

[2023] PBRA 170

Application for Reconsideration by Leason

Application

1. This is an application by Leason (the Applicant) for reconsideration of a decision of the Parole Board dated the 24 August 2023 not to direct her release or recommend a move to open conditions following an oral hearing on 21 August 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 the oral hearing decision, the application for reconsideration and the dossier, consisting of 444 pages.

Background

4. The Applicant was convicted of murder on 1 September 1980 and received a life sentence with a minimum term to serve of 15 years. The Applicant was aged 21 when convicted and is now 64 years old. She was first released on 8 June 2015 and recalled on 12 January 2016. She was released again on 2 April 2019 and recalled on 12 September 2019. She was released again on 9 March 2021 and recalled on 20 July 2021. The Applicant was last released on 2 August 2022 and recalled on 15 September 2022.

Request for Reconsideration

5. The application for reconsideration is dated 15 September 2023.
6. The grounds for seeking a reconsideration are as follows:
7. The Applicant submits that the decision was irrational and that the hearing was procedurally unfair:
 - i. It is argued that the decision was irrational in that it went against the recommendations of the professional without good reason and no sufficient reasons have been given by the panel for not following the recommendations. Further, the panel lay emphasis as justifying their decision on the number of recalls without apparently taking account of the fact that the panel



considering re-release after the 2021 recall found that that recall was not justified.

- ii. It is argued that the decision was procedurally unfair in that the panel were biased or gave the appearance of bias. The Applicant relies on parts of the decision letter as evidence of actual or apparent bias.

Current parole review

8. This was the first review by the Parole Board following the recall on 15 September 2022. The panel heard evidence from the Prison Offender Manager (POM) and the Community Offender Manager (COM).

The Relevant Law

9. The panel correctly sets out in its decision letter dated 24 August 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

10. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).
11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. I have therefore not considered that as part of this application.


Irrationality

12. 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."

13. 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.
14. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be

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fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."*

Procedural unfairness

15. 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.
16. 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.
17. The overriding objective is to ensure that the Applicant's case was dealt with justly.

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

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

Discussion

19. I will deal with the two bases for seeking a reconsideration separately, but I will also finally consider their cumulative effect.
20. **Irrationality:** The panel first had to consider whether the decision to recall the Applicant on 15 September 2022 was a reasonable one. The panel decided that it was and on the evidence they were entitled to take that view. As I understand it that decision is not challenged.
21. The panel then considered whether the test for release was met. The panel considered that the risk of the Applicant re-offending was medium. The panel gave reasons for this and they, having heard the evidence, were entitled to come to this view.
22. While both the POM and the COM accepted that the Applicant could be aggressive, they were both of the view that any risk presented by the Applicant could be managed in the community.

23. The panel did not agree. They gave reasons for their decision which included the number of recalls and failures in open conditions. The panel concluded from this that the Applicant did not put into practice the learning which she got from interventions in prison. Further, the panel found that the Applicant had poor insight into how she could get drawn into risky situations. The panel concluded *"she underestimates her risks, is highly opinionated and demonstrates a wilful disregard for compliance with supervision."*
24. The panel found that the Applicant had a belligerent attitude towards the proposed licence conditions which led them to the conclusion that she was unlikely to comply with them if she disagreed with them. The panel also found that there had been a pattern of poor behaviour in custody and in the community. The panel were concerned that the Applicant did not accept that she had behaved in a concerning manner on her last release and the panel were not convinced that she had not used drugs during her time on licence.
25. The panel gave clear reasons for disagreeing with the professionals' opinions. The Board does not have to agree with the recommendations made by professionals as it is the panel that must be satisfied that the test is met. The panel heard evidence including from the Applicant and were not satisfied that the test was met. They clearly did not ignore the opinions of the professionals, but they did not agree with them. The professionals relied on the lack of actual violence by the Applicant to support their view. As the panel made clear at paragraph 4.7 of their decision, they were of the view that the aggression that the Applicant has demonstrated in closed conditions could escalate to actual violence when less restrictions were applied.
26. In my judgment, save for one matter which I will discuss in greater detail, the panel were entitled to reach the conclusion that they did, and they have given adequate details to explain why they disagreed with the recommendations of the professionals. It needs to be remembered that the panel had the opportunity to assess the witnesses which will have contributed a significant amount to their decision and whether they agreed with the recommendations or not.
27. As is set out in paragraph 21 of this decision, the panel relied in part in reaching their decision on their view that *"[The Applicant] has completed relevant interventions during her sentence, but there is a lack of evidence that the learning has been consolidated given her failures in open conditions and her now four recalls on licence."*
28. That includes the recall on 20 July 2021. The panel who initially considered that recall decided that the decision to recall was not justified on the information known to the Respondent at the time the recall was ordered. That panel were required to consider the facts of that recall in detail.
29. At paragraph 2.4 of the decision the panel set out the facts which led to the recall and the account given by the Applicant at the hearing. It is clear that what had happened was explored with the Applicant during her evidence. Nowhere in the decision letter is there any mention of the finding of the previous panel that the decision to recall on that occasion was not justified on the basis of the information available to the Respondent at the time.



