

[2024] PBRA 189

Application for Reconsideration by Creighton

Application

1. This is an application by Creighton (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 30 August 2024 not to release the Applicant following an oral hearing on 8 August 2024.
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 application for reconsideration, the response from the Secretary of State (the Respondent), the dossier and the decision letter. I have also listened to the digital audio recording of the hearing.

Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP) imposed on 9 September 2011 for the offence of causing grievous bodily harm with intent (s18). The minimum term which was ordered to be served before the Applicant could be considered for parole was 5 years (less time served on remand).

Request for Reconsideration

5. The application for reconsideration is dated 3 September 2024 and has been made by solicitors acting on the Applicant's behalf. Unusually the representations do not contain the name of their author or the firm that represents the Applicant.
6. The grounds for seeking a reconsideration are that there has been procedural unfairness. The procedural unfairness is said to have occurred as follows:
 - (i) The panel have recommended open conditions knowing that the Applicant does not meet the test for open conditions;
 - (ii) In breach of rule 5.19 - the questioning of the Applicant was unfair, with the panel being overly critical of him, not taking account of the impact of the IPP or his mental health issues and there was no empathy or sensitivity from the panel;



- (iii) An improper observation was made about the reason the independent psychological report had not been disclosed;
- (iv) Questions were asked which were not relevant to risk – whether his partner works;
- (v) In breach of rule 5.20 – the manner in which questions were asked, including the rehearsal of information already established, putting words into the witness’ mouth, unfairly or persistently challenging risk assessments/findings, posing speculative / hypothetical questions;
- (vi) In breach of rule 5.43 – the panel chair did not interject to challenge the nature or style of questioning;
- (vii) Discussing a progressive regime which amounted to commenting on specific risk reduction which was improper;
- (viii) Behaving inappropriately towards the Applicant;
- (ix) Making a judgment on the Applicant prior to the hearing starting.

7. In view of the grounds submitted I asked for, and have listened to, the recording of the hearing.

Current parole review

8. The case was referred to the Parole Board by the Respondent on 10 February 2022. This was the first review after the Applicant’s recall to prison on 11 November 2021, having been unlawfully at large until 24 January 2022. The referral was considered by Member Case Assessment (MCA) panels on 31 March 2022, 17 June 2022 and 19 August 2022 when legal representations were directed and further information directed in relation to charges arising from alleged offending whilst on licence. The referral was considered again by an MCA panel on 5 January 2023 and directed to an oral hearing. The oral hearing was scheduled for 20 November 2023.
9. The oral hearing of 20 November 2023 was deferred due to insufficient time being allocated by the prison for the video link. The oral hearing was rescheduled to 15 March 2024. Panel Chair Directions were issued on 19 February 2024. The oral hearing was deferred for a second time on the day of the oral hearing of 15 March 2024 due to the Community Offender Manager (COM) being unprepared for the hearing. The oral hearing was rescheduled to 8 August 2024.
10. The oral hearing took place via remote video-link on 8 August 2024, before a three member panel with an independent chair, psychologist member and an independent member. The dossier comprised 525 pages. Evidence was heard from the Applicant, the Prison Offender Manager, a prison psychologist, a prisoner commissioned psychologist and the COM. The Applicant was legally represented.
11. Panel Chair Directions were made on 22 August 2024 adjourning the date of issuing the decision letter due to the ill-health of the panel chair.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 30 August 2024 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.

13. 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)

14. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
15. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
16. 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**.

Procedural unfairness

17. 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.
18. 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.
19. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Respondent

20. The Respondent has offered no representations.

Discussion

21. There are a number of different grounds set out in the application for reconsideration, each based on procedural unfairness. Within the reconsideration application it is specifically said that there have been breaches of a number of the 'Parole Board Rules'.
22. There is no identification whatsoever in the application of which of the Parole Board Rules are said to have been breached. There is reference to some of the text of the Parole Board Oral Hearing guidance, in particular the guidance at 5.19, 5.20 and 5.43. This guidance for panels does not form part of the Parole Board Rules 2019.

Ground 1 – The recommendation for open conditions knowing that the Applicant does not meet the test

23. 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**.
24. It is therefore not open to the Applicant to challenge via Rule 28 the decision of the panel to recommend his transfer to open conditions. Accordingly, this ground of the application is dismissed.

Ground 2 – Questioning

25. Grounds (ii) – (viii) all relate to the questioning of the Applicant by the panel during the oral hearing. As set out above, I have listened to the recording of the oral hearing in order to fully consider these grounds.
26. Rule 24(2)(b) and (c) of the Parole Board Rules 2019 expressly provide that the panel may ask any question to satisfy itself of the level of risk of the prisoner and must conduct the hearing in a manner it considers most suitable to the clarification of the issues before it and to the just handling of the proceedings. It is for the panel alone to determine the questions they wish to ask in order to determine these issues.
27. It is plain from the audio recording of the oral hearing that there is no substance in the claim that the panel conducted the questioning in a way that was inappropriate, improper, overly critical or unfair to the Applicant. Questions were asked of the Applicant by two of the panel members and his legal representative, with him having adequate opportunity to put his own case. The panel chair also discussed the previous adjournment with the Applicant in a fair and measured manner, with both parties reflecting on the other's perspective.
28. At no point during the hearing did either the legal representative or the Applicant object to the form or substance of the questioning or the general manner in which the oral hearing was conducted. I do not consider there was any procedural impropriety or unfairness in the conduct of the oral hearing nor more particularly in questions which were asked of the Applicant or the way in which they were put. The representation that the panel "*behaved inappropriately*" towards the Applicant is not remotely reflected in the audio recording or the considered decision letter. In my judgment the hearing was procedurally fair with the Applicant's case being dealt with justly.

29.It follows that there is nothing in this ground and I dismiss it.

Ground 3 - Making a judgment on the Applicant prior to the hearing starting.

30.It is claimed that the panel made a judgment on the Applicant prior to the hearing starting. The ground is set out in the following way in the application for reconsideration: "*They made a judgement on [the Applicant] before the hearing even started. It was clear from the outset that release was not going to be the outcome.*" There is no evidence provided in support of this ground which is entirely speculative. Nothing in the decision letter or the audio recording of the oral hearing supports this ground and I dismiss it.

Decision

31.For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Angharad Davies
24 September 2024