

[2021] PBRA 9

Application for Reconsideration by Purvis

Application

1. This is an application by Purvis (the Applicant) for reconsideration of a decision of a Parole Board member not to direct his release following a consideration on the papers.
2. The decision itself was dated 7 December 2020 and was provisional by virtue of Rule 19(6) of the Parole Board Rules 2019.
3. A prisoner may apply within 28 days to the Duty Member to request an oral hearing. Such an application was made in this case, but no direction was made.
4. 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.
5. I have considered the application on the papers. These consisted of the dossier running to 237 pages (that included the decision letter) and the representations for reconsideration.

Background

6. The Applicant was aged 39 at the time of sentence and is now aged 56 years old. He was sentenced to life imprisonment on 6 March 2003 for an offence of murder. The tariff was set at 16 years (with allowance for time on remand) and expired on 27 April 2018.
7. The Applicant has remained in custody since being sentenced.

Request for Reconsideration

8. The application for reconsideration is dated 20 January 2021.
9. The grounds for seeking a reconsideration consist mainly of submissions as to why the Duty Member was wrong to decline to direct an oral hearing in the Applicant's case.

Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board on 20 July 2020 to consider whether his release should be directed. If not, then the Panel was



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invited to advise the Secretary of State on whether a transfer to open conditions could be recommended.

11. The case would then have been allocated to a Parole Board member with the date of 7 December 2020 being fixed to allow for the Applicant to make representations (either himself or through a lawyer). No representations were submitted.
12. The Parole Board member concluded that in light of the lack of progress since the last oral hearing (December 2019) and the fact that there was still core risk reduction work outstanding, no direction for release could be made. For similar reasons it was concluded that it was not appropriate to recommend a move to open conditions.
13. An application for an oral hearing under r20(2) was made (in time) dated 21 December 2020.
14. This was drafted by the Applicant's lawyers and set out, in detail, the Applicant's account of events since December 2019. Reasons are given as to why, with reference to **Osborn, Booth & Reilly v The Parole Board [2013] UKSC 61**, an oral hearing should be held.
15. The Duty Member considered the case on 4 January 2021 in light of the representations, declined to direct an oral hearing.

The Relevant Law

16. The panel correctly sets out in its decision letter the test for release.

Eligibility under Parole Board Rules 2019

17. 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. The question of whether to make a recommendation to the Secretary of State for a progressive move to open conditions is outside of the scope of the reconsideration mechanism.
18. It is important to remember that the effect of the Rules is that whether or not an application for an oral hearing is made, it is the original decision of the Parole Board member that I must consider.
19. The decision of the Duty Member under r20(5) to decline to direct an oral hearing is not one that is in scope.
20. For that reason, however irrational or unfair the decision of the Duty Member may be (I should stress that I am not saying that it was in this case), that is not something that I can consider as part of the reconsideration mechanism.
21. The reconsideration mechanism is *'not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it'*. There is a duty on the parties to put before the Parole Board member all the relevant evidence. If that evidence is not available, and a party considers that the decision maker should have

it, then an application to adjourn or defer should be made (**Nightingale [2019] PBRA 40**, at para 37).

22. The fact that material evidence was not put before the decision maker does not mean that there is procedural unfairness, even where that evidence could have made a difference to the outcome of the case (**Williams [2019] PBRA 7**).

23. There will be cases where representations submitted, either for the Duty Member or on an application for reconsideration, highlight matters in the dossier before the original Parole Board Member that would suggest that an oral hearing should have been directed.

24. In such circumstances, it may be that these can be taken account of at the reconsideration stage. However, it is not suggested that this is such a case.

Irrationality

25. 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."

26. 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.

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

Procedural unfairness

28. 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.

29. 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 properly informed of the case against them;
- (c) they were prevented from putting their case properly; and/or
- (d) the panel was not impartial.

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

The reply on behalf of the Secretary of State

30. The Secretary of State has stated that he does not wish to make any representations.

Discussion

31. As stated above, the grounds for reconsideration focus on the decision of the Duty Member not to grant an oral hearing.

32. The matters raised in the request for reconsideration may have been enough, taken with the previous representations, to persuade a Parole Board Duty Member that it was appropriate to direct that an oral hearing be held. They do not, in my view, undermine the original decision of the Parole Board member.

33. The submissions on irrationality as they apply to the Applicant's case (paras 22-25) do not attack the original decision. It is not suggested that there was material in the dossier to suggest that the Applicant disputed the factual basis of the reports of the professionals such as to require an oral hearing to resolve them.

34. Neither do the submissions on procedural fairness suggest anything specific relating to the original decision.

35. It may be that it would have been preferable for eligible decisions under r20(1) to have been included in the scope of the reconsideration mechanism but, whether or not that is the case, it seems to me that the terms of r28(1) are clear.

Decision

36. For the reasons I have given, I do not consider that the decision was irrational, nor was it procedurally unfair.

37. Accordingly, the application for reconsideration is refused.

Daniel Bunting
09 February 2021