

[2022] PBRA 76

Application for Reconsideration by O'Loughlin

Application

1. This is an application by O'Loughlin (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP). The hearing took place on the 28 April 2022. The decision is dated 14 May 2022. The OHP did not 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 application for Reconsideration dated 2 June 2022 drafted by the Applicant's solicitor. The OHP decision and the dossier.

Background

4. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP). The sentence was imposed on 18 September 2007. The Applicant's tariff expired on the 3 May 2011. The index offences were blackmail and inflicting grievous bodily harm with intent. The Applicant imprisoned the victim in his home. The victim was vulnerable and addicted to class A drugs. The victim's home had been used by the Applicant to take drugs and the victim was reported by the judge to have been treated with appalling cruelty. The victim was assaulted in order to extract a debit card pin number. He was repeatedly kicked and punched and suffered serious internal injuries. The Applicant was aged 35 at the time of sentence he is now 49.

Request for Reconsideration

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

Irrationality

- a. The Parole Board put too much weight on the Applicant's body language and presentation in the hearing and relied on this as part of its risk assessment.
- b. The Parole Board did not give enough weight to the lack of violence in custody and the fact that substance misuse is no longer a live risk factor.

Procedurally unfairness

- c. The Parole Board relied on the Applicant's presentation in the hearing as evidence and used it as part of their reasons not to direct release.



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- d. The Parole Board hearing process should not be seen as an opportunity for the Parole Board to conduct a clinical assessment of a prisoner's presentation and use their presentation against them when conducting a risk assessment.
- e. The Parole Board did not make the Applicant aware that they had concerns over his presentation.
- f. The Parole Board asked only one witness to comment on the Applicant's presentation and failed to ask the other professionals.

Current parole review

6. The Secretary of State requested the Parole Board to consider whether or not it will be appropriate to direct the Applicant's release. In the event of not directing release the Parole Board were asked to consider whether it would be appropriate to recommend a transfer to open conditions.
7. The OHP consisted of an independent Chair, a psychiatrist member, and a psychologist member. Evidence was heard from a prison psychologist who had delivered treatment and also from a prison psychologist who had provided a psychological assessment. The Applicant was legally represented at the hearing.

The Relevant Law

8. 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

9. 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 where it is made 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.
- The overriding objective is to ensure that the Applicant's case was dealt with justly.

16. 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 their 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.

17. 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/the prisoner

18. The Secretary of State offered no representations.

Discussion

Background

19. The Applicant had been subject to a recommendation for transfer to open conditions on an earlier occasion. The Secretary of State had accepted the recommendation and the Applicant had been transferred to an open prison. As a result of an adverse incident the Applicant had been returned to a closed prison.
20. The Applicant's oral hearing took place after a number of adjournments. The OHP set out the history of adjournments and the reasons for them.
21. The recommendations from the Community Offender Manager (COM) and the assessing psychologist were that the Applicant be transferred back to an open prison.

Irrationality

22. Dealing with the grounds. The fundamental ground for the application as set out above was that the Parole Board panel placed too much weight upon the body language and presentation of the Applicant. It is argued that basing a decision upon this aspect of the evidence was irrational. It is also argued that it was procedurally unfair to have relied upon the Applicant's presentation in the hearing itself as a basis of evidence not to direct release.
23. It is further argued that the OHP conducted a "clinical" assessment of the Applicant within the hearing and that this assessment was procedurally unfair.
24. These issues are interlinked, and I therefore deal with them together. The decision letter itself was a substantial document consisting of some 30 pages. Within the document there were references by the OHP to the observable reactions of the Applicant within the hearing itself.
25. At dossier paragraph 2.32 the panel noted that the Applicant told the panel (in evidence to the OHP) that he had learnt to consider the views of others during his psychological treatment. The panel however noted that within the hearing itself the Applicant had made expressions and gestures, while witnesses were giving evidence. The panel assessed that the Applicant was demonstrating visibly that he was not in agreement with what was being said and had expressed his disagreement by the expressions and gestures.
26. This was not, in my determination, an unreasonable observation by the panel. The Applicant himself was telling the panel that he understood how to deal with the views of others. The making of gestures and expressions while others were giving evidence, was assessed by the panel as being indicative of an absence of a full understanding of the sensibilities and views of others. A factor which professionals had commented upon within the hearing and written reports.

