

[2020] PBRA 170

Application for Reconsideration by Rodgers

Application

1. This is an application by Rodgers (the Applicant) for reconsideration of a decision of decision of an oral hearing dated 5 October 2020 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 24 October 2008 following a conviction for attempted murder to which he pleaded guilty. A minimum term of four years (less time spent on remand) was imposed. His tariff expired on 31 May 2012. The Applicant was 52 years old at the time of sentencing and is now 64 years old.

Request for Reconsideration

5. The application for reconsideration is dated 16 October 2020. It is unusual in that it contains submissions from the Applicant in person as well as from solicitors acting for him.
6. The Applicant's grounds for seeking a reconsideration are as follows:
 - a. He was not asked any relevant questions relating to his ability to cope in open prison conditions or whether he was a risk to the public and this was procedurally unfair.
 - b. The decision was solely based on an email sent by a family member; the panel made its decision before the hearing took place and this was procedurally unfair.
7. The Applicant also makes a number of comments which do not amount to a basis to argue either irrationality or procedural unfairness; instead they reiterate aspects of the Applicant's evidence in relation to his case.
8. His legal representative's grounds for seeking a reconsideration are as follows:

- a. The panel gave insufficient weight to the assessment of the previous Offender Manager and the prison psychologist.
 - b. The panel gave insufficient weight to the Applicant's assertion that the complaint made by a family member was malicious, and that, as no evidence was provided to support their assertion, reliance upon it was procedurally unfair.
 - c. The Applicant's comment that the weapon used was "*only a little Swiss Army knife*" was taken out of context.
 - d. The Applicant's evidence of outside support from his family and a friend was not acknowledged by the panel, which, in fact, asserted the contrary.
 - e. The panel gave insufficient weight to the positive steps the Applicant has taken to dealing with his substance misuse.
 - f. Taken as a whole, this renders the risk assessment unfair.
9. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

- 10. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2018 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he should be transferred to open conditions.
- 11. The case has had a protracted history with a number of adjournments and deferrals. Most recently, in July 2020, the Applicant sought an adjournment for investigations to be made into allegations made by a family member. This was granted and further directions were set. The hearing reconvened on 22 September 2020 and was conducted by telephone conference in line with COVID-19 restrictions.
- 12. The Applicant sought release at the hearing, or, in the alternative, a recommendation for a progressive move to open conditions.
- 13. The panel heard evidence from the Applicant's former prison offender manager (POM), his recently appointed prison offender manager, the prison psychologist, the Applicant's community offender manager (COM) and the Applicant. He was legally represented throughout.
- 14. The Applicant's former POM supported a move to open conditions. His current POM also supported a move to open conditions. The prison psychologist supported a move to open conditions. His COM did not recommend release or a move to open conditions.
- 15. The panel concluded that the Applicant did not meet the test for release and that the Applicant's risks currently outweighed the benefits of a move to open conditions. It

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therefore made no direction for release nor a recommendation for a move to open conditions.

The Relevant Law

16. The panel correctly sets out in its decision letter dated 5 October 2020 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.

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Parole Board Rules 2019

17. 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)). This is an eligible decision.

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18. 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**.

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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.

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20. In summary, an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

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- (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.

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

Other

21. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion:

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"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and



objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."

22. **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295** established that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

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The reply on behalf of the Secretary of State

23. The Secretary of State has submitted no representations in response to this application.

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Discussion

24. The Applicant's first submission is that he was not asked any relevant questions relating to his ability to cope in open conditions or whether he was a risk to the public. It is clear from the decision letter and the views of professionals that careful consideration was given to the Applicant's suitability for open conditions and, in any event, a refusal to make a recommendation for open conditions is not open to reconsideration.

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25. There is nothing that suggests to me that the panel had made its decision prior to the hearing and the Applicant has provided no evidence to support this assertion. The decision letter carefully sets out a number of reasons for the panel's decision and it is wholly unsustainable to suggest that the decision was solely based on the allegations made by the Applicant's family member.

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26. The Applicant's personal submissions fail.

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27. The first submission made by the Applicant's legal representative is that the panel gave insufficient weight to the assessment of the previous POM and the prison psychologist. While it is true that both were supporting a move to open conditions, neither were supporting release, and, again, a refusal to make a recommendation for open conditions is not open to reconsideration.

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28. Next, it is submitted that there was no evidence to support the Applicant's assertion that the family member's allegation was malicious. He points out that the police had not sought to interview him in connection with the complaint. It is submitted that there was therefore objectively verifiable evidence to disprove the allegations which, in turn, established that there was a demonstrable mistake of fact in the panel's decision.

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29. The decision letter clearly acknowledges the context and views of witnesses in connection with the allegation. The panel does not make a finding of fact in relation to the allegation and therefore there cannot be a demonstrable mistake of fact. The allegation is but one weighted aspect of the overall risk assessment on which the panel's decision is based.

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30. The third submission concerns the context in which the panel interpreted the Applicant's comment: "*only a little Swiss Army knife*". This was a quotation from a previous decision. The Applicant also told this panel that the weapon "*was a fruit knife with a one-and-a-half-inch blade*". The main part of the decision letter offers no view on the context or inferences drawn by the panel in response to these statements. While it could have been an element of the panel's view that the Applicant had a "*tendency to minimise responsibility or harm*" there is nothing to suggest that an alternative explanation would have changed the panel's view on whether the test for release was met.

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31. The next submission concerns the Applicant's evidence of outside support from family and a friend which is not acknowledged by the panel. The decision letter is not the vehicle by which the entirety of the oral evidence is recited. I clearly cannot comment on the Applicant's oral evidence, but also do not feel it necessary to obtain the recording of the hearing, as again, there is nothing to suggest that family support would have been pivotal to the panel's view on whether the test for release was met.

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32. It is next submitted that insufficient credit was given to the Applicant's progress dealing with substance misuse. In its conclusion, the panel notes "*the panel recognises that you have undertaken work to try to show that your risks have been reduced, particularly around substance misuse, and the panel commends you for those efforts*". However, it goes on to set out other risks that, in the panel's opinion, outweigh the acknowledged progress in dealing with substance misuse.

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33. The final ground submits that the overall risk assessment was unfair in the light of the preceding submissions. Since these have all failed, it follows that the final submission must also fail.

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34. The decision not to release the Applicant is the only aspect of the decision that is open to reconsideration. With no professional witness supporting release, it is impossible to say that the panel acted irrationally, and I have found no sustainable basis for procedural unfairness.

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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.

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13 November 2020



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