

[2022] PBRA 50

Application for Reconsideration by Halliday

Application

1. This is an application by Halliday (the Applicant) for reconsideration of a decision of an oral hearing panel, dated the 18 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 31 March 2022;
 - c) The dossier, number to page 748, of which the last document is the oral hearing Decision Letter. The oral hearing panel (the panel) considered a dossier which ran to 727 pages; and
 - d) I also asked for, and received, a copy of an email sent, following the oral hearing, by the Applicant's legal representative which included a copy of an application made by the Applicant to the prison's security department.
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 the proposed grounds for reconsideration.

Background

5. The Applicant is now 34 years old. In 2012, when he was 24 years old, he received an Indeterminate Sentence for Public Protection (IPP) following his conviction for sexual offences (the Index Offences). He first became eligible to be considered for release in 2014 and this was the fourth review of his case by the Parole Board.



6. The Index Offences were committed by the Applicant when he used the internet to make contact with female children with the intention of grooming them and persuading them to meet him for sex. Over a period of time, he was able to convince a female child to meet him and he engaged in sexual activity with her. His actions placed him in breach of a Sexual Offences Prevention Order and the Applicant offended at a time when he was subject to Probation supervision following a Community Order being imposed by the courts in 2010 for similar offences.
7. The Secretary of State referred the Applicant's case to the Parole Board in May 2020 to determine whether he should be released, or in the alternative, to provide advice on whether he should remain in an open prison.
8. The panel considered the case at oral hearings in July 2021 and February 2022. The Applicant, the official supervising his case in prison, his Probation officer in the community and a prison psychologist gave evidence. The Applicant's legal representative was present, and the hearings were held remotely via a video link.

Request for Reconsideration

9. The application for reconsideration is on the basis that the panel's decision was irrational and/or procedurally unfair.
10. The grounds for seeking a reconsideration are as follows:
 - a) The panel failed to give proper weight to the evidence of the Witnesses' and former Professional Witnesses' recommendations and significantly deviated from the opinion of 4 experienced Professional Witnesses;
 - b) That the Panel failed to attach sufficient weight to the conclusion that the Applicant's risk was such that he could be managed safely in the community;
 - c) The panel overemphasised the significance of The Applicant's emotional instability and, ongoing concerns about his relationships and unknown sexual thoughts;
 - d) The Panel's differences of opinion to all of the Professional Witnesses are irrational;
 - e) The risk management plan was sufficiently robust to manage the Applicant's risk in the community; and
 - f) The panel failed to apply the correct test for release.
11. The Applicant's application sets out the reasoning as to why he believes the grounds (above) demonstrate irrationality or procedural unfairness. I note that within his reasoning he also notes that the panel did not refer in its Decision Letter to the email from the Applicant's legal representative and the supporting document (the application to the prison's security department). As noted (above), I requested and was provided with this material. I will address the matter in my discussion (below).

12. The Applicant also sets out what he sees as factual inaccuracies in the Decision Letter. I have considered these, and the entire submissions, with great care and have applied them, where necessary, to the grounds set out by the Applicant in his application for reconsideration.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 18 March 2022 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a placement in open conditions.

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. **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."

16. 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.

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

18. 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.

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.

The reply on behalf of the Secretary of State

22. In a reply dated 7 April 2022, the Secretary of State confirmed that he did not wish to make any representations.

Discussion

Grounds A, B, D and E

23. I deal with these grounds together because, essentially, they seek to make the same point. Witnesses at the oral hearing supported the Applicant's release and the panel did not follow those recommendations.

24. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is the panel's responsibility to make its own risk assessment and it must make up its own mind 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 have the expertise to do it. It is not for me, in a reconsideration application, to substitute my own findings or assessment of risk in place of those made by the panel.


