

[2021] PBRA 73

Application for Reconsideration by Burkill**Application**

1. This is an application by Burkill (the Applicant) for reconsideration of a decision of the Parole Board of 12 March 2021 that the Applicant was unsuitable for release (the Decision).
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 comprise a dossier of 533 numbered pages, written submissions from the solicitors for the Applicant which are undated together with 2 photographs of an email from the Community Offender Manager to the solicitors for the Applicant dated 18 March 2021. I also have email representations from the Secretary of State (the Respondent) dated 22 April 2021 and 28 April 2021, together with an Annex which is a statement from one of the prison psychologists.

Background

4. On 2 February 2018, the Applicant received an extended sentence comprised of a seven-year custodial period with a five-year extension period for an offence of section 18 wounding. She was also convicted of having an article with a blade or point on school premises, with no separate penalty being given for this offence. On 17 April 2019 the Court of Appeal reduced the custodial period of the sentence to 5 years, leaving the five-year extension period intact. Her parole eligibility date is 26 January 2021, with a conditional release date of 26 September 2022. Her sentence expiry date is September 2027.
5. The Applicant was aged 16 at the time of sentencing. She is now aged 19.
6. On 25 March 2020 the Applicant's case was referred to the Parole Board by the Secretary of State, for the consideration of the Applicant's suitability for release. On 28 August 2020 a single member of the board directed the Applicant's case to a directions hearing. On 11 February 2021 a directions hearing took place. On 3 March 2021 the Applicant's case was heard at an oral hearing, remotely via video link, due to Covid-19 restrictions in place at the time.
7. In the Decision dated 12 March 2021 the panel of the Parole Board decided that the Applicant was not suitable for release.



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8. The Applicant subsequently applied for reconsideration.

Request for Reconsideration

9. The application for reconsideration is undated but it is accepted that it was received by the Parole Board within the statutory timeframe and is a valid application.

10. The grounds for seeking a reconsideration are not entirely clearly defined into discreet grounds, but I consider they are as follows:

That the decision was procedurally unfair on the basis that:

- (a) the panel failed to take into consideration the Applicant's Autistic Spectrum Disorder during the hearing.

That the decision was irrational on the basis that:

- (a) the youth of the Applicant was forgotten by the panel;
- (b) the index offence was a unique set of circumstances;
- (c) there is no other evidence of violence; and
- (d) the decision focused on one comment which was taken out of context and depicted in a misleading way in the decision.

11. In view of the grounds submitted I asked for, and have listened to, the recording of the hearing.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 12 March 2021 the test for release, which is that it will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

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)). The Decision of the oral hearing panel of 12 March 2021, made after the oral hearing of 3 March 2021, is eligible for reconsideration.

Procedural unfairness

14. 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.

15. 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.

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

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.

The reply on behalf of the Secretary of State (the Respondent)

19. The Respondent initially responded with no representations in their email of 22 April 2021. Having reviewed the case I asked for a copy of the 2 photographs of an email from the Community Offender Manager to the solicitors for the Applicant dated 18 March 2021 which had been referred to in the application but not provided. This was provided and the Respondent then made further representations in their email of 28 April 2021. They advised that the email communication which had been photographed was an accurate picture of the Community Offender Manager's communication. They additionally provided a statement which had been received from the psychologist witness on 25 April 2021 and wished this statement to be submitted as their representations.

Discussion

The procedural unfairness grounds

20. The essence of the procedural unfairness ground in this reconsideration application is made is that the diagnosed condition of the Applicant was not adequately taken into consideration during the hearing. It is submitted that on multiple occasions the

Applicant had to ask the Panel to make the questions more specific and less wordy. A comment made during the course of the Applicant's evidence where she was said to have commented on it being a positive outcome of her offending in that the victim could no longer work in a school has been said to have been taken "*wildly out of context*" and "*the way in which it has been depicted in the decision is extremely misleading*".

21. The application also raises concerns as to how the questions were put to the Applicant and queries the training of the panel members in asking questions of a vulnerable/young witness.
22. The representations from the Respondent, which includes a statement from the prison psychologist made following the oral hearing also raise concerns that the autistic spectrum disorder of the Applicant was not adequately taken into consideration. These representations state that "*consideration of [the Applicant's diagnosed condition] was not consistent in the hearing in how she was questioned. This was evidenced by the multiple times [the Applicant] asked for questions to be re-worded or for questions to be clarified. Questions appeared overly complex, with a lot of information provided in the questions which was likely to be difficult for [the Applicant] to process. Questions were also leading at times and included statements where it was difficult to interpret the question/s being asked.*"
23. In the light of the grounds submitted I have requested and listened to the recording of the hearing. Unfortunately, the recording is not a complete one. In particular, much of the questioning and evidence of the Applicant has not been recorded. The recording is missing the start of the hearing, almost all of the questioning by the psychiatrist specialist member (who was the first to ask her questions), and the responses of the Applicant to those questions. This appears to be about 30 minutes of the evidence, over half of the evidence apparently given by the Applicant.
24. The recording where the Applicant's evidence is missing captures only what appears to be the 'background' noise of the remote location where the panel chair, who was responsible for recording, was. The recording has captured the questioning of the judicial member, the panel chair and the Applicant's solicitor and the answers of the Applicant, also with some background noise, although it was possible to hear the evidence.
25. From the part of the hearing that I have been able to hear, it is clear that the questioning of the Applicant was appropriate, with the questioning by the judicial member being clear and concise. There was some repetition in the questioning by the panel chair and the solicitor for the Applicant, but it was not excessive. The Applicant did not have any demonstrable difficulties in answering nor did she ask for questions to be put again, save for once during a question by her solicitor.
26. The electronic recording is the official record of the oral hearing. The failure to record a substantial tract of the Applicant's evidence makes an objective assessment impossible. Concerns about the overly complex questions and the lack of adequate consideration of the autistic spectrum disorder of the Applicant have been raised not just by the Applicant but by two of the professional witnesses, the Community Offender Manager and the Prison Psychologist.

