

[2023] PBRA 88

Application for Reconsideration by Lewis

Application

1. This is an application by Lewis (the Applicant) for reconsideration of a decision of an oral hearing panel dated 17 April 2023. The decision of the panel was not to direct 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. These are the dossier consisting of 243 pages; the Application for Reconsideration submitted by the Applicant; and the response by the Secretary of State (the Respondent).

Background

4. The Applicant pleaded guilty to offences of causing/inciting a female under 16 to engage in sexual activity and on a separate occasion committing an act outraging public decency and breach of a sexual offences prevention order. He received an extended determinate sentence of 10 years comprising a custodial term of 6 years and an extended licence of 4 years. He was 33 years old when sentenced. He is now 37 years old.

Request for Reconsideration

5. The application for reconsideration is included in two documents, one dated 24 April 2023 and a CPD 2 (Parole Board form) dated 27 April 2023. I considered both documents. The Applicant initially had difficulty in securing the correct form from the prison authorities and sensibly submitted a letter. The Applicant then submitted a form. The application was properly and validly made.
6. The grounds for seeking a reconsideration are set out below. The discussion and decision relating to each ground is also set out below.

Current parole review

7. The oral hearing took place on 5 of April 2023. The panel consisted of a judicial Chair, a psychologist member and an independent member. The witnesses were the Applicant's community probation officer, his prison offender manager, and a prison commissioned psychologist who had prepared a report. The Applicant was legally represented.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 17 April 2023 the test for release. The wording of the test is now included in a standard template form.

Parole Board Rules 2019 (as amended)

9. Under Rule 28(1) of the Parole Board Rules 2019 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. 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)).

Irrationality

10. 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."

11. 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.

12. 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

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.
16. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).
17. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.
18. 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."*
19. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Respondent

20. The Respondent offered no representations upon the reconsideration, however it was indicated that a place on a suitable course was available and could be completed in 16 weeks.

Grounds and Discussion


Ground 1

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The panel considered an indefinite period in relation to risk.

Discussion

21. The period of risk under consideration by Parole Board panels has been the subject of recent decisions in the High Court and Court of Appeal. The most recent decision ***Dich and Murphy [2023] EWHC 945 (Admin)***, indicates that the risk period for parole panels is not time limited to the end of sentence date. The law does not set a time limit on the risk consideration period. The court confirmed, as it did in an earlier case (Johnson), that there is no temporal element in the statutory test for release and consequently, panels may consider risk beyond conditional release dates (CRD) and Sentence Expiry Dates (SED). Although the court found that panels are still empowered to consider post sentence risk for determinate sentences, when assessing future risk, there must be a causal link between continued detention and the prevention or reduction of risk. It is only those future risks, which might be avoided or reduced by detention until the end of the sentence, that the panel may take into account.
22. Accordingly, I reject the submission that the decision to take account of an indefinite risk period was irrational.

Ground 2

A third party was referred to by the psychology witness – The third party was not a witness at the hearing. The evidence of the third party may have influenced the decision of the panel and could not be challenged.

Discussion

23. I have considered the panel decision in this case. The panel (at paragraph 2.8) made clear that they had considered the evidence of the prison commissioned psychologist. Their assessment of that evidence indicated that the opinion of the psychologist was that the Applicant should complete and intervention (HSP). Without such an intervention the psychologist took the view that the Applicant's risk of serious harm could not be managed in the community. The position was simply and clearly put by the Panel. There is no reference to the panel being influenced by any third party evidence. The panel were obliged to rely upon the evidence as presented. It is clear that they relied upon the expressed opinion of the prison commissioned psychologist. There is no evidence of reliance on any other information. I therefore reject this ground as indicating a procedural irregularity.

Ground 3

Poor advice from wing staff and others regarding case preparation

Discussion

24. The Parole Board are an adjudicating body. The panel would not be empowered to make decisions or intervene concerning the issue of a prisoner's case preparation.



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The Applicant was however legally represented and thus had access to advice about case preparation. This is not a ground amenable to reconsideration.

Ground 4

The suggested behavioural course (HSP) could not be completed before release.

Discussion

25. The position of an oral hearing panel is to assess risk and apply the statutory test. As was set out in the decision. The view of the panel was that the Applicant did not meet the criteria of the statutory test, namely did it remain necessary, in order to protect the public, that the Applicant be detained. The panel are obliged to take account of the actual position at the date of hearing. The fact that the Applicant may not have had an opportunity to complete an intervention before a release date is not a relevant factor to be considered by an oral hearing panel. This ground therefore does not amount to irrationality in the sense set out above.

Ground 5

The panel were not confident that the Applicant would comply in the community, although other witnesses disagreed.

Discussion

26. The oral hearing panel had the opportunity of hearing from the witnesses and the Applicant, they also considered the dossier. The role of the panel is to reach their own conclusion about the evidence and to explain the basis of that decision. The panel clearly rejected the view that the Applicant would be open and honest about feelings and what was happening in his life. The index offence was a clear example of the Applicant failing to be honest about what was happening in his life. Additionally, the panel, in any event, indicated that it was their view that the risk of harm was imminent in the case of the Applicant and that he lacked the internal ability to manage or deflect risky situations. The panel were entitled to and indeed obliged to reach their own independent decision upon the facts. The panel were not obliged to accept the views of witnesses, although they had an obligation to explain their decision, which, in my determination, they did. I do not therefore find that the panel acted irrationally in reaching the conclusion they did about the openness and honesty of the Applicant.

Ground 6

The Panel failed to mention in- cell work and 1-1 work undertaken.

Discussion

27. The Applicant refers to work completed using workbooks and 1-1 meetings. Whilst it is clear that the Applicant was amenable to such interventions and indeed worked as an education worker in the prison, supporting others in this work. The panel's view was that focused, accredited intervention work was the preferred option in the light of the Applicant's challenges. Whilst I accept that the panel omitted to mention



the unaccredited work undertaken by the Applicant, I am not persuaded that this amounted to irrationality of the overall decision. I therefore reject this ground as supporting an application for Reconsideration.

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.

HH S Dawson
15 May 2023