25. Any Decision Letter must explain why a different conclusion was reached so that the reader, including the Applicant, can understand the reasoning. 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.*"

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26. The panel's Decision Letter provides extensive detail as to why it reached a different conclusion in this case. In its assessment of risk, the panel noted the views of witnesses but went on to explain why it considered the Applicant's risk of serious harm to be high, it set out where it disagreed with the views expressed by witnesses, and it outlined its concerns in terms of the likely effectiveness of the risk management plan.
27. Within the detail of the Applicant's submissions, he questions whether the panel weighted his Autistic Spectrum Disorder (ASD) diagnosis in its interpretation and assessment of his behaviour. The Decision Letter makes clear that the panel did exactly that. It noted, where relevant, ASD traits that may have explained certain behaviours, but went on to establish why it felt there was a relevance to risk in terms of behaviour that had been of concern.
28. In my view, the panel evaluated the evidence in this case with great care and demonstrated how it had weighed that evidence in reaching its own conclusion. The Applicant may disagree, but this does not make the approach by the panel unfair or irrational.
29. I have taken note of the reported factual inaccuracies within the Applicant's submissions, however, I am not persuaded that they would materially change the decision in this case. The panel was clearly concerned about the Applicant's emotional instability, and it explained why. Although the Applicant may not have had contact with certain individuals in the community since August 2021, the panel explained why this remained, in its mind, a concern. For example, the panel explained why it doubted the Applicant's explanation as to why he had given a particular account of removing telephone numbers of individuals from his prison account.
30. The remaining points within the submissions, although attractively drafted, simply attempt to argue the same point, in that the panel reached the wrong decision in this case. As I have established, the Applicant may not agree with the panel, but it properly explained why it reached the decision that it did.

Ground C

31. The panel set out why it had concerns about the Applicant's emotional instability and why it had a relevance to risk. Concerns about his relationships were detailed and were relevant. The panel explained why it did not consider that the relationship between the Applicant and others was sufficiently resolved and, in its view, this was relevant to risk. It also explained why it attached weight to the relevance of any sexual thoughts. Again, the Applicant may disagree, but on reading the Decision Letter in its entirety, there is nothing to demonstrate that the panel had overemphasised the significance of those concerns. There is nothing, in my view, to support the Applicant's submission that this was irrational or procedurally unfair.

Ground F

32. There is nothing to this ground. The Applicant's submission is that he was a moderate risk and witnesses believed that he could be managed in the community. The panel correctly sets out the test for release in the Decision Letter and any reading of the Decision Letter establishes why the panel determined that he did not meet that test. The Applicant's submission that "*no other rational panel could come to the same conclusion*" is not, in my view, persuasive. On the contrary, it is clear from the Decision Letter why the panel reached the decision that it did.

The email and supporting document

33. Following the oral hearing, the Applicant's legal representative emailed the Parole Board with a document the Applicant had received which established that there were no concerns about letters he had sent. He is right in that there is no mention of the email or the document in the Decision Letter and it is clear, in my mind, that the panel expected to receive this.

34. In fairness to the Applicant, I asked for, and received, a copy of the email correspondence. This established that the email and the document were provided to the panel on 24 February 2022, well ahead of its finalised Decision Letter.

35. At first glance, this is the perhaps the strongest point in support of procedural unfairness in this case. The Applicant's case must be dealt with justly and that means that all evidence must be before the panel and must be considered by the panel.

36. There is nothing within the Decision Letter to establish that the panel reviewed the email and the document. However, the panel did have sight of information from the official supervising the Applicant in custody which answered the same point that the Applicant was hoping to address by the submission of the document from the security department. The response from the official in custody is within the dossier of evidence and is referenced by the panel which went on to find in the Applicant's favour when it said, "*Following the February 2022 hearing, the panel received a further report ... which clarifies the position and accepts that this was incorrect and in fact [the Applicant] asked for laptops which could not access the internet.*"

37. Having found in favour of the Applicant in respect of the point of concern that had been raised, I am not satisfied that this could be seen as procedurally unfair.

Decision

38. 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.

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20 April 2022

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