

[2023] PBRA 116

Application for Reconsideration by Narman

Application

1. This is an application by Narman (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 17 May 2023. The decision of the panel was not to direct 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, and/or (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 consisting of 525 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On the 10 December 2010 the Applicant was sentenced in relation to offences of the rape of a male child under 13; causing a child to engage in a sexual act; 2 counts of sexual assault upon a female; attempted assault on a female by penetration; and 2 counts of trespass to commit a relevant sexual offence. The Applicant was aged 22 when convicted and is now 35. The Applicant was sentenced to an indeterminate sentence for public protection. The minimum term fixed by the judge was six years and 302 days.
5. The Applicant forced entry into the homes of two elderly females and sexually assaulted them. On a different occasion a child was also, seriously sexually assaulted. The offences were committed with a background of alcohol and illicit drug misuse.
6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences prior to the index offences.

Request for Reconsideration

7. The application for reconsideration is undated but was received by the Parole Board on the 26 May 2023.

8. The grounds for seeking a reconsideration are set out below.

Current parole review

9. This was the third review by the Parole Board of the Applicant's position following the expiration of his tariff. At the second review the Parole Board had recommended that the Applicant be transferred to an open prison. The Secretary of State affirmed the recommendation and the Applicant was transferred to an open prison. Following an adverse incident, he was transferred back to a closed prison before the current review.

Oral Hearing

10. The review was conducted by an independent Chair of the Parole Board, a psychology member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by a solicitor.

11. A dossier consisting of 488 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 17 May 2023 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)

13. Pursuant to 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)).

14. 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

15. 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."

16. 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.

17. 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

18. 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.

19. 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.

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

21. 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.*"

22. 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.

The reply on behalf of the Respondent

23. The Respondent offered no representations.



Reconsideration grounds and discussion

Ground 1

24. The oral hearing Panel did not identify '*certain aspects*' leading to the decision that the Applicant's risk could not be managed.
25. This complaint arises in circumstances where the panel (at paragraph 3.8 of the decision), indicated that '*certain aspects*' of the Applicant's risk were reliant upon self-report (by the Applicant) and were therefore matters which elevated the risk of serious harm. The Applicant's legal adviser argues that these matters were not identified.

Discussion

26. At paragraph 3.9 of the decision letter the panel indicated that they were concerned about the absence of independent information relating to sexual thoughts, behaviour and activity in the community. A major risk factor identified by the panel and professionals was the Applicant's sexual preoccupation and the focusing of his life upon sex as a means of coping with low self-esteem. The panel noted that the Applicant had not kept a sexual thoughts diary which had been suggested to the Applicant. There was therefore limited corroborative evidence and information, save for self-report, of the Applicant's ability to cope and avoid risk in the community.
27. At paragraph 3.10 the panel also noted that the professionals had identified concerns about the emergence of personality traits when the Applicant was in an open prison. The panel indicated that it was their view that the testing of the ability of the Applicant to manage these traits in the community was limited.
28. In the light of these references and concerns, which were set out in the decision, I reject the submission that the aspects of concern were not identified by the panel in their decision letter.

Ground 2

Incorrect test applied:

29. The Applicant's legal adviser submits that "*the panel concluding that he remains in custody because they could not rule out that he may offend in the future is a fundamental misapplication of the statutory test, such as, to render the decision unlawful.*"

Discussion

30. This complaint arises in circumstances where the panel indicated at paragraph 3.8 that they were obliged to consider the risk of the Applicant over an indefinite period rather than for a short period when he would be intensively supervised in probation accommodation. The statutory test is correctly set out by the panel in more than one reference in the decision letter. The panel correctly interpreted the legal position so far as the application of the test is concerned. The panel were obliged to apply the test over an indefinite period and had to be satisfied that the statutory test



applied for an indefinite period beyond any accommodation provision by the probation service. Accordingly, I do not find that the panel were applying the test inappropriately. The panel properly identified the test and correctly identified the period of time over which the test applied. I therefore reject the submission that the statutory test was misapplied as argued by the Applicant's legal adviser.

Ground 3

Insufficient reasons:

31. The Applicant's legal adviser argues that the panel acted irrationally in failing to follow the recommendations of the professional witnesses and to direct release. The argument being that the panel failed to provide clear and sufficient reasons why the Applicant's risk could not be managed in the community.

Discussion

32. As set out above the panel indicated that they had considered the risk management plan. They were satisfied that it was robust, however it was clear from the panel decision that the concerns of the panel related to the fact that there was insufficient evidence that the Applicant's risk could be safely managed in the community in the longer term. The panel took the view that evidence of the long-term management of risk would be supported by the further testing of the Applicant in the community, within the controlled regime of an open prison. The panel's view was that the testing of the ability of the Applicant to manage his own risk in the community was necessary, before a final decision could be made about whether the Applicant should remain confined for the protection of the public. I am not persuaded that this view was irrational. The Applicant's risk had been tested for a relatively short period in an open prison (before he was recalled), the panel took the view that this period of testing was inadequate. The panel acknowledged the views of the professionals, and the panel were well aware that their decision did not follow the recommendations of the professionals. As was noted by the Applicant's legal adviser the panel were not obliged to adopt or follow the recommendations of the professionals. The panel were obliged to explain the reasons for their decision. I am satisfied that the panel did explain their reasons. The panel made it clear that they did not believe that there was sufficient evidence to support the view that the Applicant's risk of serious harm could be managed in the community, other than in the more controlled circumstances of an open prison.

33. It is also noted that in 2021 a panel of the Parole Board considered the Applicant's case. The recommendation by the professionals at that time was that there should be further testing in open conditions and they did not recommend release. The Applicant was in fact transferred to an open prison, however following an adverse incident he was transferred back to a closed prison. The Applicant therefore spent a short period of time in an open prison. The professionals' position therefore was somewhat conflicted and inconsistent. Although not specifically noted by the panel, with this background, the panel's decision not to follow the recommendations of the professionals, was unsurprising.



34. I am therefore satisfied that the panel appropriately explained the reason why they had decided not to follow the recommendations of the current professionals at the oral hearing. In essence the panel's view was that there was insufficient evidence to support the contention that the Applicant's risk could be safely managed in the community and that therefore it remained necessary for the Applicant to be confined, albeit within the less restrictive environment of an open prison.

Decision

35. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for reconsideration.

HH S Dawson
27 June 2023

