

[2023] PBRA 14

Application for Reconsideration by Dalton

Application

1. This is an application by Dalton (the Applicant) for reconsideration of a decision of an oral hearing panel. The decision was dated the 10 December 2022. The panel made no direction for 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. The papers were the dossier consisting of 244 pages, the oral hearing panel decision, the Application for reconsideration submitted by the Applicant's solicitor and the response by the Secretary of State.

Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP) for the offence of conspiracy to Wound with intent to cause Grievous Bodily Harm. He had been released and recalled. The offence was described by the judge as a '*contract killing*'. The Applicant and associates conspired together to attack the victim as the victim was thought to be a police informant. The victim was shot twice with a shotgun. The Applicant was 27 at the time of sentence he is now 43.

Request for Reconsideration

5. The application for reconsideration is dated 22 December 2022
6. The grounds for seeking a reconsideration are set out below. I have also set out the discussion in relation to each ground.

Current Parole Review

7. This was the fourth recall considered by the Parole Board. The Applicant was last recalled in December of 2021. The reference from the Secretary of State was to consider release and if not releasing to consider any recommendation relating to a transfer to an open prison.

The Relevant Law



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8. The panel correctly sets out in the template heading of its decision letter dated 10 December 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.
9. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

10. Pursuant to 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)).
11. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (rule 28(2)(a)).
12. 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**.

Illegality

13. An administrative decision is unlawful under the broad heading of illegality if the panel:
 - (a) misinterprets a legal instrument relevant to the function being performed;
 - (b) has no legal authority to make the decision;
 - (c) fails to fulfil a legal duty;
 - (d) exercises discretionary power for an extraneous purpose;
 - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - (f) improperly delegates decision-making power.
14. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

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



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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.

The reply on behalf of the Secretary of State

21. The Secretary of State offered no representations.

Discussion

Ground 1 - Procedural unfairness-failure to apply the relevant law

22. In this ground the Applicant's solicitors argue that an incorrect test was applied by the panel when reaching their conclusion. The correct test was set out in the decision letter template and indeed forms part of the standard current template used by all panels in their decisions.

23. In the concluding paragraph of their decision the panel listed a number of concerns and the basis of their decision. The Panel then indicated as follows

24. *"Therefore, the panel concluded that his risk of serious harm could not be effectively managed in the community and considered him to be appropriately placed in prison. It made no recommendation for his release."*

25. It is clear that the Panel were aware of the wording of the test for release as it was set out in the opening part of the Template. The wording adopted in the conclusion did not adequately reflect the test. The test is not whether serious harm can be

effectively managed (although it is highly likely that if serious harm cannot be effectively managed the test would not be met). Neither is the test whether the prisoner is appropriately placed in prison. The rewording of the statutory test implies that the Panel may have strayed from focusing upon the appropriate criteria. The appropriate wording (demonstrating that the test had been correctly applied) would have been *"therefore the panel concluded that it remained necessary for the protection of the public that the prisoner should be confined."*

Ground 2 Bias

26. The argument adduced by the Applicant's solicitor in relation to this ground was that the panel demonstrated bias by commenting on the Applicants presentation at a point in the oral hearing where he became frustrated. The decision letter notes that a break was taken at this point in the oral hearing and that the Applicant apologised for his outburst. The panel perfectly properly referred to this incident in the decision. The role of the panel is to make an overall assessment of the prisoner. That assessment can include a reflection upon the prisoner's behaviour within the oral hearing forum.

27. I therefore reject the submission that by referring to the incident in the decision letter any element of prejudice was shown towards the Applicant.

Ground 3 unproven allegations

28. I have not dealt with this ground for the reasons set out below.

Further matter – Ground not argued

29. Under the heading of the "Conclusion" paragraph the panel indicated as follows:
*"4.3 The panel considered if [the Applicant] met the criteria for a recommendation for transfer to open conditions and concluded the following. The panel were not satisfied that he had made sufficient progress in addressing and reducing his risk of harm to a level consistent with protecting the public from harm; the panel were satisfied that he would be a low risk of absconding; and the panel does not consider that a period of time in open conditions is essential to inform future decisions about release and preparation for possible release into the community.
4.4 The panel then considered whether [the Applicant] can be safely released into the community and concluded the following;..."*

30. In a Parole Board Guidance document dated August 2019 the following guidance note, addressed to decision writers appears :

"Quote the test for release in full, do not interpret, truncate or summarise it. When the referral includes consideration for transfer to or remaining in open conditions, confirm the panel must first consider the test for release."

31. In this case the panel appear to have considered the test for open conditions before considering the test for release. This is a procedural irregularity and a matter of importance in ensuring a structured decision-making approach.

32.I therefore determine that there were procedural irregularities in this decision. In particular the truncating of the test for release and the failure to consider the release and open conditions decision in the correct sequence. For these reasons I conclude that this matter must be reconsidered and so order. I have not dealt with ground 3 in the light of my decision relating to the other grounds.

Decision

33. For the reasons I have given, I do not consider that the decision was irrational however I do consider that there were procedurally irregularities and accordingly the application for reconsideration is granted.

HH S Dawson
22 January 2023