

[2022] PBRA 126

Application for Reconsideration by Hong

Application

1. This is an application by Hong (the Applicant) for Reconsideration of a decision of an oral hearing panel dated the 10 August 2022 . The panel made no direction for release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (hereafter referred to as 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 dossier, the application for Reconsideration dated 5 September 2022, and the Secretary of State's email response.

Background

4. The Applicant was convicted of the offence of murder. He was sentenced to life imprisonment on the 18 May 2010 . The minimum term set by the court was 13 years (less time served on remand) . His tariff expired on 10 July 2022. He was aged 35 years at the time of sentence , he is now aged 48.

Request for Reconsideration

5. I have set out the grounds for seeking a Reconsideration and discussion relating to those grounds below:

Current parole review

6. The panel considered a referral from the Secretary of State dated 23 February 2022. The referral requested the Parole Board to consider whether or not it would be appropriate to direct the prisoner's release. There was also a request to consider a recommendation for a transfer to open conditions.
7. The case was initially referred to the Parole Board in 2019 before the Applicant's tariff had expired for the purposes of a pre-tariff review. The matter was delayed. By the time of the oral hearing the tariff period had expired and the Secretary of State therefore requested the Parole Board to consider both release and open conditions. The Applicant was legally represented. The hearing took place within a prison although as a result of Covid restrictions the parties occupied different rooms and were linked by video. The Applicant was supported by an interpreter. The Applicant was legally represented by Counsel.



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8. Evidence was received at the hearing from the Prison Offender Manager (POM), a prison psychologist, and the Community Offender Manager (COM). The applicant gave evidence. The panel consisted of an independent Chair, an independent member, and a psychologist member. The panel considered a dossier and closing written submissions were submitted after the conclusion of the hearing. The panel received a victim statement in the absence of the Applicant, this was read to the panel. A gist of the victim statement had been included within the dossier.

The Relevant Law

9. 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.

10. 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)

11. Rule 28(1) of the Parole Board Rules 2019 indicates the types of decisions which are eligible for Reconsideration. A decision made by an oral hearing panel following oral hearing is eligible for Reconsideration Rule 25(1).

12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for Reconsideration. These include the sentence relevant to this Reconsideration application, namely indeterminate sentences Rule 28(2)(a).

13. 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**.

Illegality (unlawful decisions)

14. An administrative decision is unlawful under the broad heading of illegality if the panel:

- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

15. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power



upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

16. 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."

17. 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.

18. 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

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.

20. 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.

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

21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: *"It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of*



Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship."

The reply on behalf of the Secretary of State

22.The Secretary of State offered no representations.

Discussion and Grounds

23.**Ground 1** – Decision Irrational- - The panel were irrational in concluding that the Applicant's "low" risk assessment attributable to further general offending and "low" risk assessment attributable to non-violent reoffending could not be established as a certainty until the Applicant had been tested in the community

Discussion – Ground 1

24.Within the decision letter the panel accepted that the Applicant had completed intervention work, that no further intervention work had been identified, that the Applicant had an enhanced status in the prison and that he was employed in the prison.

25.The panel also considered risk assessments as set out in the reports. As is commonly the case, the risk assessments were both static and dynamic.

26.Static risk assessments are calculated by the use of a formula and are based upon a comparison to a group of similar individuals utilising known factors or scores. The testing process is accepted as statistically valid as it is tested on large samples. However, the static risk testing instruments have limitations in that they are based upon gathering information that is retained in a standardised way and do not identify how risk factors might affect a particular individual. Although static risk assessments are of assistance, it is accepted that such assessments can be affected by individualised circumstances such as a long prison sentence intervening between an offence and the assessment.

27.Dynamic risk assessments are also undertaken by probation officers and included within their reports. Dynamic assessments take account of the individual circumstances of the prisoner and require a process known as structured professional judgement (SPJ). Dynamic assessments involve a wider approach to assessing risk and in particular require an assessment of the particular individual and his or her personal attributes and risk issues. ((the publication - Risk of Serious Harm Guidance published by HM Prison and Probation service offers more detailed information relating to risk assessment by the probation and prison service).

28.In this case the panel noted, using a dynamic assessment, that the Applicant's risk of serious harm to the public was assessed as 'High' . This assessment was accepted by the panel.

29.The static assessments relating to general reoffending and violent reoffending were noted and were both set as 'low' . These static assessments were also accepted as correct.

30. The panel indicated as follows “*noting the circumstances of the index offence, the high risk of serious harm towards the public is likely to be accurate and will not reduce until (the Applicant) has been tested in less restrictive conditions*”. The panel therefore took the view that the Applicant’s risk, of serious harm to the public, required testing by way of supervised temporary release into the community . This would usually be available from an open prison.
31. The concept of testing risk by managed temporary release is well established within the custodial environment. It is also well established and commonplace for prisoners reaching the end of a substantial prison term to be tested by way of temporary supervised and unsupervised release into the community. Such testing takes account of the stress and potential challenges faced by prisoners who have served lengthy custodial sentences. Stress and life challenges can lead to an elevation of risk. In this case there were relevant risk factors relating to alcohol, illicit drug use, non-compliance and an issue relating to a lack of immigration status, all of which were untested in the community. The panel made it clear, in their decision, that all these matters were relevant to a final decision as to risk and required testing, before a final conclusion could be reached in relation to the statutory test for release.
32. The panel also indicated that it appeared likely that some of the criteria allowing for a transfer to open conditions were applicable to the Applicant. However, as noted in the decision the requirement to present with a very low risk of absconding (as required of Foreign national Prisoners) was not found to be present so far as the Applicant was concerned and accordingly the panel reached their decision.
33. The argument adduced by the Applicant under this ground of Appeal is that the panel were irrational in concluding that the test for release could not be established with certainty until the Applicant had been tested in the community. As indicated above , the Applicant had been in custody for a considerable period of time, he had limited community ties , he had historical issues relating to alcohol and illicit drugs. The panel referenced these issues and concerns within their decision. I am satisfied therefore that the decision of the panel was rational in the legal sense set out above. I therefore reject this ground of appeal.
34. **Ground 2** – Decision Irrational-the panel failed to provide reasons as to why they believe the low assessment is likely to underestimate the risk posed.

Discussion – Ground 2

35. As set out above. There exist fundamental differences between static and dynamic risk assessments. The panel indicated within their decision, that in reaching their decision they had taken account of the individual issues relating to the Applicant. The Applicant’s assessed risk of serious harm to the public remained high. The panel’s concerns , as set out in their decision , were that managing the Applicant’s risk in the real world atmosphere of the community, remained untested. Despite the Applicant’s positive behaviour in the prison environment , a number of factors uniquely related to life within the community remained untested. I therefore reject the argument, by the Applicant, that the panel failed to provide an explanation of the reasons for their decision.



36. **Ground 3** – Decision Irrational - the panel were irrational in concluding that the Applicant did not meet the criteria for a move to open conditions.

Discussion Ground 3

37. As indicated above a decision as to whether or not to recommend a transfer to open conditions is not eligible for Reconsideration.

Decision

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

HH S Dawson
16 September 2022