

[2019] PBRA 51

## Application for Reconsideration by Brogan

### Application

1. This is an application by Brogan (the Applicant) for reconsideration of a decision communicated in a decision letter dated 27 September 2019 (the decision letter) following an oral hearing of a Parole Board panel on 16 August 2019. The decision was not to release the Applicant nor to direct his transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 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.

### Background

3. The Applicant is serving a discretionary life sentence for an offence of rape for which he was sentenced on 20 July 1979. The tariff was set at two years. On 15 February 2008, the Applicant was further sentenced to an indeterminate sentence of imprisonment for an offence of false imprisonment with intent to commit a sexual offence. The tariff in this case was also set at two years and expired in February 2010.

### Request for Reconsideration

4. An application for reconsideration was made on 16 October 2019 by solicitors acting on the Applicant's behalf who had represented him at his oral hearing. That application was in time. On 21 October 2019 further grounds of application were received from the Applicant himself. He has since requested the Reconsideration Panel to ignore the representations made on his behalf by his solicitors which he says were submitted without his approval.
5. The Applicant, in his own representations, now contends that the panel's decision was irrational and procedurally unfair on, in substance, the following grounds:
  - a. Owing to extremely dense cataracts in both his eyes he was not able to read the lengthy dossier or associated paperwork in his case. His request for a larger print dossier was declined on technical grounds and his request for a magnifying glass was also declined on the grounds there were none available;
  - b. His attempt to take notes during the hearing (and to read them) was likewise hampered by his poor eyesight rendering his evidence both inadequate and flawed;

- c. Poor and deficient hearing likewise hampered his ability to present his case;
  - d. He only met his legal representative 10 minutes prior to the hearing who complained he had only two days to prepare the lengthy and complex dossier. Nevertheless, the Applicant was reluctant to ask for an adjournment since the hearing had been adjourned a number of times previously.
6. The Secretary of State responded to these grounds in a letter dated 29 October 2019 to the effect that his Offender Manager, his Custody Prison Officer and others had had discussions with the Applicant where he had been able to voice his opinion and concerns regarding recommendations and various reports contained in the dossier. As to the hearing difficulties, it was said that the Applicant told witnesses from time to time that he had difficulty hearing whereupon witnesses repeated themselves and spoke louder.

### **The Current Parole Review**

7. The current parole review under consideration was the Applicant's third since his previous recall. It appears he has been released and recalled three times since 1994, the last being in 2007.
8. The progression to the ultimate decision letter was considerably protracted. The first oral hearing was scheduled for 5 February 2018. (Even that date was delayed owing to awaiting medical reports.) Evidence was taken on 5 February, but the hearing was adjourned for more information to 26 June 2018 when further evidence was taken. The panel was due to sit again on 7 November 2018, but the hearing was again adjourned for further reports and assessments. It reconvened on 28 February 2019 and yet again adjourned owing to lack of provision of information requested. Thus far the Applicant had been represented by the same legal representative and the Secretary of State had also been represented. The Applicant's case had also been one for release. The next hearing (15 May 2019) was further adjourned as the Applicant decided to dispense with his legal representative and wished time to instruct a new one and arrange for the attendance of an independent psychologist.
9. Finally, on 16 August 2019 the panel reconvened and concluded the oral evidence. The panel heard evidence from a prison psychologist in training and her supervisor, from the independent psychologist, the Applicant's Wing Officer, his Offender Supervisor and Offender Manager and also from the Applicant. They also had their record of the evidence taken at the previous hearings. The dossier at this stage was already 724 pages.
10. Even then the hearing had to be adjourned for the provision of up-to-date medical and other reports, and written closing submissions, all of which were provided by the end of September 2019 by which time the dossier was 809 pages.
11. The Applicant was now represented by a new legal representative whose application was for release, but after hearing the evidence of the professionals (including that of the independent psychologist who modified her earlier opinion)



decided to amend the application to ask for a recommendation for transfer to open conditions. The Secretary of State continued to be represented.

12. Whilst there was some support for a move to open conditions, the tenor of the evidence on the whole was against release and against a move to open conditions. Even, as noted above, the independent psychologist modified her previous view in favour of release to a more cautious approach. The prison psychologist supported neither release nor a move to open conditions on the basis of risk and the need for further 1:1 work.
13. The decision letter was thorough, balanced, and lengthy, running to 15 pages. The panel noted the Applicant's physical disabilities (being a wheelchair user – but not to the point, it was also noted, that he could not get out of it and respond in an aggressive manner, should he so choose). The panel noted the up-to-date medical report which included reference to his poorly controlled diabetes. (It also noted his eye problems due to cataracts.) The independent psychologist assessed the Applicant's risk of sexual re-offending as moderate, with moderate imminence. The prison psychologist assessed the risk and imminence as high. She may have been a trainee but was there with her supervisor. The panel were entitled to assess, accept and prefer her evidence. In reaching their conclusions the decision letter expressly noted the Applicant was substantially over tariff and his current medical condition. The result was, as mentioned, after a thorough review, not to direct release nor to recommend a transfer to open conditions.

## The Relevant Law

14. 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.
15. As noted above, 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.
16. 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.



17. Procedural unfairness essentially means there must have been some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed, unjust or irrational result. Obvious examples are failure to take into account matters which the panel ought to have taken into account or taking into account matters they ought not. The overriding objective, however, is to do justice.

## Discussion

18. On the evidence before me I am totally unpersuaded that the Applicant suffered any injustice as a result of his eyesight or hearing difficulties. He was legally represented throughout. The written closing submissions on both sides made no reference to any difficulties the Applicant claims as regarding the reading of the dossier, his taking or reading of his notes or of hearing the evidence. The Secretary of State's representations to this panel make it plain (as must have been the case) that over the prolonged adjournments of this current review the Applicant had plenty of opportunity, despite the lengthy dossier, to discuss its contents with his legal representatives, with his Offender Managers and his Custody Prison Officers. Witnesses repeated evidence when indications were given as to difficulty of hearing. The Applicant's new legal representative was a result of his having discharged his previous solicitor. That new representative's closing written submissions were thorough, careful and cogent. I have, however, as the Applicant requested, directed my attention to his representations, not those of his legal representative.

19. The panel, in reaching its balanced decision, was entitled to read, see, hear and test the evidence for themselves; that was their task. They plainly and explicitly preferred the views of those against recommending release or open conditions; they clearly stated their reasons for doing so and there was ample evidence to justify it. Some concerns might be expressed at the very lengthy delay between the start of the panel hearing in the current review and the commencement of the evidence (February 2018) and its conclusion (September 2019), and whilst justice delayed can, in some circumstances, amount to justice denied, the decision letter was carefully balanced, contained a thorough review of the evidence, and was neither unreasonable nor irrational. No injustice was done to the Applicant on account of his physical difficulties.

## Decision

20. For the reasons I have given, I consider the decision was neither procedurally unfair nor irrational. Accordingly, the application for reconsideration is refused.

HH Roger Kaye QC  
5 November 2019

