

[2023] PBRA 157

Application for Reconsideration by Sanderson

Application

1. This is an application by Sanderson ("the Applicant") for reconsideration of a decision of the Parole Board dated 31 July 2023 not to direct his release. The decision followed an oral hearing which took place by video-link on 30 June 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in Rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are (1) the dossier, now running to some 459 pages; (2) the decision; and (3) the application for reconsideration including written submissions from the Applicant's legal representative. I have also listened to the recording of the oral hearing.

Background

4. The Applicant is serving a sentence of life imprisonment for manslaughter. The Applicant was aged 23 years old at the time he was sentenced and is now 55 years old. Originally, on 6 December 1991, he was convicted of murder. On 23 March 1993 the Court of Appeal quashed that conviction and substituted a conviction for manslaughter. On 21 July 1993 it imposed the sentence of life imprisonment and set the minimum term at 8 years. That minimum term expired on 1 December 1998.
5. The offence was committed against the Applicant's partner. The offence consisted of extreme violence and brutality which caused fatal injuries to the victim. According to the trial Judge's report the Applicant had severely beaten two previous girlfriends. He was on probation at the time of the offence. He was addicted to both cocaine and heroin. The probation order had been imposed with a condition of treatment. He did not co-operate with the treatment.
6. The Applicant had pleaded not guilty to murder by reason of diminished responsibility. It was on this basis that the Court of Appeal reduced his conviction to manslaughter. He was described by the psychiatrist who saw him in 1993 as a highly unstable and dangerous personality prone to paranoid psychosis and violent behaviour towards people with whom he becomes emotionally involved.



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7. The Applicant remained in closed conditions for many years. He was repeatedly assessed as having a high level of psychopathic traits. Eventually, following a lengthy period of treatment in a specialist prison unit and some years without violence the Parole Board recommended a move to open conditions. The move took place on 9 April 2021.

Current Parole Review

8. On 26 November 2021 the Secretary of State again referred the Applicant's case to the Parole Board. At that time the Applicant was still in open conditions. However, on 11 March 2022 he was returned to closed conditions.
9. On 16 May 2022 the Applicant's case was directed to an oral hearing. An updated psychological risk assessment (PRA) was directed. The case was listed for three and a half hours with three members. An updated PRA was prepared. The oral hearing was listed for 10 March 2023 but adjourned on the day by reason of the appointment of a new Community Offender Manager (COM) and the lack of a risk management plan.
10. As noted above, the oral hearing took place on 30 June 2023. The panel consisted of an independent chair, a psychologist co-panellist, and an independent member co-panellist. Evidence was taken from the Prison Offender Manager (POM), the Applicant himself, the psychologist and the COM. It was agreed that the Applicant's legal representative would provide written submissions after the hearing.
11. To a large extent the circumstances in which the Applicant was returned to closed conditions were accepted by him. He had met a woman in a supermarket and formed an intimate relationship with her. He had lied to her when she asked him where he was from. On the third occasion of meeting her he had gone to her house and had sexual intercourse with her. He had not disclosed the relationship to staff and he had not disclosed his whereabouts to staff. When returned to closed conditions, the Applicant had requested her telephone number to be put on his PIN phone account and asked that she be permitted to visit him, saying untruthfully that she was his aunt. He had written several letters to her, in breach of a non-contact order signed by him. He gave varying explanations for his failure to disclose the relationship.
12. The psychologist's recommendation was that the Applicant should not be released. She considered that the risk management plan depended to a significant extent on the Applicant's honesty; she was not confident that the Applicant would be honest with professionals. She considered that a further period in open conditions was essential to test whether problematic patterns of behaviour would re-emerge. The POM and COM, on the other hand, recommended release. The COM considered that the Applicant had been open and honest with him and that they had built a good relationship.
13. In its reasons the panel noted that the POM and the COM were in favour of release, and continued as follows.

"The panel considered that the risk management plan is as robust as it can be but are mindful that [the Applicant] has been in prison for an extensive period of over

30 years, with all but 11 months of that in closed conditions. His time in open conditions was only in-part successful, in that he was able to have some time during the day in the community and undertake work in the community, but with this time in the community, he breached his ROTL [release on temporary license] conditions and commenced an intimate relationship, intentionally lying about his identity to his new partner, placing himself in a risky situation and being deceitful to professionals on a number of occasions. He has not yet had the opportunity to have overnight ROTLs, has not had the opportunity to spend time in an AP [approved premises] and has not demonstrated that he can comply in a less secure environment for a sustained period in the panel's view to provide sufficient evidence that he can be open and honest or comply with restrictions of a licence which are considered necessary to manage his risk in the community."

