

[2023] PBRA 209**Application for Reconsideration by Barron****Application**

1. This is an application by Barron (the Applicant) for reconsideration of a decision of an oral hearing panel. The decision was dated the 24 October 2023. The panel made no direction for release.
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. The papers were the dossier consisting of 1391 pages, the oral hearing panel decision, the application for reconsideration submitted by the Applicant and the response by the Secretary of State.

Background

4. The Applicant was sentenced on 30 August 2007 and is serving a sentence of life imprisonment for offences committed between 1994-2006 against female children aged between three years and twelve years old. The offences included rape, attempted rape, sexual assault, indecent assault, indecency with a child, causing or inciting a child under 13 to engage in sexual activity, assault of a child under 13 by digital penetration and the taking and possessing of indecent photographs.
5. The Applicant is now aged 70. He was aged 54 when sentenced.

Request for Reconsideration

6. The application for reconsideration is dated 19 November 2023.
7. The grounds for seeking a reconsideration are set out below. I have also set out the discussion in relation to each ground.

Current parole review

8. This was the third review by the Parole Board of the Applicant's sentence. The reference from the Secretary of State was to consider release and if not releasing to consider any recommendation relating to a transfer to an open prison. The case



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suffered considerable delays. The initial referral was made in 2020. There were a number of adjournments.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 24 October 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.
10. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

11. Pursuant to 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)).
12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include life sentences (rule 28(2)(a)).
13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Illegality

14. An administrative decision is unlawful under the broad heading of illegality if the panel:
 - (a) misinterprets a legal instrument relevant to the function being performed;
 - (b) has no legal authority to make the decision;
 - (c) fails to fulfil a legal duty;
 - (d) exercises discretionary power for an extraneous purpose;
 - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - (f) improperly delegates decision-making power.
15. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

16. 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."

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

Procedural unfairness

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.
22. 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)

23. The Respondent offered representations in connection with the requirements of the Applicant's licence conditions while on temporary leave. These matters were discussed at the hearing and do not, in my view, add to the issues addressed below.

Grounds and Discussion

Ground 1

24. The Applicant submits that the panel's process deviated from what the Applicant expected, in that it did not follow the 'aims' set out in an earlier direction of the Panel Chair.

Discussion

25. I have considered this representation by the Applicant and also the written directions (referred to by the Applicant) which were issued by the Panel, before the hearing date, in November 2022. Those written directions referred to the fact that there had been a change in circumstances, and a perceived elevation in risk because of the Applicant's behaviour. This reference related to incidents which had taken place while the Applicant was residing in an open prison.

26. I have also considered the final decision in this case. It is clear to me that the panel's procedures were, as would be expected, an analysis of any risk posed by the Applicant, and in particular any issues which had arisen following the allegations which led to the Applicant's return to a closed prison. The Applicant would also have been aware of the explanatory leaflet which was included in the dossier. The leaflet is called "A guide to help with your parole review" the leaflet sets out the process which will take place and the questions that need to be addressed by the Parole Board panel. The Applicant was also legally represented and would most certainly have been advised of the process in this hearing. I therefore do not find that this ground amounts either to irrationality or to procedural irregularity.

Ground 2

27. The Applicant asserts that the panel did not "*probe or question*" the witnesses in sufficient depth about the allegations and concerns.

Discussion

28. Having considered the written decision by the panel in this case it is clear that the panel addressed, in some detail, the allegations which led to the Applicant being returned to a closed prison. Panels of the Parole Board are at liberty to test evidence in such ways as they deem appropriate, in accordance with their duty to assess risk. They should take account of the law, of guidance published by the Board and of the overarching necessity to act fairly. The Applicant, in this case was legally represented and was given the opportunity both himself and through his legal representative to raise any issues beyond those which were raised by the panel. Having considered the decision letter in this case, there are numerous references to various aspects of the evidence, taken by the panel, and considered by them in reaching their decision. The panel addressed the issues which clearly related to potential risk issues. I can find no evidence of an absence of appropriate assessment of that evidence and therefore no evidence of procedural irregularity or irrationality.

Ground 3

29. The Applicant's right to respond was not sufficient and he was not given an opportunity to 'air' the evidence.

Discussion

30. This case had been listed for a number of months and had been adjourned on occasions. The Applicant was legally represented. The Applicant was well aware of the nature of the proceedings and had every opportunity to adduce evidence either in advance of the hearing or at the hearing itself. This ground is vague in its content and argument. The Applicant notes that the panel had indicated that it was likely that they would focus much of their consideration upon negative aspects. Inevitably, in a hearing which relates to the risk of serious harm, it is highly likely that there will be a focus upon negative evidence. The panel were, however, obliged to consider all aspects of the risk assessment. A careful reading of the decision indicates that the panel took account of appropriate positive factors; for example at paragraph 2.6 the panel noted the positive work that had been undertaken by the Applicant on a behavioural course in prison. At paragraph 2.25 the panel noted positive engagement whilst living on a specialist wing of a prison. At 2.28 it was noted that the Applicant had retained a positive behaviour status whilst at his current prison placement. The panel also highlighted a number of concerns relating to the Applicant's progress in prison and discussed those concerns within the hearing. The Applicant had every opportunity at the hearing, and before it, to adduce any evidence which he wished to produce. I therefore find no evidence of irrationality or procedural irregularity in the conduct of the hearing.

Ground 4

31. The Applicant submits that a witness and the author of a report, which set out the reasons for the Applicant being transferred from an open prison to a closed prison, should have been present 'in person' at the hearing.

Discussion

32. This ground is not developed further than the comment that the witness should have attended in person. Parole board panels are able and prepared to make arrangements for witnesses to attend a hearing at a prison, in person. Where a party takes the view that such a requirement is necessary and appropriate and the panel agree, an order will be made. However a large number of hearings are now conducted by video. The clear advantage of such arrangements are that hearings can be heard more swiftly and more efficiently. There is no evidence that either the Applicant himself or his legal representative made any application for the witness to attend in person, or indeed could adduce any evidence to support a reason for such an attendance in person. This ground does not therefore amount, in my view, to procedural irregularity or irrationality.

Grounds 5 and 6

33. I have considered a bundle of documents entitled "*additional comments re application for reconsideration*". Within the bundle of documents, the Applicant indicates that he was expecting the panel to focus upon concerns and allegations which are listed by the Applicant. The Applicant also sets out explanations for various issues which were clearly raised at the hearing itself.

Discussion

34. The reconsideration process is not a rehearing of the evidence. The oral hearing panel in this case had the advantage of an extensive dossier containing reports and other material. They also had the advantage of seeing and hearing the Applicant as well as the witnesses. The Applicant was legally represented throughout. The role of the panel was to assess the evidence presented to them and make a determination upon that evidence. It was plainly a matter for the panel to determine which evidence and opinions they preferred. It is clear from the comprehensive and detailed decision, provided by the panel, that all matters which were presented at the hearing were appropriately considered by them. The panel took account of the fact that the Applicant challenged some of the inferences to be drawn from his behaviour. The panel took a differing view to that of the Applicant in relation to much of his behaviour and took the view that his evidence was lacking in credibility in many respects. The test to be applied in connection with an application for reconsideration is whether the panel's reasons, as set out in their decision, are soundly based upon evidence as well as rational and reasonable or at least not so outrageous in the sense expressed above. I have carefully considered the decision and the representations of the Applicant in this case. I consider that the decision of the panel was neither irrational in the legal sense set out above, nor procedurally irregular or unfair. For that reason, the application for reconsideration is refused.

Decision

35. 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.

HH S Dawson
21 December 2023