

[2023] PBRA 142**Application for Reconsideration by John****Application**

1. This is an application by John (the Applicant) for reconsideration of a decision dated 30 June 2023 of a panel following an oral hearing on 30 March 2023 not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended) 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 and/or (c) that the decision contains an error of law.
3. I have considered the application on the papers. These are the application for reconsideration contained in an email; the decision not to direct release; applications relating to non-disclosure and the dossier.

Background

4. On 11 August 2021, the Applicant was convicted of one count of possession of information likely to be useful to a person committing or preparing an act of terrorism. This was a document called the Anarchist's cookbook which contains details of how to prepare explosives amongst other things. On 31 August 2021, the Applicant was sentenced by the trial Judge to two years imprisonment, suspended for two years and a community order. That sentence was appealed by the Attorney General as being unduly lenient. His appeal was upheld, and the Applicant was re-sentenced to 3 years imprisonment made up of two years custodial and an additional one year's licence as an offender of particular concern. The Judge's sentencing remarks were included in the dossier, but not the decision of the Court of Appeal who had to re-sentence the Applicant. That is a serious omission particularly as the decision is readily available and is reported at **[2022] EWCA Crim 54**. I have read that decision. In the event, it does not, in my view, affect the decision of the panel but it should have been in the dossier.

Request for Reconsideration

5. The application for reconsideration is dated 23 July 2023. It is accepted that if an order for reconsideration is made there will be no time for it to be decided before the Applicant is released so, to that extent, the application is academic. I have considered the application without making a ruling whether there is a right to a decision if it will be of no practical effect or if a panel member has a discretion to refuse to consider it.

6. The grounds for seeking a reconsideration are as follows: it is said that the decision is procedurally unfair as the decision letter was not received until 3 July when it was due to be received on 20 April 2023. Further, it is argued that the decision was irrational as it was contrary to the evidence of the witnesses. The witnesses said that the risk management plan was capable of managing the risk posed by the Applicant and that the protection of the public in the long term would be better served if the Applicant spent a longer term in the community prior to his sentence end. While the panel disagreed with this assessment it is argued that they have not given adequate reasons for that view. It is further submitted that the panel have not set out why they have concerns that the Applicant poses a risk of serious harm. Finally, reconsideration is sought on the ground that the panel made a mistake of fact in that they said that the Applicant's offending took place over a number of years which it is suggested was incorrect.

Current parole review

7. The case was referred to the parole board on 7 April 2022. There were a series of adjournments mainly caused by difficulties in the disclosure process.
8. The hearing on 30 March 2023 lasted a day and five professional witnesses and the Applicant gave evidence.

The Relevant Law

9. The panel correctly sets out in its decision letter which was dated 30 June 2023 the test for release and correctly applied the decisions of the Divisional Court in **Johnson and Dich** which it decided were relevant to its considerations.

Parole Board Rules 2019 (as amended)

10. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) 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.

Irrationality

11. 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."

12. 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.

Procedural unfairness

13. 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.
14. 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.
15. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

16. 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 (the Respondent)

17. The Respondent has made no representations in response to this application.

Discussion

18. The application for reconsideration on the grounds of procedural unfairness is misconceived. Unfairness to justify reconsideration must be such as could affect the result of the parole review. While it can be said to have been unfair that the Applicant had to wait so long to know the outcome, that is not unfairness which affected the outcome of the hearing. It is not a ground for reconsideration that the Applicant has had to wait a long time for the result. For that reason, I have not made further investigations into the reasons for the delay.
19. Equally, I do not accept that the panel made a mistake of fact. The offence was possession of an article useful to a person committing or preparing an act of terrorism. As set out in the Judge's sentencing remarks the Anarchist's cookbook was already on the Applicant's electronic device in 2018 when the Applicant was referred to Prevent and was part of a download from the Applicant's devices on to hard drives in 2019. The Judge found that the Applicant had plenty of chances and in effect warnings to get rid of the material, but he didn't. The panel were entitled to conclude that the Applicant

had been in possession of the item for a significant period of time and therefore committing the offence for a significant period of time.

20. The essence of this application is that the decision was irrational in that it was contrary to the evidence given by the professional witnesses.
21. Guidance from the High Court makes it clear that a panel is entitled to disagree with the evidence of the professionals provided it makes clear why it disagrees. In my judgment the panel does do that. The panel, while accepting that the Applicant had made significant progress in custody, assessed that if he was released at the time of the review, he was susceptible to being influenced by material which he would be likely to be able to access. The panel noted that even after the Applicant had been signed off by Prevent, he was still accessing extremist material on the internet. That continued when he was made the subject of a suspended sentence and given his last chance. He has demonstrated in the past that he is able to deceive those who supervise him and continue to access extremist material.
22. At various stages of the decision the panel indicated where and why it disagreed with the professional witnesses. For example, the panel expressed their concern at the Applicant's interest in those pagan runes which are most closely linked to extremism (para 2.6). While the panel agreed with witnesses that the Applicant had insight into his risks, they said at 2.8 *"The difficulty is in regard to how well developed [the Applicant's] skills and strategies are to ensure that he maintains that insight and acts to manage those issues. This has not been tested in the community setting or in prison conditions of lesser security than his current location in a Category B prison, and nor in the medium and longer term"*.
23. At 2.10 when considering the evidence of the Prison Offender Manager the panel expressed concerns about the efficacy of supervision because of *"deliberate fogging"* by the Applicant and that he may mask his true thoughts and feelings.
24. At paragraphs 2.19 and 2.20 the panel expressed concerns that the Applicant's interest in Druidism and particularly interest in the three runes most connected to extremism could lead him into difficult situations.
25. At 2.33 the panel recorded the response of the psychologist to their concerns that in the past, despite what were serious warnings as to his conduct, the Applicant had returned to online offending.
26. At 3.3 the panel agreed that the risk management plan was sufficient to control the Applicant's risk until his SED (Sentence Expiry Date), but longer-term risks were considered by the panel to be a concern and that would not control his risk in the medium and long term.
27. At 4.2 the panel set out their view that long term risks remained which would benefit by more work being undertaken in custody. They were entitled to come to that view and in my judgment, they have correctly followed the law as set out by the High Court and given adequate reasons for disagreeing with the professionals. Because of the nature of the offence the panel were entitled to conclude that the risk was one of serious bodily harm.

Decision

28. 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.

John Saunders
16 August 2023