14. The panel, while acknowledging that the Applicant appeared motivated to live a pro-social life and had developed a good relationship with his POM and his COM, was not satisfied that the release test was met and rather recommended that he be moved to open conditions.

Request for Reconsideration

15. Submissions in support of the application for reconsideration are developed under two headings.
16. Firstly, it is submitted that the oral hearing was procedurally unfair. It is said that there was a substantial amount of pressure on the Applicant and the legal representative to present their case – a clear desire to "get through" the witness evidence quickly, especially the evidence of the COM. It is said that the Applicant has instructed his representatives that he does not feel he was afforded the pressure to present his case and feels that the panel "rushed" him through his evidence. Therefore, it is submitted, the Applicant was adversely affected by the panel chair's "disclosure of the limited time available to conduct the hearing". It is suggested that by reason of pressure of time the panel did not sufficiently explore the plans either with the Applicant or with the COM.
17. It is also put forward on the Applicant's instructions that there were issues with the video link which made him feel uncomfortable – in particular, that the panel chair's picture kept freezing and that there were issues with the sound quality when the psychologist gave her evidence which he found unsettling.
18. Secondly, it is submitted that it was irrational for the panel to prefer the evidence of the psychologist to that of the POM and the COM. It is pointed out that her report on the Applicant was nearly twelve months old by the time of the hearing; that she felt the Applicant had been "guarded" in his interview with her because she had interviewed him before and not recommended release; that she did not engage with the argument that additional licence conditions, including GPS tagging and requirements round mobile phone conditions, could have provided an additional dimension to the risk management plan; that she was wrong to find that he had "struggled" in open conditions; and that she focussed unduly on a recent allegation which had been dismissed.
19. It is said that these two grounds inter-relate: if the COM had not been "rushed" through his evidence the panel would have found it more compelling.



The Relevant Law

20. The panel correctly set out the test for release in its decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
21. The panel's decision as to release is eligible for reconsideration since the Applicant is serving an indeterminate sentence and the decision was taken under rule 25(1) of the Parole Board Rules: see rule 28(1) and 28(2)(a) of the Rules. The panel's decision to recommend open conditions is not eligible for reconsideration.
22. The concept of irrationality is derived from public law. The test is whether the 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.*" See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
23. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality.
24. Where an allegation of procedural unfairness is raised it is my duty to consider for myself whether it is, or is not, made out. My role is not merely to review the procedure of the panel and ask whether the panel reasonably thought it was fair. See **R(Osborn) v Parole Board of England and Wales** [2013] UKSC 61 at paragraph 65.

The reply on behalf of the Secretary of State (the Respondent)

25. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

Discussion

Ground one – procedural unfairness

26. I have listened with care to the recording of the oral hearing. Times which follow are times in the recording. The recording is 3 hours and 48 minutes in length. A deduction of 10 minutes must be made for an occasion when the recording was kept on during a short adjournment (01:17 to 01:27 approximately). The actual hearing time recorded is therefore 3 hours 38 minutes approximately. It will be recalled that the time estimate for the hearing was 3 hours 30 minutes. In my experience that is a common time estimate for a case where there is a psychologist witness as well as

POM, prisoner, and COM. It is also common, where the time estimate is 3 hours 30 minutes, for a second case to be listed to run on afterwards.

