

[2022] PBRA 43

Application for Reconsideration by Moore

Application

1. This is an application by Moore (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 14 March 2022 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:
 - a) The Decision Letter dated 14 March 2022;
 - b) A request for reconsideration in the form of written representations from the Applicant's legal representative, dated 21 March 2022;
 - c) The dossier, numbered to page 344, of which the last document is the oral hearing Decision Letter. The Decision Letter indicates that the oral hearing panel (the panel) considered a dossier that ran to 329 pages. There is a report from the Community Offender Manager (COM) dated 8 February 2022 (pages 330-334). It is not clear from the Decision Letter as to whether the panel had sight of this document. The reconsideration application makes no mention of additional evidence and, noting the date of the COM report, it would seem more likely than not that it was before the panel and the parties.
4. 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, and I am satisfied that the written representations provide the Applicant's explanation as to why he believes the case should be reconsidered.

Background

5. The Applicant is now 49 years old. On 15 May 1996, when he was 23 years old, he received a mandatory Life sentence following conviction for Murder (the Index Offence), with a requirement that he should serve 15 years before he could be considered for release by the Parole Board.



6. The Applicant first became eligible to be considered for release on 23 March 2010. Therefore, he has now been in prison for an additional 11 years as a result of the reviews undertaken by the Parole Board.
7. The circumstances of the Index Offence were that the victim, who was walking home with his 16-year-old son, witnessed the Applicant and his co-defendant behaving in an unruly manner, armed with a sawn-off shotgun. The Applicant had been committing burglaries, armed with weapons, and had discharged a firearm through the windows of his sister's ex-partner. The victim showed his disapproval of the behaviour and in response, the Applicant assaulted both the victim and his son. The victim tried to defend himself and was stabbed four times to the head and neck by the Applicant's co-defendant. The Applicant then shot the victim in the buttocks as he was trying to get away. The victim fell to the ground and the Applicant shot him again in the chest, in what was described as an 'execution'.
8. The Applicant has a history of offending which began when he was 12 years old and has included previous matters of violence. His behaviour has been linked to his lifestyle, including his abuse of drugs and alcohol.
9. An earlier review by the Parole Board recommended to the Secretary of State that the Applicant should be moved to an open prison. The Secretary of State accepted that recommendation and the Applicant moved to an open prison in July 2018. In May 2019, the Applicant produced a positive drug test result but was allowed to stay at the open prison. In or around December 2019, following a late return from a period of temporary release and concerns about the Applicant's wellbeing, he was returned to a closed prison. In February 2020 the Applicant was allowed to resume his place in an open prison.
10. At his sixth review by the Parole Board (13/10/2020), the Applicant had retained his place in the open prison. However, he had been unable to resume periods of temporary release because of the Coronavirus pandemic lockdown restrictions. At the 2020 review, the Applicant's release was supported by Probation, however, the 2020 panel did not agree and determined that he should remain in the open prison for further testing.
11. The Secretary of State referred the Applicant's case to the Parole Board for his 7th review (the current review) in May 2021 to determine whether he could be released or in the alternative whether a recommendation could be made for his transfer to open conditions.
12. On 19 July 2021, the Applicant was returned to a closed prison due to suspected substance misuse and other concerns, including a late return from a period of temporary release in May 2021. On 6 October 2021, the Applicant's case was reviewed by the Parole Board and it was decided that an oral hearing would be required to consider the full detail of the case. Subsequently, on the 18 January 2022, the Secretary of State made a further referral to the Parole Board seeking its advice on the Applicant's continued suitability for a place in an open prison. It is not unusual for the Secretary of State to seek such advice or for the initial referral in May 2021 to be combined with the further referral in January 2022.

13. The case was listed to be heard at an oral hearing on 2 March 2022. The Applicant, the official supervising his case in custody, the Applicant's Probation officer and a prison psychologist gave evidence on that date. The Applicant was legally represented and the hearing took place via a video link. The panel determined that it would not direct the Applicant's release but would recommend to the Secretary of State that he be returned to an open prison.

Request for Reconsideration

14. The Applicant's grounds for reconsideration do not establish whether he is seeking reconsideration on the basis that the decision was irrational or procedurally flawed or both. In fairness to him, I have considered his application on both grounds.