30. In my judgment the panel were entitled to take into account the evidence given about this recall in the hearing. Also, in my judgment, the panel should have taken into account the finding of the previous panel in reaching the conclusion I have set out at paragraph 27.
31. There are two alternatives. The panel were aware of the previous decision but did not mention it or they were unaware of it or had forgotten about it before they reached their decision and therefore did not take it into account.
32. It is unlikely in my view that they were unaware of it. It is mentioned in several parts of the dossier, and it is likely, although I cannot be sure, that it was mentioned in the legal representative's submissions. It is in the earlier submissions in the dossier.
33. Although that is my view I will deal with this matter on the basis that either the panel were unaware of that finding or they had forgotten it when they came to discuss their conclusions as this is the most favourable basis for the Applicant.
34. Where a panel acts under a mistake of fact it does not necessarily render the decision irrational. It depends what affect, knowing the correct position would have had, on the decision and whether knowledge of the correct facts would render the decision irrational.
35. If the panel was acting under a mistake of fact or had forgotten that finding that was capable of having some significance, the conclusion that the panel set out in paragraph 4.3 would only be based on three recalls rather than four together with the failures in open conditions. While it was capable of being of significance, in my judgement it would not have had any material effect on the decision, nor does it render the decision irrational. It would have made no difference to the conclusion whether it was based on three recalls and failures in open rather than four recalls.
36. It would of course have been better if the panel had taken note of and given effect to the decision of the previous panel, but I do not consider that any mistake materially affected the conclusion of the panel and nor should it have done. Recognising the mistake of fact does not render the decision of the panel irrational.
37. **Procedural unfairness:** I accept as is set out above that the hearing would be procedurally unfair if the panel was not impartial. I also accept that because of the difficulty of proving actual bias, if there is the appearance of bias that that would be sufficient to establish procedural unfairness. I also accept the quotations from **Porter -v- McGill and Hardisty** in the reconsideration application as being accurate statements of the law on the basis of which I will make my decision.
38. Bias is a serious allegation to make against a panel. As with any Judges, it is essential that Parole Board members act fairly and are impartial. I have considered with care the evidential material which is relied on to support this contention. I find it entirely unconvincing.
39. The Applicant first relies on a passage from 2.6 of the decision: "[The Applicant] *denied any substance misuse. She said that at the time she had suffered another*



mini stroke after reporting earlier to be feeling unwell. Surprisingly, neither she nor the AP staff had summoned emergency assistance but she went to the local Hospital."

40. I do not think that that comment can conceivably be interpreted as demonstrating bias. The panel were clearly dubious about the Applicant's denial of substance abuse. If the comment does relate to that, the panel were perfectly entitled to reach that conclusion having heard the Applicant give evidence about it. If a panel does not believe a prisoner it is not an indication of prejudice, it is a view taken on consideration of the evidence. The comment may however be simply an understandable expression of surprise that as a result of a mini stroke the Applicant was not taken to hospital. Whatever the proper interpretation, it is not capable of being an indication of bias.
41. The other indications of bias are said to come from comments in the decision relating to the Applicant's position as a transgender woman. I do not consider that they do indicate bias. A comment is made about the Applicant wearing female underwear. The Applicant is in a male prison where it might be deemed inappropriate to wear female underwear 'in front of prisoners and staff'. It is not the wearing which is being criticised but wearing it 'in front of prisoners and staff'. Again, in my judgment this together with questioning the Applicant as to whether she has had surgery does not support a suggestion of or the appearance of bias.
42. Complaint is made of what was said at paragraph 1.10 of the decision. If that represented the view of the panel of the evidence, then it was relevant to risk and does not in my judgment indicate bias or give the appearance of bias.
43. Finally, complaint is made of the description at paragraph 4.3 of the decision of the Applicant as '*opinionated*'. Again, the panel were indicating that as the Applicant was so opinionated, in their view, she was less likely to be compliant with supervision. If that was their view, it was relevant to risk and does not in any way indicate bias or give the appearance of bias.
44. Having considered the individual complaints, I have considered whether they cumulatively justify ordering reconsideration. I have found that the third recall could and should have been dealt with differently but does not justify an order for reconsideration. I do not think that any of the other complaints are justified and do not add to that one matter that I have expressed concerns about.

Decision

45. 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.

Sir John Saunders
05 September 2023