27. Lord Reid stated in **Osborn, Booth & Reilly [2013] UKSC 61** that “*The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner’s legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.*” The Applicant must therefore be able to fully participate in their oral hearing, with questions they understand, and account being taken of any additional needs they have.
28. It is well established that I must determine for myself whether a fair procedure was followed (**Gillies v Secretary of State for Work and Pensions [2006] UKHL 2**), my function not being merely to review the reasonableness of the panel’s judgment of what fairness required.
29. On the balance of the evidence I have, I am concerned that there has been a potential unfairness of process, which I am unable to properly assess due to a failure to record key evidence. Additionally, there is undoubtedly a perception of unfairness by several professionals who were involved in the hearing, with the Respondent adopting the representations made by the Prison Psychologist. Justice must of course not only be done but be seen to be done.
30. In my judgment it has not been demonstrated that the common law duty to act fairly and the requirements of **Article 5(4)** of the **European Convention on Human Rights** have been consistently applied during this oral hearing with the autism spectrum disorder of the Applicant not being adequately taken into consideration during the hearing. I therefore accept the Applicant’s submission that there has been a procedural unfairness.
31. I do not make this determination on the basis of an inadequacy or otherwise of the training of the panel in the questioning of witnesses. All panel members of the Parole Board receive compulsory training on effective questioning. In addition, the judicial member of the Board is likely to have received specialised training in the context of their judicial role outside the Board on dealing with vulnerable witnesses. In any event as I have already found the questioning of the Applicant which was recorded was appropriate, I have no concerns about that part of the hearing giving rise to a procedural unfairness.

The irrationality grounds

32. The second part of the application is on the basis that the decision was an irrational one. These grounds address the alleged failure of the panel to consider that the offence committed by the Applicant was unique to its circumstances, that she was young at the time of the index offence and that the violence was unusual for her. The decision was also said to be focused on a comment taken out of context that the Applicant saw as a positive that her victim was no longer working in a school environment.
33. The Board did not accept the recommendations of the Community Offender Manager, the Prison Offender Manager and the Prison Psychologist that the Applicant was manageable in the community. All professionals agreed that the Applicant met the test for release.

34. The decision letter recorded the progress made by the Applicant in completing offence focused work, that she had a strong relationship with her Community Offender Manager and that she was considered to be capable of developing therapeutic and supportive relationships with other professionals.
35. The panel identified the major external protective factors provided by the extensive multi-agency risk management plan and the knowledge of the Applicant by her Community Offender Manager. They raised concerns about a lack of on-site 24-hour support at the proposed accommodation, the "significant leap" from the closed prison environment. There were also concerns about a lack of full parental engagement and the release plan being heavily weighted on her relationship with her Community Offender Manager. The panel concluded that a period of consolidation and testing was needed to evidence that the Applicant can mix with others, approach staff for support and deal with situations which may make her feel angry or let down without resorting to violence.
36. The probation service assessment report which assessed the Applicant's risk of causing serious harm as high to staff and medium to known adult and children, was accepted by the panel. The risk to staff includes any staff member that the Applicant perceives to have failed her or not fully supported her and for whom she harbours longstanding resentment. The panel were concerned that although the Applicant's risks were not considered imminent that they could not be so certain that there would be obvious warning signs and an observable build-up of events prior to any imminent risk of harm.
37. Whilst the panel did disagree with the opinions and recommendations of the professionals, they are not obliged to adopt them. It is the responsibility of a panel to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
38. The panel clearly explained its reasons for coming to a different decision than that recommended to them. Whilst the Applicant may be disappointed by this, and whilst a different panel might well have reached a different conclusion, the threshold of irrationality is not met in this case. In my judgment the conclusion of the panel cannot be characterised as irrational within the definitions set out at paragraphs 16 and 17 above.

Decision

39. Accordingly, I have found there to have been a procedural irregularity. I do consider, applying the test as defined in case law, that the decision of the oral hearing of 12 March 2021 is procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.
40. I do not consider that the decision was irrational and accordingly the application for reconsideration on the grounds of irrationality is refused.

Angharad Davies
28 May 2021