

[2022] PBRA 103

Application for Reconsideration by Johnson

Application

1. This is an application by Johnson (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 16 June 2022 not to direct his release. It was issued to the parties on 26 June 2022.
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 oral hearing decision, the dossier, and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 1 November 2007 following conviction for robbery to which he pleaded guilty. His tariff expired in December 2010.
5. The Applicant was aged 24 at the time of sentencing. He is now 39 years old.

Request for Reconsideration

6. The application for reconsideration is dated 18 July 2022 and has been drafted and submitted by solicitors acting on behalf of the Applicant.
7. It submits that the decision was procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the 'Discussion' section below. No submissions were made on the grounds of irrationality or error of law.

Current Parole Review

8. The Applicant's case was most recently referred to the Parole Board by the Secretary of State in February 2022 to consider whether or not it would be appropriate to direct his release. If the Parole Board did not direct release, it was invited to advise the Secretary of State on whether the Applicant should be transferred to open conditions.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



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0203 880 0885

9. The case proceeded to an oral hearing on 16 June 2022 before a two-member panel, including a judicial member. The Applicant was legally represented throughout.
10. The Applicant has been in a number of establishments during the course of this review and three Prisoner Offender Managers gave oral evidence. The first two supervised the Applicant in previous establishments (POM1 and POM2) and the third is currently responsible for his supervision (POM3). The panel also heard oral evidence from the Applicant's Community Offender Manager (COM) and a Deputy Governor (Governor) from a former establishment in which the Applicant was located from September 2021 until January 2022 at which time he was transferred out for security reasons. During this time the Applicant was supervised in custody by POM2.
11. POM1 recommended transfer to open conditions. POM2 did not offer a recommendation but noted that the Applicant had completed all the work he could do in custody and that, although release would be challenging, there was nothing in terms of risk that could not be managed in the community. POM3 recommended release, as a recent period of stability showed the Applicant could apply the skills learned in various offending behaviour programmes completed over the course of his sentence. His COM recommended release and was 'tentatively' confident that his risk could be managed in the community.
12. The panel did not direct his release and considered the Applicant to be appropriately located in closed conditions.

The Relevant Law

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. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
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 Secretary of State

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

Discussion

Eligibility

21. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

22. The application for reconsideration was submitted on the last possible date of 18 July 2022. It notes, however, that it was drafted without the benefit of the Applicant's full instructions. It appears that a legal visit had been arranged for the 19 July 2022 deadline and on 19 July 2022 a Duty Member extended the reconsideration window until 25 July 2022. No further legal representations have been received on behalf of the Applicant following the legal visit, and I am therefore considering the submissions dated 18 July 2022.

Procedural unfairness

23. The application for reconsideration submits that the decision was procedurally unfair as the panel gave undue weight to the evidence of the Governor which was contrary to the views of other witnesses.

24. As a preliminary matter, the application notes the Governor did not provide a witness statement/report before the hearing. It says this matter was pointed out to the Panel Chair, but the hearing proceeded. If the Applicant felt that he was being unfairly disadvantaged by the lack of a written report, then it was open to him to make a formal application for proceedings to be adjourned for such a report to be produced. There is

nothing to suggest this was the case and therefore there is no basis on which to find procedural unfairness on this point.

25. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, as is submitted here, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).
26. Having said that, the panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the other witnesses. Where there is a conflict of opinion, as is the case here, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence.
27. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
28. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
29. It is submitted that the Governor 'put his own slant' on a number of pieces of security information which were, by their nature, uncorroborated. This could, perhaps less contentiously, be reworded as the Governor 'gave his professional opinion' on that information, in just the same way that other witnesses gave their professional opinions on documentary evidence.
30. While the Applicant robustly contends that the panel should not have given the Governor's evidence such weight, this would only amount to procedural unfairness if doing so was manifestly unfair.
31. The conclusion of the decision is not solely based on the Governor's oral evidence. It gives credit to the Applicant for the progress he has made, particularly recently. Against this it sets out its concerns noting the Applicant's volatility, inability to manage conflict, poor consequential thinking, lack of emotional management and control and impulsivity. The decision also carefully notes its analysis of the security information and the process it adopted in evaluating it. It disagreed with the suggestion that as the Applicant moved from prison to prison each prison had conspired to create false information to damage his character. It carefully explained why it disagreed with the rationale for release advanced by the COM.
32. Reasons given are clearly explained and supported by the panel's analysis of the evidence before it. The application does not submit that the decision was irrational or unreasonable as a matter of law.

33. On the evidence before me, I do not find that the process taken by the panel in reaching its decision was so fundamentally flawed that its decision was unfair.

Decision

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

Stefan Fafinski
9 August 2022