

[2021] PBRA 186

Application for Reconsideration by Fox

Application

1. This is an application by Fox (the Applicant) for reconsideration of a decision of an oral hearing dated the 12 November 2021, not to direct release or recommend progression 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 the dossier amounting to 540 pages (including the decision letter) and the Application for Reconsideration, dated the 3 December 2021.

Background

4. The Applicant is 34 years old at the time of writing. He pleaded guilty to wounding with intent and was sentenced to detention for public protection on the 21 November 2006, with a minimum tariff of 3 years, less time spent on remand.
5. Whilst on remand for the wounding with intent offence, he committed a further offence of soliciting murder. He was convicted after trial and sentenced to detention for public protection on the 11 July 2007, with a minimum tariff of 6 years 6 months.
6. He was aged 19 years when sentenced.
7. He was released on licence on the 4 August 2017. He was arrested on suspicion of having committed further offences and his licence was revoked and he was returned to prison on the 5 February 2019. The alleged offences were sexually assaulting a child who had not yet reached the age of 13, conducting himself in a disorderly manner by recording on a mobile telephone images of women and girls, thereby committing a breach of the peace and possession of a bladed article.
8. He was sentenced for those matters to 2 years imprisonment.

Request for Reconsideration

9. The application for reconsideration is dated the 3 December 2021.



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10. The grounds for seeking a reconsideration are based both on irrationality and procedural unfairness and are as follows:

Irrationality

Ground 1.

It was false to state the Applicant pleaded guilty to the offence of recording images when he actually maintained his innocence and, there was no evidence he intended to share the images with anyone.

Ground 2.

The panel simply adopted the assessments of risk made by the professionals and failed to make its own independent assessment.

Ground 3.

The panel failed to explain why it found the risk management plan insufficiently robust to manage the Applicant's risk in the community.

Ground 4.

The panel misapplied the test for release.

Procedural unfairness

Ground 5.

The professional witnesses changed their recommendations after a multi-agency child protection meeting (the "meeting") at which the Applicant and his solicitor were not present, and the witnesses failed to provide evidence for the change in their recommendations.

Current parole review

11. The Secretary of State's referral required the panel to consider the Applicant's release or, in the alternative, to make a recommendation for a move to open conditions.

12. The panel consisted of three members, of whom one was a psychologist member and two were independent members. Because of the Covid-19 pandemic, the hearing took place by way of video link. The panel had the same dossier as I have. The panel heard evidence from the Prison Offender Manager, the Community Based Social Worker and the Community Offender Manager. The Applicant was represented throughout by the same legal representative as currently acts for him.

The Relevant Law

13. The panel correctly sets out in its decision letter dated the 12 November 2021 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**.

Irrationality

16. 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."

17. 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.
18. 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

19. 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.
20. 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.

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

Other

22. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

23. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

24. The Secretary of State has not chosen to make any representations in respect of the application.

Discussion

25. Ground 1. Two points are raised on behalf of the Applicant, first, it was false to state he pleaded guilty and, second, there was no evidence he intended to share the images with anyone.

26. The Applicant produces no evidence that the panel was in fact in error. The legal representations on behalf of the Applicant, dated the 1 April 2020, at page 128 of dossier, state,

"Despite [the Applicant's] explanation for the footage, he pleaded guilty to recording the two second footage up a woman's skirt and recording people in [a store] in breach of the peace and his clearly equivocal pleas were accepted".

27. Assuming for the purposes of this application, the panel had made a mistake, it is not established that it came to its decision on the basis that the Applicant was admitting any behaviour alleged against him. Two passages in the decision letter make that clear. At paragraph 1.5 it is stated,

"He maintains his innocence of the recall offences and so there has been no real opportunity to gain a full understanding of his risk factors relating to sexual offending".

and at paragraph 2.6,

"He pleaded guilty to two offences, was convicted of a third and acquitted of a fourth. Despite his guilty pleas, he maintains his innocence of all offences and claims to have only pleaded guilty on legal advice".

28. There is simply no evidence to suggest that, if an error was made, it materially affected the panel's decision, within the meaning of the authorities cited in paragraph 22 above.

29. It is plain that in paragraph 2.7, the words *"intending that he or another look at those images"* appears. Nothing turns on it, because the panel was simply reproducing the wording of the section under which the Applicant had been prosecuted.

30. Ground 2. It is possible to break down the relevant part of the decision letter into a number of simple propositions.

- (a) The Applicant had engaged well in addressing his offending behaviour, both in custody and in the community;
- (b) The reoffending took the professional witnesses by surprise;
- (c) Given the Applicant's stance (i.e. denying he had committed the offences), the professional witnesses were unable to state confidently what had led to the reoffending;
- (d) None recommended release;
- (e) Denial in itself is no reason for preventing progression;
- (f) Given that evidence, the panel could not reliably and comprehensively identify what underpinned and triggered the Applicant's sexual offending; and
- (g) In those circumstances, there was insufficient evidence the Applicant's risk could be managed in the community.

31. Whether one agrees or disagrees with the conclusion it seems to me very clear that the panel did analyse the evidence and came to his own conclusion. Virtually every decision letter will state whether the professional witnesses support or do not support or differ on the recommendation for release; to seize on this convention and elevate it to a ground of complaint is extremely artificial.

32.Ground 3. The panel did explain why it found the risk management plan to be insufficiently robust. The reasons given by the panel were that external controls alone were not sufficient to manage the Applicant's risk. He had shown he was not able to put his learning into practice and he did not consider the consequences of his actions.

33.The position is well expressed in **Buckney [2021] PBRA 165**,

"A risk management plan, however robust, can provide external controls but those can only go so far in providing the necessary protection for the public. What is required is an effective combination of external and internal controls. The panel's conclusion in this case was that the Applicant's internal controls were insufficient to enable his risk to be managed safely in the community and therefore his continued confinement in prison was necessary for the protection of the public".

34.Ground 4. The panel found that no one could reliably and comprehensively identify what underpinned and triggered the Applicant's sexual offending and, in those circumstances, it could not be said his risk was manageable in the community. The Applicant relies upon this finding as evidence the panel applied the wrong test for release. With respect to the author of the Application for Reconsideration, if panels were prevented from relying upon this as a reason for saying the Applicant did not meet the test and for refusing to release, innumerable highly dangerous prisoners would be released into the community when it was manifestly unsafe so to do. The panel was simply taking a conventional, dependable and sensible approach to assessing risk.

35.The decision letter in two separate places, correctly states the correct test for release and for progression to open conditions.

36.Ground 5. It is not procedurally unfair for witnesses to change their minds. If such a rule existed, it would inhibit professional witnesses from reconsidering their opinions, in the light of what other witnesses, with a different expertise, had said. In many cases, that would be a recipe for injustice.

37.Where a professional witness changes his or her mind, there must be safeguards. It should be possible to answer in the affirmative did the witness acknowledge he had changed his opinion, did he give reasons for so doing and were the reasons intelligible and broadly consistent with the evidence. In other words, could they or could they not be stigmatised as irrational.

38.The Applicant did not attend the meeting. I am not told whether he could or could not attend. What is clear, is that an Applicant can ask for the minutes of the meeting and can question the professional witnesses not only on what they said at the meeting but what others said, which may have caused them to change their mind.

39.In this case, there was adequate opportunity to explore with each witness why he or she had changed their mind.

Decision

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

James Orrell
04 January 2022