

[2019] PBRA 5

## Application for Reconsideration by Hall

### Decision of the Assessment Panel

#### Application

1. This is an application by Hall (the Applicant) for reconsideration of the decision of a two-member panel not to direct his release, following an oral hearing which convened on 13 June 2019.
2. I have considered this application on the papers. These were the dossier, the provisional decision letter of the panel dated 9 August 2019, the five documents comprising the application for reconsideration and the response of the Secretary of State on 29 August 2019, indicating that he did not offer representations.

#### Background

3. The Applicant is serving an indeterminate sentence of Imprisonment for Public Protection (IPP) imposed in 2006 for sexual activity with children. His tariff expired in 2008. He was released on IPP licence to a probation hostel in June 2017 but recalled in November 2017. He was re-released at the direction of a parole panel in June 2018 but recalled again last December.

#### Request for Reconsideration

4. The request was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded. The document explains how the assessor will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration.
5. The documents sent in support of this application are four letters from the Applicant dated 15, 16, 27 and 28 August 2019 and representations dated 27 August 2019 from his solicitor, who also appeared at the hearing on 13 June 2019.
6. This composite application makes a complaint of procedural unfairness and submits that the panel acted irrationally in recommending that he progress to open conditions rather than be released.

## Current parole review

7. In January 2019 the Secretary of State referred the Applicant's case to the Parole Board for his eighth review. The terms of reference asked the panel first to consider whether it was appropriate to direct the Applicant's release. If not, the panel was invited to advise the Secretary of State on whether the Applicant should be transferred to open conditions.
8. The panel heard oral evidence from the Applicant, his Offender Supervisor and his past and present Offender Managers.
9. The provisional decision letter records that elements of the recall were disputed, and the panel was satisfied on all the evidence available to it that the recall was justified.
10. The panel took particular care to clarify the detail of the events that led to the Applicant's recall, adjourning for further information on this and other points that had arisen during the course of the oral evidence. The Applicant's solicitor had the last word, providing written closing submissions on 1 August 2019. He argued for re-release rather than progression to open. No complaint of procedural unfairness was then made on the Applicant's behalf. The hearing was said to have been positive in terms of the evidence given by the Applicant and his very experienced Offender Supervisor.
11. The Offender Supervisor supported re-release but the Offender Manager did not. The latter report author believed that the Applicant posed a high risk of serious harm and this could be imminent. His record of compliance with licence conditions was poor. The Offender Manager said he was not safe to be released, but he could be managed in open conditions, where he could prove himself in a staged and tested way.
12. The panel was not satisfied that the Applicant's risks could be safely managed in the community and made no direction for release. However, the panel concluded that the Applicant could be safely managed in conditions of lesser security where he would have the chance to demonstrate that he could respond to trust being placed in him and comply with what was required of him. The panel therefore recommended to the Secretary of State that he be transferred to open conditions.

## The Relevant Law

13. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
14. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.



15. In **R (on the application of 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."*

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

## Discussion

16. Although the Applicant is legally represented, he has written directly to the Board both to initiate this reconsideration process and several times during the post-hearing phase of the current parole review. The provisional decision letter sets out the concerns of the panel chair about the tone and content of the first such letter. His subsequent correspondence has been clearer and his four letters in support of this application are expressed with moderation and courtesy. I can find within them no description of a specific act or omission in relation to the conduct of the oral hearing or the parole review as a whole which could be said to constitute procedural unfairness. The letters are simply re-arguing his case, especially in relation to the disputed events that led to his recall. It is not open to me to reconsider the facts as the Applicant begs me to do. I am not a second reviewing panel.
17. The representations from the Applicant's solicitors largely reflect the Applicant's instructions and repeat the arguments that the panel did not accept. It is said that the matters that counted in his favour (such as addressing his drug habit in custody) were not given proper weight. The factors said to undermine the contested statements of the complainant to the Offender Manager and other probation staff before recall are again rehearsed.
18. It is plain from the adjournment for more information and the reasoning of the panel that it discharged its duty to examine the disputed circumstances and necessity for the recall with conspicuous fairness. The panel complied with **Calder [2015] EWCA Civ 1050**. Its reservations about the shortcomings of the evidence of the complainant are reflected in its mixed findings of fact on this aspect of the case. Due caution was exercised with regard to this evaluation of this hearsay.
19. The panel explained in its detailed reasons how it had analysed, weighed and balanced the competing views and facts. The conclusion is a succinct and well-rounded summation of the relevant matters. It stated and applied the right test. It was correctly focused on risk throughout. The panel was reasonably entitled to



prefer the risk assessment and recommendation of the Offender Manager to that of the Offender Supervisor and reach the conclusions it did on the facts as it found them to be. The legal test of irrationality is a very strict one. This case does not meet it.

**Decision**

20. The complaints of procedural unfairness and irrationality are not made out on the papers before me.

21. Accordingly, this application is dismissed.

Anthony Bate  
4 September 2019