

[2021] PBRA 82

Application for Reconsideration Dobson

Application

1. This is an application by Dobson (the Applicant) for reconsideration of a decision of an oral hearing dated the 26 April 2021 not to direct release but to recommend progression to open conditions.
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 the dossier of 409 pages (including the decision letter) and the application for reconsideration.

Background

4. On 25 April 2008 the Applicant was sentenced to serve an indeterminate sentence for public protection for the offence of committing arson recklessly. His tariff was set at 27 months less time on remand. He was aged 22 at the time of sentencing and is now aged 36.
5. The tariff expired on 30 July 2009.

Request for Reconsideration

6. The application for reconsideration is dated 10 May 2021.
7. The application is based on both procedural irregularity and irrationality.
8. The grounds are the same under both heads:
 - (a) The panel refused an application for an adjournment to obtain mobile telephone evidence.
 - (b) Having refused the application, the panel included the mobile telephone evidence in the "*Indication of possible next steps to assist future panels*" section of the decision letter.
 - (c) A judicial member, described by the chair in the introductions as an observer, asked questions of the witnesses.



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Current parole review

9. The Secretary of State referred the Applicant's case to the Parole Board on 7 February 2020.
10. The oral hearing, which took place remotely by video link due to the Covid-19 restrictions on 16 March 2021. The panel heard from the Applicant, the Prison Offender Manager and the Community Offender Manager.

The Relevant Law

11. The panel correctly sets out in its decision letter 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.

Irrationality

12. 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."

13. 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.
14. 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

15. 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.
16. 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.

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

The reply on behalf of the Secretary of State

18. The Secretary of State was not represented and did not lodge any submissions.

Discussion

19. Between 2013 and 2016, the Applicant was released on licence and subsequently recalled three times.

20. The panel was concerned with his fourth release on licence in November 2018.

21. After a satisfactory start, on 21 October 2019, he was sentenced to a suspended sentence of imprisonment for assaulting an emergency worker and two police officers, offences committed during an evening of heavy drinking.

22. Surprisingly, he was not recalled, but was given a final written warning.

23. In November 2019, he met and entered into a relationship with a woman he had met online. After about 7 weeks the relationship came to an end.

24. The Applicant sent text messages both to her and to her former partner, who informed him she was a prostitute. The Applicant appears to have wanted to know more about that suggestion, even though the relationship had come to an end.

25. The Community Offender Manager in her report dated the 27 January 2020, gave the Applicant's description of the text messages as,

"During Police Interview, [the Applicant] admitted sending [A] text messages, contacting her family members via social media and advised he could see that the content of some of these messages would be distressing and perceived as abusive".

26. In the course of the proceedings, the Applicant wanted to persuade the panel that the text messages had not been abusive and, to that end, sought an adjournment so the panel could direct the police to disclose the mobile telephone evidence.

27. It is also clear that the panel had offered the Applicant the opportunity for an adjournment for a psychological assessment. It seems the Applicant took it upon himself to attach his request for an adjournment to the panel's offer of a psychological assessment and agreed to the latter provided the panel direct to the former.

28. The panel refused the application to adjourn to obtain the mobile telephone evidence.
29. The criticism of the panel is framed in two ways: (a) the panel should have acceded to the application and (b) the panel contradicted its refusal to adjourn by including in the section of the decision letter headed "*Indication of possible next steps to assist future panels*" the suggestion that the mobile telephone evidence should be before the next panel.
30. When considering the application for an adjournment, the panel would have had to have asked itself what the relevance of the material was. The simple answer was it was irrelevant because it had nothing to do with the gravity or otherwise of the allegation. The Applicant had been charged and pleaded guilty only to the offence of Stalking without Fear. The panel was proceeding on that basis and considered that whatever the text messages said, they would not add to the seriousness of the conduct, namely turning up at 4:30 am, unannounced and ringing the front door bell for about two minutes in the context of a relationship that had recently come to an end.
31. The decision was entirely within the discretion of the panel; it was not irrational; it was perfectly intelligible and took into account the relevant factors.
32. The inclusion of the mobile telephone evidence in the '*Indication of possible next steps*' section is saying no more than the panel does not believe an adjournment was necessary to obtain the information; however, if the Applicant is still so worried about the absence of the material, he can have the evidence before the next panel. I would describe it as a "forensic palliative" and no more.
33. Reading the whole of the decision letter, the description of the Applicant's conduct on licence and the recommendations of the professional witnesses, it becomes quite plain that the introduction of the text messages would not have made any difference to the panel's decision.
34. The second ground of the application is that a judicial member of the panel, apparently described as an observer, asked questions. It is not possible to understand precisely what happened because the introduction of the decision letter clearly states "*A four-member panel of the Parole Board, including a psychologist, two independent and a judicial member, was due to meet at [the prison] on 14 April 2021 to consider...*"
35. A four member panel of the parole board is unusual and tends to occur when a panel member is in training. In the initial stages of training, the panel member is an observer and does not ask questions and does not take part in the decision-making process. In the second stage, the trainee member does take part and asks questions. The particular judicial member may have been mis-described by the panel chair.
36. Whether that is the explanation or not, if it was thought that a procedural irregularity was taking place, an objection should have been made there and then or, at the very least, an enquiry made as to whether there had been a simple



misdescription by the chair. The reconsideration process follows as far as possible the procedure of the Divisional Court and is not there to put right, on review, what could have been put right very simply at first instance.

37.Nothing untoward occurred during this hearing and the grounds fail.

Decision

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

James Orrell
17 June 2021