15. In summary, the detail of the application is as follows:

- (a) The evidence at the hearing established that the Applicant had been tested following the incident of suspected drug misuse and produced a negative result, albeit that he admitted to using cannabis. He had given an account of the incident that led to his return to a closed prison, and it is submitted that this account has been consistent. It is said that there is no substantive evidence to support the suspicion of drug misuse.
- (b) The panel noted that intelligence originated from prison staff whereas the Applicant believes that if a prisoner reports a matter to staff, whether it is true or not, it will be entered by staff onto an intelligence report and so it cannot be said that the intelligence came directly from a member of staff.
- (c) The Decision Letter refers to prison intelligence which suspected the Applicant of being under the influence of drugs, however, this was not corroborated and the panel should not have attached weight to the intelligence.
- (d) The Decision Letter states that the panel was concerned at the Applicant's account in evidence that he had not misused drugs in custody whereas the Applicant's legal representative submits that he said that he had used drugs on his sentence but had never resorted to using violence, and that drug use was no longer a problem for him.
- (e) The Applicant said in evidence that a female (C) was not his girlfriend as had been reported and that he had not had any contact with her for a long time. The Applicant states that he cannot recollect having nine visits with her as is detailed in the Decision Letter.
- (f) The panel was concerned about the Applicant's openness and honesty whereas the official supervising his case in prison considered him to be very open and honest.
- (g) The assessed likelihood of further violence was reported to be low and the Applicant had done well in terms of his progress in the open prison prior to his return to a closed prison.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 14 March 2022 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. The panel also noted the combined review in this case.

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. 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)).

18. In **R (on the application of 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."

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

20. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

21. 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.

22. 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

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e) the panel was not impartial.

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

The reply on behalf of the Secretary of State

24. In a reply dated the 30 March 2022, the Secretary of State has confined his representations to the Applicant's comment about prison intelligence. The Secretary of State's response states that the intelligence was submitted by prison staff and that this has been confirmed by the official supervising the Applicant's case in custody.

Discussion

25. It is clear from the Decision Letter that the panel were concerned about suspected drug misuse and issues with compliance. It considered that the Applicant would be likely to need to complete further work on drug misuse, and it noted that his case was still open with the substance misuse team. The Applicant had indicated that *"prisoners were falsely informing on him, but the panel noted that most of the intelligence originates from prison staff"*. The panel noted the Applicant's explanations for his late return from a period of temporary release and raised concerns that he had *"failed his first opportunity for [temporary release] following it being previously revoked"*. The Probation officer told the panel that there were some inconsistencies in the Applicant's explanation and that it was only when asked why he was late that he admitted he had returned with a friend and had missed the train. This led the Probation officer to have concerns about his likely compliance.

26. The Decision Letter states that the Applicant's return to a closed prison followed a series of events that *"strongly suggest to the panel that he was misusing illicit substances and associating with those involved in the prison drug culture"*. The panel noted intelligence reports which included a report that suggested that the Applicant had received another prisoner's urine for testing because of his own daily drug use.

27. The panel said that the Applicant told them that the tablets found in his possession and the bottle of urine belonged to a friend who had left them in his room. It also noted that he had not produced any positive drug tests. The Applicant had admitted to the panel that he had used cannabis when at the open prison, saying that he had asked a friend *"for a drag of his cigarette"* and then realised that it contained cannabis. He said that he told staff, but the subsequent drug test result was negative.

28. The prison psychologist told the panel that the Applicant had told her *"a slightly different explanation about the tablets he was found with"* but that this would not change her assessment and decision. The Applicant had told the prison psychologist that the prisoner he had believed he had been helping had since told him that he was paid to *"set up"* the Applicant.

29. The panel noted that witnesses were not supporting the Applicant's release and said that it was *"concerned about the number and nature"* of allegations about the



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Applicant in custody, “his lack of honesty and openness, that resulted in the panel assessing that he may not comply should he be released into the community”. The panel was not satisfied that the Applicant would cope with the challenges of direct release from a closed prison and determined that he would need further testing in an open prison.

