

[2022] PBRA 98

Application for Reconsideration by Reay

Application

1. This is an application by Reay (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 5 July 2022 not to direct his release.
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:
 - a) The Decision Letter dated the 5 July 2022;
 - b) A request for reconsideration from the Applicant which he has completed on the published form CPD2; and
 - c) The dossier, numbered to page 308, of which the last document is the Decision Letter. The panel had a dossier numbered to page 299.

Background

4. The Applicant is now 41 years old. On the 4 December 2009, when he was 28 years old, he received a sentence of imprisonment for public protection following his conviction for seven offences of robbery (the Index Offences). The sentencing court determined that he must serve six years prior to being considered for release by the Parole Board.
5. The background to the Index Offences is that the Applicant and two others targeted betting shops, carrying out robberies when armed with weapons and with their faces disguised. The Applicant was convicted at trial and maintains that he did not commit the Index Offences.
6. Prior to the present review, the Applicant's case was considered on the papers by the Parole Board in May 2020. The Parole Board on that occasion noted that the Applicant had been expected to engage with offending behaviour work and to show positive



custodial behaviour, both of which he had failed to do. The 2020 review did not direct the Applicant's release or recommend his progression to an open prison.

7. On 22 April 2021, the Secretary of State referred the Applicant's case to the Parole Board to consider whether it was appropriate to direct his release. If not persuaded to direct his release, the panel was asked to advise the Secretary of State on the Applicant's suitability for a place in an open prison. Following the referral, in June 2021, the Applicant absconded from hospital after receiving medical treatment and was located by the police shortly afterwards hiding in a bush.
8. The present review was the fourth review of the Applicant's case by the Parole Board. In legal representations of the 19 August 2021, the Applicant asked the Parole Board to consider his case at an oral hearing. An initial paper review by the Parole Board on 17 September 2021 granted that request and the case was sent to an oral hearing.
9. The panel considered the Applicant's case at an oral hearing on the 29 June 2022. At this point the Applicant had been convicted of escaping from custody and had received a custodial sentence. Evidence was heard from the Applicant, from his Probation Officer based in the community and the official managing his case in the prison. The Applicant was legally represented at the oral hearing. In its Decision Letter of the 5 July 2022, the panel did not direct the Applicant's release and did not recommend his progression to an open prison.
10. The panel identified a need for offence focussed work to be completed in the closed estate. In its decision not to direct his release, the panel noted the history of offending in this case, concerns about the Applicant's behaviour in custody and that his release was not supported by the Applicant's Probation Officer.

Request for Reconsideration

11. The Applicant's grounds for reconsideration are that the panel's decision was irrational and procedurally unfair, in that:

Irrationality

The panel relied on security information and the dossier contained factually inaccurate information.

Procedurally unfair

There was information missing from the dossier and it had not been issued to him because the prison was understaffed.

The Relevant Law


12. The panel correctly sets out in its decision letter dated the 5 July 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. Those issues had been revised by the Secretary of State and were detailed by the panel.

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Parole Board Rules 2019 (as amended)

13. 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)).
14. 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)).

Irrationality

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.

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

The reply on behalf of the Secretary of State

20. In an email on the 1 August 2022, the Secretary of State confirmed that he would not be making any representations.

Discussion

Irrationality

21. The Applicant complains that the panel used security intelligence information about his escape. He says that allegations within that security intelligence are incorrect, for example, that a car was used and that he had a knife on his person. He says that the intelligence also provided unsubstantiated allegations of further escape plans and a robbery plan.

22. The Applicant points out that he has been trying to complete a recommended offending behaviour programme but it has not been made available to him. He questions why he is assessed as presenting a high risk of serious harm towards staff in custody and prisoners and why the dossier identified a female as his partner when he did not know who this person was.

23. In support of his submission of irrationality, the Applicant adds that he has completed many courses in prison and has reports of excellent behaviour. He believes that it is unfair that he has served the minimum term of his sentence and, over six years later, he is still in prison.

24. There is nothing put forward in the submissions by the Applicant that demonstrate that the panel's decision was irrational. The complaint made by the Applicant focuses more on his dissatisfaction with the decision of the panel not to direct his release.

25. The panel was entitled to consider security intelligence in its assessment of the Applicant's escape from custody. Although the Applicant submits that elements of that intelligence were incorrect, this does not alter the fact that he committed the offence. Any reading of the Decision Letter demonstrates that the panel was focussed on the escape itself and it made no reference to the elements disputed by the Applicant, which would suggest that the panel did not weight those elements in its assessment.

26. The panel reflected the security intelligence alleging escape plans and a robbery plan, however, it also noted that there was insufficient evidence for it to make any finding

of fact. The Applicant disputes the unproven intelligence and it played no part in the panel's decision not to direct his release.

27. The completion of work in custody and the Applicant's frustration at the long wait for the recommended offending behaviour programme does not support irrationality. The Parole Board does not define sentencing planning or courses that must be completed. The panel in this case commented on risk and determined that further work would be needed in custody. It was entitled to reach that conclusion.

28. The risk of serious harm was considered by the panel, the Applicant may not agree with the findings, however, this does not point to irrationality. The Applicant's reference to a female detailed in the dossier was not mentioned in the panel's Decision Letter and so it is reasonable to conclude that it played no part in its decision not to direct his release.

Procedurally unfair

29. The Applicant states that the dossier was not provided to him and that he told the panel of this at the oral hearing. He says that he then had to sit through the oral hearing not knowing what was to come.

30. He says that he had wanted to submit written evidence and couldn't do so because of Coronavirus restrictions and a lack of staff at the prison. In particular, the Applicant had wanted the panel to see the Judge's summing up in respect of the further conviction for escape, which he felt would establish the true facts of the matter.

31. In the Applicant's view, his hearing was unfair.

32. I note that the Applicant was legally represented at the oral hearing. It is usual for panels to check with representatives that the same paperwork has been seen by both the panel and the representative. No doubt, if this procedure had not been followed, the Applicant's legal representative or the Applicant himself would have made reference to this irregularity.

33. It may well be that the Applicant did not have access to the full dossier, however, there is nothing before me to suggest that his legal representative did not have the dossier or that the legal representative had been frustrated in anyway in dealing with the Applicant's case, including providing advice to him or taking his instructions.

34. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

35. The Applicant's submission that he had wanted to submit other written evidence or had wanted the panel to see the summing up by the Judge in his recent conviction were matters that he could have properly addressed with his legal representative. He makes no complaint of being unable to consult with his legal representative in the preparation

of his oral hearing and therefore it is reasonable to conclude that he had the opportunity to do so.

36. The procedure for filing evidence in a Parole review is detailed in the Parole Board Rules 2019 (as amended). The opportunity to submit written evidence or to apply for the panel to make a direction for other evidence to be produced was available to the Applicant. The fact that he did not seek to do this prior to the hearing does not make the hearing unfair.

37. I am not persuaded by the Applicant's submission of procedural unfairness.

Decision

38. 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.

Robert McKeon
3 August 2022