

Application for Reconsideration by POLLARD

Application

1. This is an application by Pollard (the Applicant) for reconsideration of a decision of an oral hearing dated 5 April 2022 not to direct release and to make no recommendation for open conditions.
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 Applicant's hand-written (but perfectly legible) letter giving his reasons for appealing, which I will call the Application;
 - The Oral Hearing Decision Letter; and
 - The dossier, which now contains 666 numbered pages, including the Applicant's representative's closing submissions and the Decision Letter.

Background

4. The Applicant was born in 1954. In 1972, when he was 18, he was sentenced to life imprisonment for murder. He stabbed his neighbour to death while burgling her house.
5. He was released on licence in June 1983. In 1985 he was sentenced to two months' imprisonment for offences of dishonesty. In May 1985 the Home Office revoked his licence and he was recalled to custody.
6. In February 1986 he was again released on licence. In November 1988 (a typographical error in the Decision Letter incorrectly gives the year as 1998), when he was 34, he received a life sentence with a minimum term of 20 years and 1 day for a second murder. He strangled a sex worker and mutilated her body.
7. His tariff expiry date for this sentence was in April 2008. This is the 7th Parole Board Review of the sentence. He is now 68 years old.



8. The application before the Parole Board was for a recommendation for open conditions. This is plain throughout the dossier, up to and including the Applicant's representative's closing submissions. No-one, including the Applicant, was suggesting that the Applicant could safely be released after so long in custody without being tested in open conditions. Such an application is not subject to the reconsideration process: the only decisions that can be reconsidered by this process are decisions to direct, or not to direct, release.
9. However, before a panel of the Parole Board can decide whether to recommend a move to open conditions, it must decide not to direct release. I will therefore look at whether there are any grounds for suggesting that the decision not to direct release was irrational or flawed by procedural unfairness.

Request for Reconsideration

10. The Application for reconsideration is dated 6 April 2022.
11. As I have said, the Application is expressed as a wish to appeal the Parole Board's decision and for it to be reconsidered. This may indicate a misunderstanding of what the reconsideration process involves.
12. It is not easy to follow what the Applicant is saying was irrational and/or procedurally unfair. Doing the best that I can, the grounds for seeking a reconsideration seem to be as follows:
 - (1) The dossier contains a number of slightly different descriptions of the appearance of the body of the victim of the first murder. In some places it is said her nightdress was pulled up; in others that it was lifted up, or over her head. The suggestion is that such inconsistencies invalidate the assessments of psychologists and others in the dossier.
 - (2) A complaint that the decision letter contains a reference to the Applicant being unable to provide any further explanation for his actions. The Applicant complains that neither the panel nor his own representative asked him questions about this. It should be noted that this phrase appears only once in the decision letter, at Paragraph 1.1, in relation to the first murder.
 - (3) A complaint that the Applicant was forced to do a programme intended for sexual offenders despite the fact that there was no evidence of a sexual element to his offending.
 - (4) It is irrational and procedurally unfair that the Applicant's solicitor did not suggest to the panel that the various assessments of his risk were biased because of irregularities within the dossier.
 - (5) There are complaints about the factual findings and opinion evidence before the panel, but no suggestion that there was anything irrational or procedurally unfair in the way the panel approached the evidence.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board on 31 January 2019, inviting the Board to consider a direction for release or a recommendation for open conditions. There were several deferments before the case was finally heard on 22 March 2022 by a three-member panel consisting of a psychologist and two independent members of the Board. The panel considered the dossier, which then contained 650 pages, and heard evidence from the Prison Offender Manager (POM), a prison psychologist and the Community Offender Manager (COM), and from the Applicant himself. None of the professionals recommended either release or a transfer to open conditions. The panel also heard and read statements from two relatives of the victim in the second murder.
14. The hearing took place remotely, due to Covid restrictions and the unavailability of panel members able to travel to the prison. The Applicant's representative was at the prison with him. She was able to speak with him privately if either of them wished that to happen. At the end of the hearing both the Applicant and his representative confirmed they were content with the way the hearing had proceeded. There were not then and are not now any expressed concerns regarding the fairness and effectiveness of the hearing itself. The representative was able to ask questions of all the witnesses, including the Applicant, and to make submissions in writing at the end. The Secretary of State was not represented at the hearing, but written representations were made on his behalf before the hearing and placed in the dossier. The Applicant submitted several documents to the Board, including comments on reports in the dossier, all of which were before the panel.

The Relevant Law

15. 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.

Parole Board Rules 2019

16. Under 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 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)).
17. 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

18. 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."

19. 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.

20. More recently, in **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."*

Procedural unfairness

21. 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.

22. 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.

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

24. 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.

Other

25. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing his risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

26. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.

The reply on behalf of the Secretary of State

27. The Secretary of State has made representations dated 19 April 2022 with regard to Ground (3) above, pointing out that there was a sexual element, namely the mutilation, in the second murder, and that the Applicant was not, and could not, be "forced" to take part in any programme.

Discussion


28. There is in reality no challenge to the decision not to direct the Applicant's release.

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29. I have looked closely at the matters raised in the Application (for which see Paragraph 12 above), in case they or any of them did raise an issue of irrationality or procedural unfairness. They do not.
30. The issues set out in Ground (1) are minor differences in phrasing, which do not affect the validity of any part of the assessments or the panel's decision-making process.
31. As to Ground (2), the dossier contains many references to the Applicant's explanations for his offending. The panel was entitled to come to the conclusion that the Applicant displayed very limited insight into his risk factors, continuing, as he does, to use phrases such as "*blind panic*", "*low self-esteem*" and "*out of character*", without being able to explain how this specifically related to his offending. He was unable to explain to the panel why he strangled and mutilated his second victim.
32. As to Ground (3), it does not appear to give rise to any issue of irrationality or procedural unfairness, but, in any event, as the Secretary of State points out, there was clear evidence of a sexual element in his mutilation of his second victim.
33. Ground (4) is a repetition of Ground (1), though this time complaining that the Applicant's solicitor did not take issue with these matters before the panel. Since they have no relevance, the solicitor could not be blamed for not pursuing them. Furthermore, this does not raise any issue of irrationality or procedural unfairness as defined above.
34. As to Ground (5), it is for the panel to assess the evidence. There is no suggestion of irrationality or procedural unfairness in the way it did so.

Decision

35. 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.

Patrick Thomas
20 April 2022