

[2021] PBRA 118

Application for Reconsideration by Harrison

Application

1. This is an application by Harrison (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 19 July 2021 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 on the basis either (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 Decision Letter dated 19 July 2021;
 - A handwritten letter from the Applicant headed Parole Appeal (to which I will refer as Applicant's Letter); and
 - The Dossier, numbered to page 327, of which the last document is the Decision Letter.
4. From the Applicant's Letter, both in form and content, it appears that he misunderstands what the reconsideration process is. He really wishes to appeal against the panel's decision not to release him. As I explain below, the reconsideration process can only look at whether the panel's decision was irrational, and/or whether there was unfairness in the procedure that led to that decision.
5. The Applicant was represented throughout the proceedings. His Letter comes to the Parole Board through his solicitors. I must therefore take it that the Applicant has received advice about the process. It is certainly not for me to give him legal advice. I must assume that he has raised in his Letter those matters which he wishes the Parole Board to consider at this stage.

Background

6. The Applicant is now 46 years old. In January 2019, when he was 44, he received an extended determinate sentence of 4 years' imprisonment, with an extension period of 6 years, for a contact sexual offence to which he had pleaded Guilty. He also received a concurrent sentence of imprisonment for breaching a Sexual Harm Prevention Order. The sentencing judge described him as someone who had a



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"significant history of similar offending and breaching court orders designed to prevent him from doing so."



7. In 2013 the Applicant received a community order for two sexual offences. In November 2017 he was sentenced to 32 months' imprisonment for breaching the notification requirements arising from the earlier conviction, and for numerous breaches of the Sexual Harm Prevention Order to which he was subject following that conviction.
8. The Applicant will become eligible for parole on 14 August 2021. His conditional release date is in December 2022 and his sentence expiry date is in December 2028.

Request for Reconsideration

9. The application for reconsideration is dated 27 July 2021.
10. The grounds for seeking a reconsideration are as follows:
 - a) His prison record has been exemplary;
 - b) He has completed two programmes (neither of which specifically relate to risk reduction) to a high standard;
 - c) He has completed education and holds numerous certificates;
 - d) He has many positive reports and no negatives or adjudications;
 - e) He has held and holds responsible positions in the prison;
 - f) He was and is willing to participate in offending-related programmes, but was initially (and wrongly) regarded as too low-risk to qualify for them.
 - g) Now he is accepted as qualified for an appropriate programme, but has been unable to start because he is in his parole window;
 - h) He is registered disabled;
 - i) He wishes to be given the chance to prove his risk can be managed in the community;
 - j) He can and will complete the necessary programme in the community; and
 - k) He should not be punished for the error that has so far prevented him from completing the necessary programme.
11. The Applicant's solicitor's covering letter accompanying the Applicant's Letter states that, for the avoidance of doubt, the basis for the application is that the Parole Board's decision was irrational.
12. It is clear from the Applicant's Letter that he disagrees with the decision of the oral hearing panel. It is not clear what he alleges to be irrational, in the sense defined below, about the decision. For completeness, I will in due course set out what, for the purposes of a reconsideration application, is meant by procedural unfairness as well as irrationality, even though there is no complaint of procedural unfairness.

Current parole review

13. The referral by the Secretary of State was dated 1 December 2020 and requested the Parole Board to consider releasing the Applicant on licence.

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14. On 12 July 2021 the oral hearing was conducted remotely by video link (due to Covid-19 restrictions in place at the time) before an independent chair and an independent member of the Parole Board. The panel heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was represented throughout, and his representative made submissions in writing at the close of the evidence. The Secretary of State was not represented and made no submissions.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 19 July 2021 the test for release: the Board can direct release only if it is no longer necessary for the protection of the public that the Applicant remain confined.

Parole Board Rules 2019

16. 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)).

Irrationality

17. 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."

18. 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

19. 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.

20. 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.

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

The reply on behalf of the Secretary of State

22. The Secretary of State has indicated that he does not seek to respond to the application.

Discussion

23. I have looked closely at the Decision Letter to see if there is any indication of irrationality or procedural unfairness as defined above. I have found none, either in the matters suggested in the Applicant's Letter or in any other way.

24. The Applicant's complaint in reality is that it is not his fault that he has not completed the risk reduction work deemed necessary, and it is unfair that he should suffer as a result of someone else's past mistake as to his qualification for a risk reduction programme. Be that as it may, the Parole Board has to deal with the situation as it is, not as it ought to be. The Applicant has done no offence-focused risk reduction work. The oral hearing panel agreed with the professionals that the programme suggested was necessary core risk reduction work, and that, bearing in mind the Applicant's history, his risk could not be safely managed while he completed the programme in the community. It is that decision which, for this application to succeed, must be shown to be, at least potentially, one that no sensible person who had applied his mind to the question to be decided could have arrived at.

25. There was ample evidence to support the panel's conclusion. The panel noted all the points made by the Applicant and on his behalf about his conduct in custody, but of course good behaviour in custody is not a guarantee of good behaviour in very different conditions after release. The Applicant's history of offending, in a very specific and calculated way, and his breaches of previous orders in offence-paralleling ways, entirely justify the panel's decision that he could not be safely released until he had completed a programme designed to build up internal controls. It follows that the panel was entitled to conclude that the test for release was not met.

26.The panel explained its reasoning very clearly, by reference to the evidence on both sides of the question. The fact that the Applicant disagrees with the panel’s conclusion does not make it irrational. There is no hint of procedural unfairness.

Decision

27.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.

Patrick Thomas
18 August 2021