

[2022] PBRA 134

Application for Reconsideration by Shepherd

Application

1. This is an application by Shepherd (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 26 August 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 26 August 2022;
 - b) A request for reconsideration from the Applicant in the form of his personal representations to his legal representative which have been forwarded to the Parole Board (dated the 29 August 2022); and
 - c) The dossier, numbered to page 312, of which the last document is the Decision Letter. The panel had a dossier numbered to page 299.

Background

4. The Applicant is now 48 years old. On 28 August 2019, when he was 45 years old, he received an extended sentence of detention following his conviction for three offences of making indecent photographs of children. The sentencing court imposed a term of 4 years in custody, with an extended licence period of 1 year. The Applicant first became eligible for consideration of release by the Parole Board on 27 April 2022. If not released by the panel, he would otherwise be released automatically in August 2023.
5. The Index Offences were committed while the Applicant was on licence in the community, having been released from an earlier custodial sentence.
6. The panel's consideration of this case was the first review by the Parole Board. The Applicant asked that his release be directed. The panel considered the written evidence and the oral evidence at a hearing on the 22 August 2022. A prison psychologist, the Applicant's Probation Officer in the community and the official responsible for the Applicant's case in custody gave evidence at the oral



hearing. The Applicant also gave evidence to the panel and he was legally represented.

7. In its Decision Letter of the 26 August 2022, the panel did not direct the Applicant's release. The panel noted the view of witnesses that the Applicant should complete risk reduction work in custody and that there was no support for his release. The Applicant had indicated a preference to complete work in the community after his release, although he did not believe such work would be necessary. The panel considered the Applicant to present a high risk of committing a further sexual offence.
8. In deciding not to direct the Applicant's release, the panel considered that the Applicant would only be prepared to engage '*on his own terms and with things that he felt were for his benefit (as judged by him)*'. The panel agreed that work needed to be completed in custody to address the Applicant's offending behaviour.

Request for Reconsideration

9. The application for reconsideration is that the panel's decision was irrational and procedurally unfair, in that:

Irrationality

The Applicant states that work to address risk has not been completed in custody but he has not been given the opportunity to complete this work. He submits that the panel commented on his lack of remorse but he had, in his view, evidenced remorse.

Procedurally Unfair

The Applicant believes that the official responsible for his case in custody made recommendations for work to be completed in custody but did not follow the correct procedures, leading the panel to make an inaccurate assessment. The Applicant also believes that he should have had an opportunity to challenge the recommendation that he must complete treatment in custody prior to being released.

10. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

The Relevant Law

11. The panel correctly sets out in its decision letter dated the 26 August 2022 the test for release.

Parole Board Rules 2019 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

14. 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."

15. 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.
16. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

17. 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.

18. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me that either:



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



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✉ info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

- (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.

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

The reply on behalf of the Secretary of State

19. In a reply of the 20 September 2022, the Secretary of State submitted:

- a) The Applicant's sentence plan and/or sentence objectives were discussed with him at meetings with his Probation Officer in September 2021 and November 2021; and
- b) The Applicant was assessed as unsuitable for an accredited intervention (Horizon) because he had been unable to identify any issues that the programme might build on.

Discussion

Irrationality

20. The Applicant states that he was assessed for the Horizon course in November 2020 and that it was deemed that it would not be beneficial to him at the time. He says that the official supervising his case in custody spoke to him in March 2021 and discussed individualised work, but that this never took place. The Applicant states that the Healthy Sex Programme was '*briefly mentioned*' after the prison psychologist produced a report about him. He says that the course had not been raised before this and was not on his sentence plan.

21. In its Decision Letter, at paragraph 4.7, the panel stated:

'The panel agreed with professionals that there was core risk reduction work outstanding, and that risk of serious harm would be imminent upon release. The evidence strongly suggests that [the Applicant] remains sexually attracted to young girls and the panel was not convinced by his assertions to the contrary, particularly since [the Applicant] himself considered being around young girls would be risky for him.'

22. This paragraph sets out clearly why the panel found it necessary that the Applicant should complete offence focussed work in custody prior to his release. Panels must make an assessment of risk and in doing so may identify treatment needs. It was not for the panel to determine a particular course to be



completed in this case and the panel was entitled to reach the conclusion that it did. The Applicant may be frustrated by the identified need for work, however, it does not make the panel's decision irrational.

23. The Applicant disputes the panel's comment about his lack of remorse and submits that he evidenced remorse during the preparation of reports before the panel. In reading the Decision Letter in its entirety, it is clear to me that the issue of any remorse was not a deciding factor in this case. The panel concluded that there was a treatment need to be met in custody and therefore the Applicant was not safe to be released. There is nothing to this point.

Procedural Unfairness

24. The Applicant says that his Probation Officer had agreed that he could be assessed for an accredited treatment programme in the community but had offered a different view at the oral hearing. This, he says, was because the Probation Officer had spoken to a treatment manager who felt that the work should be completed in custody. The Applicant submits that this was unfair because he did not have an opportunity to challenge the view of the treatment manager.

25. The Applicant was legally represented at the oral hearing and he had the opportunity therefore to challenge the Probation Officer about the suitability for offending behaviour programmes or any change of view being presented. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

26. The Applicant also submits that the official responsible for his case in custody did not reference that treatment courses would not be available to him in custody and so it would be impossible for him to complete any work. He says that he has waited for three years for a sentence planning meeting, without any meeting taking place.

27. Whether accredited coursework is available to the Applicant is not a matter for the Parole Board. The panel determined that work to address his level of risk needed to be completed in custody prior to any safe release. In the absence of such work, the panel was satisfied that it would not be safe to direct the Applicant's release.

28. The availability of coursework is an issue that the Applicant may wish to address with the prison and probation service, however, it does not amount to procedural unfairness in terms of the panel's review of his case. Equally, although the Secretary of State disputes the submission about the lack of a sentence planning meeting, this is a matter for the Applicant to take up with the prison and probation service.

29. There was, in my view, nothing procedurally unfair in the panel's approach to this case.

Decision

30. 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.

Robert McKeon
3 October 2022



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



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