

[2022] PBRA 28**Application for Reconsideration by McGrath****Application**

1. This is an application by McGrath (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release, dated 25 January 2022 (the Decision).
2. I have considered the application on the papers comprising:
 - a) A dossier of 573 numbered pages including a copy of the Decision;
 - b) Written submissions by the Applicant's solicitors, by which reconsideration is requested, dated 13 February 2022; and
 - c) Written submissions by the Public Protection Casework Section for the Secretary of State dated 23 February 2022.

Background

5. The Applicant is currently subject to an extended determinate sentence (EDS) imposed on 22 November 2013 for rape of an elderly victim in her home. The Applicant was aged 34 when that sentence was imposed, and he is presently aged 42.

Current parole review

6. The decision was made on the first of the Secretary of State's referrals of the Applicant's case to the Parole Board during the current sentence.
7. The decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing, conducted by remote video-links on 17 January 2022. The panel comprised of two Independent Members of the Board, one of whom chaired the panel, and a Psychologist Member of the Board.

Application and response

8. The Applicant's submissions assert that the Decision is marred by irrationality and procedural unfairness.
9. The Public Protection Casework Section (PPCS) has provided representations for the Secretary of State in response to some of the Applicant's reconsideration grounds.



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The Relevant Law

10. Rule 28(1) of the 2019 Rules 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.

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.

13. 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. 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.

Consideration

15. The Applicant submits that there was procedural unfairness in the Panel's decision to proceed with the hearing knowing that the psychologist witness was unaware of the hearing being brought forward from a date in March 2022 to 17 January 2022 and thus had not had the opportunity to prepare in full.

16. It is stated in the Applicant's submissions that, on 17 January 2022, all attendees bar the psychologist witness joined the video hearing link but that, following enquiries being made by the Panel, the psychologist witness joined a short time later. It is stated that the witness apologised profusely and stated that she was unaware that the hearing had been brought forward from 15 March 2022 to 17 January 2022. It is stated that the Panel Chair asked the psychologist witness if she was prepared to, which she stated that she understood, that it was preferred that the hearing proceeded and that the Chair responded by confirming that the psychologist witness could catch up whilst the hearing progressed. It is stated that the Panel Chair failed to give the psychologist witness an opportunity to review her

notes prior to the commencement of the hearing. It is also stated that, in making the decision to proceed with the hearing, the Panel Chair failed to invite the Applicant's legal representative to comment on whether they were content for the hearing to proceed in the light of the psychologist witness's position.

17. In its 23 February 2022 response, PPCS stated that it contacted the psychologist witness and stated that her absence at the beginning of the hearing was due to an administrative error on her part. It is also stated in the response that the psychologist witness confirmed to PPCS that she had prepared before the hearing because the hearing had initially been listed for 10 January 2022. It is stated that the psychologist witness confirmed that she had the benefit of listening to evidence during the hearing and was accessing the full dossier electronically due to the hearing being conducted virtually. It is stated that the psychologist witness accepted that she would have prepared differently had the previously mentioned administrative error not occurred, however as discussed above, she had fully prepared to give oral evidence at an earlier January date.
18. The Respondent's reference to the psychologist witness having fully prepared to give oral evidence at an earlier January date appears to be part of the Respondent's submissions, rather than the psychologist witness's response to the issues raised by the Applicant's submissions. However, in any event, the 10 January 2022 hearing was deferred on 7 October 2021, after which the hearing was relisted for March 2022 and the 17 January 2022 date was notified on 22 December 2021. Therefore, the psychologist witness's full preparation that is referred to was over three months before the 17 January 2022 when she became aware of the 17 January 2022 listing when enquiries were made while the other attendees waited to start. I also note that the psychologist witness's report was prepared in July 2021 and that 104 pages of information were added to the dossier after the hearing was deferred on 7 October 2021.
19. The implication from the information provided in the Applicant's submissions is that the psychologist witness did not confirm when asked by the Panel Chair that she was prepared to participate in the hearing. There is no indication in the response that the psychologist witness was asked by PPCS whether she disputed the assertions made in the Applicant's submissions and there is nothing of assistance in the Decision reasons, which make no mention at all of the unusual procedural issues raised by the Applicant. PPCS does not deny any of the other facts stated in the Applicant's submissions on the ground in question.
20. I therefore conclude that the psychologist witness joined the hearing without notice having last prepared for the case some three months earlier since when 104 pages of information had been added to the dossier, that the psychologist witness did not confirm when asked by the Panel Chair that she was prepared to participate in the hearing, that the psychologist witness was not given any time to make further preparations before the hearing was started, and that the Applicant and his legal representative were not given the opportunity to comment on those matters before the hearing started.
21. There is no explanation of how the psychologist witness might have prepared differently had she had time, but it is axiomatic that a professional witness would need to spend some considerable time preparing in order to fully participate in an

oral parole hearing, and that that would need to be done at a near to the time of the hearing, to update the memory and consider any new information. In the Applicant's case, it was apparent that a critical professional witness had not been able to conduct such preparation and I consider that that failure could not have been adequately corrected by the psychologist witness familiarizing herself with the case and considering the additional 104 pages of information while other witnesses gave evidence. In the event, the Decision was against the recommendation of the psychologist witness, but I cannot speculate that adequate preparation by the witness would have made no difference to the outcome.

22.I am therefore satisfied that the Decision is marred by procedural unfairness. It is unnecessary to consider whether irrationality was also involved.

Decision

23.Reconsideration is directed.

Timothy Lawrence
28 February 2022