as appropriate, full opportunity to test the evidence of all the witnesses. His challenges, with respect to some of the recommendations/assessments of the Psychologists, are recorded in the decision letter.
35. I note that there is no record in the decision letter (or stated in the Application for Reconsideration) of any application made by the Applicant's legal representative for an adjournment in order for there to be a personality assessment at any time during or just after the hearing.
36. The Psychologists are not recorded as saying that they were unable to make an assessment of risk or a recommendation. They did both and, confirmed their recommendations at the hearing which were recorded in the decision.
37. In coming to its decision, I further note that the panel took into account that there were significant gaps in knowledge about the periods of time that the Applicant spent abroad on both occasions when unlawfully at large, and that there were concerns about the Applicant's honesty in his accounts. The panel also took into account the positive behaviour in custody and engagement with offence focused risk reduction work in custody but noted that this was a pattern of previous behaviour such as good engagement in custody followed by non-compliance and, evidence of, and concerns about, violence in the community.
38. The panel freely acknowledged the gaps in the information before it and explored these gaps as much as possible within the hearing. At no point in the decision letter



did the panel indicate that not having a personality assessment restricted their ability to make a decision on the evidence available to it at the time.

39. The panel's decision was made after testing all the evidence before it, giving the Applicant's legal representative an opportunity to do the same, and came to a conclusion that the Applicant needed to engage with further core risk reduction work before release or progression to open conditions. In other words, the test for release was not met.

Decision

40. There is no doubt that this was a difficult case, and that the gaps in information as to what transpired while the Applicant was unlawfully at large were of concern. However, in my judgement, the panel's approach was not fundamentally flawed. It took careful account of all the evidence available to it and made its decision based on the correct test. It took into account the positive developments in the Applicant's case and was not able to be confident that those developments indicated a sufficient reduction in risk for release, or even for progression. The panel gave reasons for its lack of confidence.

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

Chitra Karve
25 March 2020