

[2022] PBRA 68

Application for Reconsideration by Bazil

Application

1. This is an application by Bazil (the Applicant) for reconsideration of a decision, dated 20 April 2022, by a 3-member Parole Board Panel including 2 psychologist members, refusing to direct his release. He has been held in open conditions since August 2017 and there is no suggestion that he is no longer suitable for Category D.
2. The review was conducted by video conference on 20 April 2022 when evidence was given by the Applicant himself, his Prison Offender Manager (POM), his Community Offender Manager (COM), a prison appointed psychologist (VB) and an independent psychologist commissioned on behalf of the Applicant (CH).
3. I have considered this application on the papers. These comprise of the dossier, the decision of the Panel and the application for reconsideration.

Background

4. On 18 May 2007, the Applicant having, at the age of 48, been convicted, after trial, of charges of sexual assault by touching - the first by penis on the victim's cheek and the second by placing a hand on her genital area, through her clothing, was sentenced to an indefinite term of imprisonment for public protection (IPP) with a tariff expiry date of 6 October 2008.
5. On 2 February 2012, the Court of Appeal Criminal Division, applications having been made to appeal against both convictions and sentence and following initial refusal by a Single Judge, refused the applications.
6. This was the Parole Board's 6th Review of the Applicant's sentence. There had been no previous release decisions but, following a recommendation for transfer to open conditions in November 2016, the Applicant had been moved to an open prison in August 2017.

Request for Reconsideration

7. The application for reconsideration comprises a 7-page document, prepared by the Applicant's Legal Representative.
8. The application seeks reconsideration on the grounds that the decision was irrational and procedurally unfair. It is not necessary to reproduce the application in full, but



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



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info@paroleboard.gov.uk



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0203 880 0885

all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below.

9. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge. It has considered the application on the basis that both limbs are challenged.

10. Issues in relation to open conditions are not, in any event, within the scope of the Reconsideration Mechanism (see **Panasuik [2019] PBRA 2**). The RAP has not, therefore, considered matters strictly related to open conditions save in so far as they are relevant to the statutory limbs of challenge.

11. In general terms the application submits:

(a) Irrationality:

- i) That the risk factors identified by the Panel were not prevalent in the evidence, that it failed to consider the extent of his positive engagement with the prison regime or the *"cumulative evidence present regarding him managing his risk in the community"*.
- ii) That such risk factors as were considered in the case were *"evidenced to have been tested whilst in open conditions"* and there was no formal finding as to agreement or otherwise with risk assessments.
- iii) A number of criticisms were made of the Panel's suggested failures to consider aspects of evidence, alleging that there was no apparent evaluation of the evidence making it not possible to consider whether the judgment was irrational. *"It is submitted that by default this should be considered irrational."*

(b) Procedurally unfair:

- i) The Panel irrationally did not adjourn the case following completion of the evidence and on application to adjourn being made on his behalf. An adjournment would have allowed the Risk Management Plan (RMP) to be completed, and further evidence provided as to its suitability.
- ii) It was procedurally unfair and irrational not to allow such adjournment, for three months, in that such adjournment would have allowed specifically for professionals to meet to complete and advise as to the appropriateness of a revised RMP, to consider whether sufficient relationships had developed between the Applicant and professionals together with appropriate external controls.
- iii) It would have been possible for the Panel, in place of the requested 3 months period, to have imposed an adjournment period of 4 to 6 months.


Response from the Secretary of State

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

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 info@paroleboard.gov.uk

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12. The Secretary of State (SoS), by e-mail dated 25 May 2022, indicated that no representations were made in response to the application.

Current parole review

13. The Panel considered a dossier of 927 pages and, in a comprehensive 13-page decision, dealt in detail with the index offence, the Applicant's personal background including substantial drugs and alcohol abuse which was said to be involved in much of his offending. The Panel drew particular attention to the serious concerns of the Sentencing Judge who had drawn a direct comparison with the facts of a 1998 conviction for false imprisonment and drugs possession. It gave him credit for the positive aspects of his custodial behaviour, his protective factors and the progress evidenced in open conditions but noted not only his continued denial of guilt but minimisation of other offences and, for example, in the 1998 case, his allegation that he had been "*stitched up by the Police*". It noted his evidence as to mistrust of professionals and unwillingness to participate in HORIZON (a training course addressing sex offending) lest it "*undermined his appeal*."

14. It found, however, that all professionals agreed that the Applicant's triggers and risks were not, and might never be, well understood, that he could not engage in collaborative risk management and all risk management would have to be by external factors. A robust RMP for which his COM made "*some sensible proposals for strengthening*" was not yet in place and even the independent psychologist who, alone amongst the witnesses considered the Applicant's risks to be currently manageable in the community (albeit via Approved Premises) acknowledged the need for monitoring. All professionals agreed that, for management of risk in the community, consistency of professional relationships was essential but there was to be a change of COM and a 3-month adjournment would allow only for structural implementation of proposals but not "*a robust evidence-based evaluation*" of how they were working. Such evaluation, concluded the Panel, would require much longer "*especially given [The Applicant's] communication, presentation and mistrust of professionals*."

15. The Panel acknowledged the delays to the Parole process and the effects on ROTLs (periods of authorised leave from open prison) of the pandemic, commenting that the Applicant was doing everything that could "*be realistically expected of him*."

The Relevant Law

14. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.
17. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.
18. Under the principles expressed in **Osborn**, the key test is whether the fairness to a prisoner requires an oral hearing, bearing in mind the facts of the case and the importance of the issue at stake. Factors to be considered include:
 - Whether the evidence can be considered without the need for it to be tested orally or in person;
 - Despite the duty of the Parole Board to provide a swift review, the test is not the likelihood (or otherwise) of release or the need to save time, expense or trouble;
 - All evidence must be given the appropriate scrutiny with particular care in relation to issues of fact which may be disputed or open to explanation or mitigation;
 - Whether the prisoner wishes to have an oral hearing and the legitimate interest in being able to participate in a decision which has important implications for him;
 - The evidential effect of the conclusion of pending criminal proceedings;
 - Whether there are psychological issues which need to be tested;
 - The decision is not confined to a determination of whether or not to direct release (or recommend a transfer to open conditions) but includes other aspects, such as comments or advice in relation to the prisoner's treatment or offending behaviour work which may be required, which will, in practice, have a significant effect on his management in prison or on future reviews.
19. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

Discussion

20. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier gave a clear and reasoned decision, on that basis, and adopted a correct test for its decision. When considering a substantial dossier and detailed oral evidence, the duty of the Panel is not to identify, with particularity, each and every aspect of relevant issues but to show that both positive and negative aspects of a prisoner's case have been examined and a fair decision taken in accordance with the test required. I am fully satisfied that this has been done. Reconsideration is not a re-examination of evidence.

Procedural Unfairness

21. The sole separate submission in relation to procedural unfairness centres around the refusal to grant the last-minute application for a 3-month adjournment to enable further professional discussions to take place and a more stringent RMP to be considered. The Panel decision makes it clear that the application was carefully considered but it could not be sure that, in the time scale proposed by the Applicant, the relevant information would be available or that an understanding of the Applicant's complex needs and development of new, vital, trusting relationships developed. The Panel is under an **Osborn** duty to complete the review within a reasonable period and no reasonable timescale could be identified at that scale. There was no duty on a Panel to grant an extension greater than sought in circumstances when this, too, would be a matter for conjecture. I can find no basis for any complaint on this ground.

Decision

22. For the reasons that have been given, the RAP does not consider that the Panel's decision was irrational or procedurally unfair and accordingly, the application for reconsideration is refused.

Edward Slinger
31 May 2022