27. The hearing began with normal introductions and explanations. I can detect no sense of pressure or hurry in the way the panel chair dealt with these matters.
28. The POM was the first witness, beginning at 0:11:46. There was a recent development which took a little time to deal with, including the 10 minutes which I have referred to above, but there is no sense of hurry in any of the questioning. The POM's evidence finished at 01:23.
29. The Applicant then gave evidence. At the outset the panel chair had invited the legal representative to question the Applicant first. This was expressly done for the benefit of the Applicant. The legal representative questioned the Applicant from 01:23 to 02:03. The questioning was appropriate and took the Applicant sympathetically through the key issues in the case. He was not interrupted or otherwise put under pressure; there is no indication that he or the Applicant thought he was under any pressure. The panel then questioned the Applicant between 02:03 and 02:43. Again he was not interrupted or otherwise put under pressure, and I can detect no indication that the questioners or the Applicant felt under any pressure.
30. At the end of the Applicant's evidence the panel chair called for a comfort break and also said that she would take the opportunity to put the next case back. In my experience this commonly occurs where the first case is listed for 3 hours or more. The next case will be listed to follow on soon after the first, but the panel often wishes to allow additional time before the second case starts. The chair said nothing to foreshorten the time allowed for the Applicant's case.
31. The psychologist was the next witness. She gave evidence from 02:44 to 03:23. I detected no sense of pressure or hurry in the way in which the psychologist was questioned. In particular, the Applicant's representative questioned the psychologist from about 03:07 to about 03:21. The Applicant's case was fully put to the psychologist. Nothing was said or done to place the Applicant's representative under any pressure, and I can detect no sense that the representative felt under any pressure.
32. The final witness was the COM who gave evidence from about 03:23 to about 03:46. There was an up-to-date report from the COM dated 9 June 2023 only some three weeks before the hearing. It contained the COM's recommendation and an updated risk management plan proposing (inter alia) a three-month GPS tag and the Building Better Relationships (BBR) programme. Key parts of the COM's assessment and proposals were therefore before the panel in up-to-date written form. The questioning focussed appropriately on issues arising out of this up-to-date report. Once again, nothing was said to place any questioner or the witness under any pressure and I can detect no sense that the witness felt under pressure. The Applicant's representative asked questions last; he was not interrupted but understandably had limited questions for the COM, whose recommendation had been in his client's favour.

33. It was agreed that the legal representative would provide written submissions. That is common where there are two cases in a day, and not at all unusual in the case of an indeterminate prisoner where there is psychological evidence even if it is the only case in the day.
34. Towards the end of the Applicant's evidence the panel chair mentioned that her screen had frozen. She asked questions of the Applicant for about seven minutes. It is not clear whether her screen was frozen for some or all that time; if it was, no person made complaint about it, her voice was clearly audible, and the Applicant answered her questions without apparent difficulty.
35. I can detect no problem in the recording relating to the audibility of the psychologist when she gave evidence; no complaint was made by the Applicant, the legal representative or anyone else.
36. I have no hesitation in rejecting the complaint that the hearing was rushed, or the Applicant or the Applicant's witness placed under pressure. I regret to say that I consider the complaint to be contrived by the Applicant. As I have noted above, the hearing time was not foreshortened, and the witnesses were not rushed or put under pressure. I am particularly critical of the suggestion that the panel rushed the Applicant through his evidence when, as I have described, the Applicant's own representative questioned him first without any interference or interruption from the panel. I wish to say, having listened to the whole of the recording, that I regard the way in which the hearing was conducted by the chair and the panel members as exemplary.
37. It is clear that at some point the panel chair's image on the screen froze, but I am entirely unpersuaded that this resulted in any unfairness to the Applicant. Again, I regard the complaint as contrived and opportunistic. I do not accept that the Applicant had any significant problem in listening to the evidence of the psychologist.
38. For these reasons I reject the complaint of procedural unfairness.

Ground two – irrationality

39. As noted above, there was a difference of recommendation between the psychologist on the one hand and the POM and the COM on the other. The panel rejected the recommendation of the POM and the COM for reasons which I have quoted above.
40. In my view the reasons given by the panel are sound reasons for its conclusion and cannot be characterised as irrational. I do not think the panel was bound to prefer the reasons of the POM and the COM because they had more recent experience of the Applicant. The panel was entitled to place weight on the fact that the Applicant had demonstrated sustained and deliberate dishonesty in the area of his risk – intimate relationships – while in open conditions and even after his return to closed conditions. The panel was fully entitled to conclude that his risk had to be properly tested by a further period in open conditions before it could be confident that he could be safely released. Nor was the panel bound to conclude that additional licence conditions would manage his risk; the GPS tag would operate only for a limited time

whereas the panel was concerned with life-long risk, and any condition relating to a mobile phone can be defeated by dishonestly acquiring and using a second mobile phone. Nor was it inappropriate to suggest that the Applicant had struggled in open conditions: he had failed in the most important area of all for managing his risk, namely openness and honesty in personal relationships.

Decision

41. For these reasons I refuse the application for reconsideration.

David Richardson
7 September 2023