27. At paragraph 3.41 the panel noted that it was distracted during the course of one witness's evidence by the Applicant's "*dismissive reactions and gestures*". However, the panel pursued this matter with the psychology witness who knew the Applicant well. The psychology witness explained that her assessment was that the Applicant had conducted himself 'well' at the current hearing and had conceded that he should not interrupt when asked not to do so. The Applicant's behaviour was therefore noted but also explained within the decision letter.
28. At paragraph 3.47 the panel had been taking evidence from a witness who had indicated that the Applicant, if in the community, might become overwhelmed and in particular express himself in a way which sought to blame others or use difficult terminology or make complaints which would raise concerns. The panel commented that they themselves had observed the Applicant's presentation at two hearings and had observed how he verbalised and gestured his frustrations and anger.
29. In my view the panel were not unfair or unreasonable in commenting upon observed behaviour in the circumstances of this hearing. Evidence was given by professionals about concerns relating to the behaviour. The panel were entitled to comment upon their view of the way that the Applicant was presenting himself, and in particular to associate their observations with evidence that was being given about similar behaviour in the past.
30. I fully accept that it would be inappropriate for a Parole Board panel during the course of the hearing to attempt to make a "*clinical*" assessment of the Applicant on the basis of his presentation at the hearing. Certainly, where no independent assessment had taken place outside the hearing, such an attempt at assessment would be inappropriate and unfair. However, the Parole Board panel were far from making such an assessment. The Parole Board panel were receiving evidence from a psychologist and a COM about the historical behaviour and presentation of the Applicant. The OHP were perfectly entitled to indicate that signs of such behaviour were observed by them within the hearing itself. I do not accept the argument that the Parole Board panel were making an independent clinical assessment of any sort. The assessments had been made by professionals within the presented evidence.
31. As a result I do not determine that the decision letter is evidence of the panel itself conducting any form of clinical assessment of the Applicant. The premise of this ground is therefore not established, and on that basis I do not find that the panel acted irrationally by commenting upon their observations in the hearing, the observations did not amount to a clinical assessment of the Applicant. The panel clearly relied upon the assessments of the professionals who gave evidence in reaching a conclusion. However, they were, as I have indicated above, perfectly entitled to comment upon their own observations of the Applicant's behaviour and presentation.
32. The assessments which were used by the panel were set out in the decision letter. For example, at paragraph 1.16 the COM gave evidence of current risk factors being anger management, levels of paranoia, and suspicion. These concerns were described by the witness as being "live" concerns. The panel accepted this assessment and found that the Applicant had limited insight into his personality difficulties and into his difficulties in managing emotions and interacting with others.

33. In addition the panel noted that there had been evidence of the Applicant making verbal threats to a member of staff. Again, supporting the concerns about the Applicant's self-control and presentation. (Dossier Paragraph 2.10).

Procedural unfairness

34. So far as procedural unfairness is concerned, it is submitted that the OHP acted unfairly by not commenting, within the hearing, upon their views relating to the Applicant's presentation.

35. I am not persuaded that it would have been appropriate for a panel, in the course of the hearing, to make direct comments about the Applicant's presentation. The Applicant was entitled to present his case in the way that he thought appropriate. He was also supported by a legal representative who had the right to apply for a short adjournment and speak to the Applicant about his presentation, if that was thought appropriate. An adverse comment, by the OHP, during the course of a hearing could have been seriously undermining for the Applicant. The panel's duty was to receive the evidence as a whole and to assess the totality of the evidence at the conclusion of the hearing. I do not therefore accept that commenting upon the Applicant's behaviour during the course of the hearing (subject to highly disruptive behaviour) would be appropriate. I do not therefore find that the panel were acting unfairly in omitting to make any direct comment, about the presentation of the Applicant, during the course of the hearing.

36. It is also argued by the Applicant that it was unfair to ask only one of the OH witnesses about the Applicant's presentation within the hearing. The witness who was asked about the Applicant's presentation was a psychologist who had worked with the Applicant in a clinical environment. I can find no objection to this witness being asked about the way that the Applicant was presenting himself, particularly if this witness had delivered psychological treatment and therefore could comment from a clinical point of view. I also do not determine that it was unfair to omit to ask each of the witnesses about this topic. Again, it was open to the Applicant's legal representative to raise this topic with any of the witnesses, if thought appropriate.

37. It is also recorded (at paragraph 3.41) that the Prison-based assessing psychologist indicated that the Applicant had, in the witness's view, conducted himself well at the hearings and that he had accepted requests not to interrupt and to concentrate on questions. The panel therefore fairly balanced and considered the views of those who knew the Applicant.

38. Dealing with ground 5 (b) above. I note that at paragraph 4.3 of the decision letter, the panel acknowledged in their conclusion that the Applicant had made progress in relation to substance use and noted the absence of recent violence.

39. However, the panel set out in their conclusions that there remained significant concerns about the Applicant's own perceptions, the use of verbal aggression, expressions of frustration, rigidity and an inability to deal with challenge and the views of others than his own. The panel concluded, that there was insufficient evidence (in the light of his risk factors) that the Applicant had developed effective coping and emotional management skills. The panel were not confident that the Applicant's propensity to verbal aggression and lashing out would be manageable in the

community. For these reasons the panel concluded that the test for release had not been met.

40. I am satisfied that the panel took account of the progress that the Applicant had made, however, in looking at the evidence as a whole, the panel explained their conclusion as to why the test for release had not been met.

41. I am not therefore persuaded, on this ground, that the panel failed to take account of the positive factors in the Applicant's progress in particular in relation to physical violence and drug misuse. Accordingly, I do not find that the panel acted irrationally in reaching their conclusion.

Decision

42. 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.

HH S Dawson
15 June 2022