30. Within the dossier there is a report about the Applicant’s failure in the open prison and this details many of the reports about him, including a report on 19 May 2021 when the Applicant admitted that he had not taken the train despite it being the mode of transport listed on his licence. The report establishes that he had initially told staff that he was late due to delays with trains and had only revealed the truth when evidence was produced to the contrary.
31. The report also identifies that he was found during the night of 18 July 2021 with various tablets in his hand, was believed to be under the influence of substances and, when searched, had a bottle of urine secreted under his scrotum. When questioned in the holding cell about these events, the Applicant told staff that he had smoked cannabis, had let himself down, and that he had been provided with the tablets from a friend and had intended to flush them away. The report suggests that he had secreted urine on his person in case of a drug test, although the wording of the report does not establish that the Applicant actually said this to staff. The report also notes that the Applicant’s temporary release in May 2021 saw him arrange to meet C.
32. In response to that report, the Applicant submitted representations to the Parole Board, although these should have been made to the Secretary of State, to argue that he should be returned to the open prison. Within those representations, the Applicant denied being under the influence of drugs and said that the urine bottle was in his shorts and not secreted under his scrotum, and that it was his own urine which he had planned to give to another prisoner who had drug misuse issues. He said that he had fallen asleep and awoken to find the tablets under his pillow and had no knowledge that they were there.

Prison Intelligence and Drug Misuse in Custody

33. The prison intelligence report provides gradings of high, medium or low in terms of reliability and it is clear that some of the entries relate to direct observations of the Applicant by prison staff and some are anonymous reports about him. It is a more detailed report than might often be produced in a parole review and it was open to the panel to consider the information within it. The panel identified that most of the reports were from staff, it did not find that all reports were made by staff. It was open to the panel, having assessed all available evidence, to reach its own conclusion about what weight to attach to that intelligence. The panel was equally entitled to identify the concerns it had about the suspected drug misuse in custody and to weight those concerns accordingly. The Applicant may disagree with the panel’s approach and its view, but this does not make it irrational or procedurally unfair.

Ms C

34. It was C who drove the Applicant back to the prison when he was late returning from the period of temporary release in May 2021. The nine (remote) prison visits are detailed in the written evidence before the panel. The Applicant clearly has had contact with C, he spent time with her on his temporary release in May 2021. To suggest he has not seen her in "a long time" is simply not true. There is nothing in this ground to support any irrational or procedurally unfair approach.

Openness and Honesty

35. It may be that others considered the Applicant to be open and honest, however, the panel was required to reach its own conclusion having assessed the evidence. Noting the detail of the evidence before them, some of which I have referred to above, there was nothing irrational or unfair in terms of the panel's conclusion about the Applicant's openness and honesty.

Low Risk of Violence

36. It is reasonable to consider that a low assessed risk of future violent offending is a relevant consideration in terms of whether a prisoner in custody meets the test for release. In my view, the panel was alive to this. It noted the detail of the assessment but also that Probation could not be confident in warning signs being spotted that might show risk was increasing. The panel explained, in detail, why it did not direct his release. It is not for me to substitute my own assessment of risk in a reconsideration application and there is nothing in this ground to demonstrate an irrational or procedurally unfair approach.

The Applicant's Oral Evidence

37. So what did the Applicant say to the panel in his oral evidence? To ensure fairness to the Applicant in his application, I requested and received a copy of the oral hearing recording. Sadly, a technical issue meant that the recording did not actually record any of the oral evidence.

38. It is submitted that the Applicant's account of events leading to his recall to the closed prison have been consistent and that he did not tell the panel that he had not used drugs in prison. If all he submits is true, it does not detract from the panel's general concern of suspected drug misuse in custody and the panel was entitled to reach the conclusions that it did.

39. It is the panel's responsibility to make its own risk assessment and it must make up its own mind about a case on the totality of the evidence that it hears, including any evidence from the Applicant. The panel would be failing in its duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that. As was observed by the Divisional Court in **DSD**, panels of the Parole Board have the expertise to do this. Whether or not the Applicant agrees with the evidence before the panel or the panel's assessment of that evidence does not meet the test for irrationality or procedural unfairness.

40. Any reading of the decision letter establishes that the panel's note of the Applicant's account of drug use in custody was not the overriding factor in its decision not to direct his release. There was a range of evidence that the panel

was entitled to attach weight to. The Applicant may disagree with the panel's approach, but it does mean that this was irrational or procedurally unfair.

Decision

41. This was on any view a serious case. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether the panel's conclusions were adequately and sufficiently explained.
42. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a carefully reasoned decision the panel in my judgment satisfied the public law duty to provide evidence-based reasons that adequately and sufficiently explained the conclusion it reached.
43. 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
5 April 2022