

[2021] PBRA 81

## Application for Reconsideration by Bernard

### Application

1. This is an application by Bernard (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 10 May 2021 not to direct his 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 decision letter, the dossier and the application for reconsideration.

### Background

4. The Applicant is serving a mandatory life sentence imposed on 23 June 1994 following conviction for murder. The minimum tariff was set at ten years less time spent on remand and expired on 25 May 2003. This is the Applicant's tenth parole review.
5. The Applicant was aged 23 at the time of sentencing. He is now 50 years old.

### Request for Reconsideration

6. The application for reconsideration is dated 17 May 2021 and has been submitted by solicitors acting for the Applicant.
7. It submits that the panel's decision was both irrational and procedurally unfair, since the panel:
  - (a) Failed to consider the current risk and evidence of change and has inaccurately reported incidents which took place several years ago; and/or
  - (b) The hearing was unfair as the panel's assessments and conclusions were *'tainted by misinformation'*.
8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

## Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in September 2019 to consider whether to direct his release and, if release was not directed, to advise the Secretary of State on whether the Applicant was suitable to be moved to open conditions (having been removed from open conditions in June 2019).
10. On 6 March 2020, the case was referred to an oral hearing. Directions were made for an updated psychological risk assessment (PRA) and, in the light of this, further reports from the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM).
11. The PRA was produced in August 2020. It reported that several risk factors were present (or partially present) and highly relevant to the Applicant's risk of violent reoffending.
12. The case proceeded to an oral hearing on 30 April 2021. This was held remotely by video conference (due to COVID-19 restrictions) before a panel of three members, including a psychologist specialist member. The panel heard oral evidence from the POM, prison psychologist (author of the PRA), a Senior Probation Officer (SPO) standing in for the COM and the Applicant. The Applicant was legally represented throughout.
13. The decision indicates that none of the witnesses supported release, but all recommended a transfer to open conditions.
14. The panel did not direct the Applicant's release but recommended open conditions.

## The Relevant Law

15. The panel correctly sets out the test for release in its decision letter dated 10 May 2021.

### *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)).
17. 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*

18. 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.

19. 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.

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

### *Irrationality*

21. 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."*

22. 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.

23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

### **The Reply on behalf of the Secretary of State**

24. The Secretary of State has submitted no representations in response to this application.

### **Discussion**

25. The application for reconsideration sets out an extensive list of points which, it is submitted, have been documented inaccurately within the written evidence. On this basis, it is submitted that the panel's decision was irrational (in that it did not make an accurate assessment of risk) and procedurally unfair (in that the Applicant did not have a fair hearing).

26. It is clear from reading of the dossier that the Applicant has long been concerned with repeated documentary inaccuracies. There are legal representations on this point dated 3 July 2020. There is also a letter from a second firm of solicitors to the National Probation Service dated 15 February 2021 with a voluminous number of requests for correction in line with prevailing data protection legislation.

27. The psychological report of August 2020 notes the Applicant's view that "*previous reports contain several inconsistencies he is clearly unhappy about*" and that such concerns "*clearly dominated his thinking*". I have no doubt from the content of the dossier and the content of the application for reconsideration that this is so.

28. The legal representations of 3 July 2020 note that "*the matters... may alone not bear much significance... [but] the cumulative effect can be detrimental and misleading*". In carefully reviewing the list of points of disagreement raised in the application, I agree that none of them have a significant bearing individually. However, I cannot see that, taken cumulatively, they have had a material bearing on the panel's independent assessment of risk.

29. In these circumstances it is not the panel's job, nor mine, to undertake a fact-finding exercise in relation to each disputed statement. The panel's decision has considered all the written and oral evidence before it (in the knowledge of the Applicant's disagreements as documented in the dossier by two different legal representatives) and reached a rational decision in accordance with all professional witnesses in a fair way. The application must therefore fail.

## Decision

30. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair and accordingly the application for reconsideration is refused.

**Stefan Fafinski**  
**3 June 2021**