

[2022] PBRA 149

Application for Reconsideration by Catley

Application

1. This is an application by Catley (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board dated the 15 September 2022 not to direct release but to recommend progression to open conditions.
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 dossier, decision letter and the Application for Reconsideration.

Background

4. On 4 February 2011 the Applicant was sentenced to a period of imprisonment for public protection, with a tariff (subsequently set by the Court of Appeal) of 3 years less time spent on remand. His sentence was imposed following his conviction of attempted robbery and assault occasioning actual bodily harm, both committed on 6 July 2010. The Applicant picked up a glass bottle, smashed it and then waved it at the victims, threatening to stab them with it if they did not hand over their mobile phones. He also punched the female victim repeatedly in the face causing her cuts and bruises when she intervened after he threw a liquid in the face of her partner, the other victim. The Applicant's tariff expired on 8 July 2013.
5. In November 2021 the Applicant was released on licence at the direction of the Parole Board, but his licence was revoked on 17 December 2021 and he was returned to prison on 20 December 2021. The hearing on 15 September 2022 was the Applicant's first review since recall.

Request for Reconsideration

6. The application for reconsideration is dated 16 September 2022
7. The grounds for seeking a reconsideration are as follows:

Procedural unfairness



- (i) The process followed was procedurally unfair and incorrect as the panel made no direction for the Applicant's release but a recommendation for open conditions when the Applicant's evidence was that open conditions were unsuitable for him, and that opinion was supported by the Probation Service.
- (ii) The process followed was procedurally unfair and incorrect as the Applicant received his decision letter more than 14 days after the hearing, namely on 15 September 2022 when the hearing took place on 5 July 2022.

Irrationality

- (iii) The decision was irrational because it was based on a finding that the Applicant had not been tested in realistic conditions, but in fact by virtue of its decision, the Applicant is now confined and cannot be tested in realistic conditions.
- (iv) The decision was irrational because it disregards the evidence presented at the oral hearing dated 5 July 2022.

Current parole review

- 8. The original referral from the Secretary of State is dated 13 January 2022. On 8 March 2022 the referral was considered by a Parole Board member and directed to an oral hearing.
- 9. The oral hearing took place on 5 July 2022. The panel consisted of a judicial chair, a psychiatrist member and an independent member. The panel considered a dossier of 255 pages. The oral hearing was held remotely over video link. The panel heard evidence from a Prison Offender Manager (POM) Community Offender Manager (COM) and the Applicant. The Applicant was legally represented throughout the review.

The Relevant Law

- 10. The panel correctly sets out in its decision letter dated 15 September 2022 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 (as amended)

- 11. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).

- 12. 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)).

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**.

Irrationality

14. 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."

15. 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.
16. 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

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.

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

The reply on behalf of the Secretary of State

19. On 22 September 2022 the Secretary of State confirmed that they offered no representations in relation to the application.

Discussion

Procedural unfairness

20. The Applicant alleges irregularity on two limbs, first in relation to the making of a decision which is contrary to the opinions and evidence of the professional witnesses, and second in that the decision letter was received outside the 14-day time limit specified in Rule 25(6).

21. As the first limb is also (and more appropriately) alleged under the ground of irrationality, I have addressed that part of the application under the section on irrationality below.

22. So far as the timing of the decision letter is concerned, I agree that it did not comply with Rule 25(6), and there is no explanation in the decision letter itself as to the reason for the delay.

23. However, in order for the application to succeed on this ground, there must be a procedural impropriety or unfairness which results in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

24. The decision letter is the recording of the 'result' in itself. The delay in receiving the letter could well have caused the Applicant stress and worry, but in itself I am not satisfied that this would have resulted in the proceedings being fundamentally flawed.

Irrationality

25. 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 POM and COM. The Applicant was also legally represented throughout and made closing submissions at the end of the oral hearing, which are referenced in the decision letter. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

26. The panel clearly set out in the decision letter the evidence it heard about the Applicant's behaviour since returning to prison following his recall, which was appropriately a factor in its decision-making.



27. The decision letter records evidence from the POM, COM and the Applicant, and it is clear that the panel understood the Applicant's position that he "would never go to open conditions again" and did not consider it suitable for him.
28. The decision letter also clearly records the COM's evidence that she would not support his progression to open conditions, and the reasons for her reaching that conclusion, namely that she felt he had already spent a reasonable period in open conditions prior to release, and whilst it had been challenging for him, it had led to the Applicant engaging well with her. The letter records her opinion that the Applicant found open conditions to be very stressful.
29. The decision letter clearly sets out its acknowledgement that the professional witnesses support the Applicant's release. It also records its rationale for disagreeing with their opinions. It notes the "new improved attitude" of the Applicant but sets it against an entrenched criminal lifestyle, concerns about behaviour whilst on licence, the short period of time the Applicant spent in the community prior to recall and the evidence it had heard that there remained some instability in his custodial behaviour, albeit improved.
30. It is evident therefore from the decision letter that the panel carefully considered the evidence of the professional witnesses but disagreed with their conclusions and recorded clearly the reasons for their disagreement.
31. 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.
32. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710.**]
33. 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.
34. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found



by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

35.I find there is neither in this case.

Decision

36.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.

Victoria Farmer
24 October 2022



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



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



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885