

[2022] PBRA 119

## Application for Reconsideration by Penrose

### Application

1. This is an application by Penrose (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated the 8 August 2022 not to direct 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 the dossier, the decision of the OHP, the Application for Reconsideration dated 26 August 2022, and the representations of the Secretary of State.

### Background

4. The Applicant is now aged 50. He was aged 36 when sentenced. He is serving a sentence of imprisonment for public protection. The sentence was imposed in September of 2008. The index offences were robbery and theft. His tariff expired in September 2011. The Applicant had been released and recalled on three occasions before this matter.

### Request for Reconsideration

5. The grounds for seeking a reconsideration are as follows:

**Ground 1** – Procedural unfairness – The panel failed to apply the relevant law in connection with the statutory test. The Applicant argues that the panel applied a “confused” interpretation of the test for release within the decision.

**Ground 2** – Procedural unfairness – Bias or perception of bias.

**Ground 3** – Procedural unfairness – Unproven Allegations.

### Current Parole Review

6. This Applicant’s case was referred by the Secretary of State to the Parole Board on 7 December 2021. The Secretary of State requested the Parole Board to consider whether the Applicant should be released and if not whether a recommendation for a transfer to open conditions should be made.
7. The matter was considered by a panel consisting of two independent members of the Parole Board. Evidence was given at the hearing by the Community Offender



Manager and the Prison Offender Manager. A further witness also gave evidence. The Applicant was represented by a solicitor.

## The Relevant Law

8. The panel correctly sets out in the introductory sections of the written 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.

### *Parole Board Rules 2019*

9. Pursuant to 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 when it is made (as in this case) by an oral hearing panel after an oral hearing (Rule 25(1)).
10. 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**.

### *Irrationality*

11. 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."*

12. 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.
13. 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*

14. 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.

15. 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.

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

17. 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, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

18. It is for me to decide whether I consider the procedure adopted by the panel in conducting the parole hearing was unfair to either of the parties.

### **The reply on behalf of the Secretary of State**

19. The Secretary of State made no representations in response to this application for reconsideration.

### **Discussion**

#### **Ground 1**

20. Within the introductory section of the written decision, the panel correctly recorded the wording of the test for release as set out in the legislation namely the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The wording is as follows: *"The Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."*

21. However, within the section of the written decision headed "Conclusion", the panel indicated the following - *"The panel therefore concluded that it remains necessary for the protection of the public that [The Applicant] remains confined, so that core risk reduction work can be undertaken, and he can develop the necessary internal controls to manage his risk over the indefinite period under consideration."*

22. The panel therefore added a gloss to the test for release. The panel referred to both protection of the public and the completion of intervention work. By doing so, it appeared that the panel's decision was twofold. Firstly, the panel determined that that it was necessary that the Applicant remain confined for the protection of the public, and secondly the panel determined that the Applicant should remain confined so that core risk reduction work could be undertaken.

23. The Applicant correctly argues in the Reconsideration Application that the test for release does not include any reference to confinement for the purposes of completing risk reduction work. Whilst it may be that the wording of this concluding

comment was not intended to imply that the Applicant's confinement was for two purposes, the wording itself infers that possibility.

24. It is a matter of fundamental importance that the decision to confine is clearly and solely focused upon the appropriate legal test. In this case the panel appear to have merged considerations relating to release with those concerning the future undertaking of behavioural work.
25. Having considered this matter I am satisfied that the panel failed to correctly record the statutory test within the concluding paragraph of the decision, and by inference failed to correctly apply the test to the overall decision. I am satisfied that this failure amounts to a procedural irregularity. The irregularity is fundamental to the decision in this case and I therefore direct that the matter should be reconsidered.
26. In the light of my decision relating to Ground 1 of this Reconsideration Application and my decision to direct reconsideration it is not necessary for me to make any finding in relation to the additional grounds.

### **Decision**

27. Accordingly, whilst I do not find there to have been an irrational conclusion, I have found there has been a procedural irregularity. As indicated, I do consider applying the test as defined in case law that the decision was procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**HH S Dawson**  
**5 September 2022**