

[2021] PBRA 84

Application for Reconsideration by Ellis

Application

1. This is an application by Ellis (the Applicant) for reconsideration of a decision of an oral hearing panel dated 27 April 2021 not to direct release or recommend a move to open conditions.
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) The dossier, numbered to page 390, of which the last 10 pages are the Decision Letter. The dossier is otherwise that seen by the Oral Hearing Panel;
 - (b) The Decision Letter dated 27 April 2021; and
 - (c) The Application for Reconsideration.

Background

4. The Applicant was 29 years old when he was sentenced on 16 March 2011 for offences of robbery and kidnapping. The sentence was imprisonment for public protection, with a minimum tariff that expired on 4 March 2019.
5. The Applicant has a criminal record dating back to when he was 15, for a wide variety of offences. Much of his offending was related to substance misuse. The Applicant's first Parole Review was in February 2019 and was concluded by a paper decision that release was not directed, nor was a progressive move to open conditions recommended.

Request for Reconsideration

6. The application for reconsideration is dated 17 May 2021.
7. The grounds for seeking a reconsideration are as follows:

The decision was procedurally unfair:

- a) No psychological assessment has been completed, despite a previous Panel stating a psychological risk assessment was needed;



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



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0203 880 0885

- b) Reports had been written without any consultation with the Applicant (for no apparent reason;
- c) Despite the fact that the Applicant is an indeterminate sentence for public protection (IPP) prisoner and has convictions for a number of serious offences, it appears there has never been any psychological involvement or intervention; and
- d) The failure to have any psychological involvement in the Applicant's case that involves consulting with him means that his needs (treatment and understanding of the parole process) have not been catered for.

8. There is no suggestion that the panel's decision was irrational.

Current parole review

9. The Oral Hearing took place on 19 April 2021 remotely because of the COVID-19 lockdown. The Applicant was legally represented. On the day the Applicant requested a video hearing rather than a telephone hearing, and a video hearing duly took place. The panel consisted of a psychologist chair and two independent members. Evidence was given by the Prison Offender Manager, the Community Offender Manager, the Prison Psychologist and the Applicant. The Secretary of State was not represented and did not provide any view to the panel.

10. The Applicant requested, not release, but a recommendation for a transfer to open conditions. He specifically said he was not seeking release because he had been inside for 11 years, the world had changed, and he wanted the tools to prepare himself and to achieve things. None of the witnesses supported release. In the circumstances there was only an outline risk management plan.

11. The panel discussed in detail the Applicant's history of engagement (and difficulty with engaging) with offender behaviour programmes.

12. The Applicant was 39 years old at the time of the hearing.

The Relevant Law

13. 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

14. 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)).

15. 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**.
16. The application at the oral hearing was not for release, but for a recommendation for a move to open conditions. Before the panel could consider making such a recommendation it had to be satisfied that the test for release (which requires the panel to be satisfied that it is no longer necessary for the protection of the public that the Applicant remain confined) was not met.
17. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
- (a) the progress of the prisoner in addressing and reducing their risk;
 - (b) the likeliness of the prisoner to comply with conditions of temporary release
 - (c) the likeliness of the prisoner absconding; and
 - (d) the benefit the prisoner is likely to derive from open conditions.

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 focuses 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) he was not given a fair hearing.
 - (c) he was not properly informed of the case against him.
 - (d) he was prevented from putting his 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.

The reply on behalf of the Secretary of State

21. The Secretary of State has indicated that he does not wish to make any representations about this application.

Discussion

22. There is no suggestion that the panel's decision not to direct release was irrational. All the witnesses, including the Applicant, agreed that he was not ready for release. The decision not to recommend open conditions is not subject to reconsideration: see Paragraph 15 above.
23. However, that is not the end of the matter. A rational (indeed, unimpeachable) decision may still be flawed by procedural unfairness. The essence of the first complaint raised in this case is that no psychological assessment had been completed, despite a previous panel stating a psychological risk assessment was needed. The suggestion seems to be that it was unfair to proceed without such an assessment after what the previous panel had said.
24. What the previous panel in 2019 actually said was this: *"At the point of the next review, the panel will wish to see the outcome of any further work completed (i.e. a report from [a training course addressing the use of violence and sex offending], updated Offender Manager and Offender Supervisor reports, as well as updated adjudication and security information. Furthermore, it is likely that a psychological risk assessment would enable the panel to assess the extent to which the work completed has reduced the current risks identified."*
25. In a lengthy analysis of 'Evidence of change since last review and progress in custody', covering nearly three pages, the oral hearing panel discussed in detail what had happened since the last panel's decision. In a nutshell, no work has been completed. The Applicant had started the programme recommended by a previous Programme Needs Assessment in 2018 but did not complete it. The dossier says the Applicant was de-selected from the programme because of his behaviour, and then refused to re-engage. He started working towards acceptance on another psychologically based programme, but again did not complete the preliminary work. The Applicant denied that he was de-selected from either programme. He said he had asked to be removed from the second programme four times but had been talked into staying. He had done one-to-one work with a psychologist between August and December 2020. The prison psychologist agreed it could be beneficial to undertake full psychological, personality and cognitive assessment in the future.
26. The position therefore is, and was, that since his last parole review the Applicant has completed no work to reduce his risk. Accordingly, the condition precedent for the previous panel's suggestion has not been met. This complaint does not raise an issue of procedural unfairness.
27. The other matters raised are that:
- (a) The reports have been written without consultation with the Applicant;
 - (b) There has never been any psychological involvement or intervention; and
 - (c) This means his needs have not been catered for.

28.It does not appear from the documents that any application was made for the hearing to be adjourned or deferred to enable the Applicant to contribute to the preparation of reports. The Applicant gave evidence to the panel. The Parole Board is not in a position to prescribe treatments or interventions. The Board assesses risk in the light of the information placed before it.

29.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.

30.Bearing that in mind, the matters set out in Paragraph 26 above do not provide grounds for procedural unfairness.

Decision

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

Patrick Thomas
27 June 2021