

[2023] PBRA 196

Application for Reconsideration by Rhodes**Application**

1. This is an application by Rhodes ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 5 October 2023, after oral hearings on 2 May 2023 and 31 July 2023, made a decision not to direct his release on licence and not to recommend a move to an open prison.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is serving an indeterminate sentence of imprisonment for public protection ('IPP') which was imposed on 15 May 2006. The offence for which the sentence was imposed was one of sexual assault by penetration. The victim was his then partner. He received concurrent determinate sentences for threatening to destroy or damage property and offences of assault. He had pleaded guilty to some of the less serious offences but was convicted of the index offence and one other after a contested trial.
4. He had a difficult childhood and had accumulated a number of previous convictions, and he accepts that he had been guilty of domestic violence in previous relationships.
5. The Applicant was 22 years old at the time of sentencing and is now 39 years old.
6. The minimum term ('tariff') under his IPP sentence was one year and 228 days (taking into account time served on remand). It expired on 29 December 2007.
7. He was released on licence on 29 March 2021, but was recalled to prison on 24 January 2022. The principal reason for his recall was that his then partner (Ms M) had alleged to the police that he had been guilty of domestic violence against her. An additional reason was that he had entered the area which he was prohibited from entering in order to visit Ms M who lived in that area.
8. The Applicant has always strenuously denied Ms M's allegations of domestic violence and provided a reason why she could have made up those allegations. The allegations were investigated by the police. On 14 February 2022 Ms M made a further statement stating that she did not wish to give evidence in court against the Applicant. She did not retract the allegations, but in the light of her unwillingness to give evidence against



the Applicant the police decided, entirely reasonably, not to take any further action against the Applicant. That decision was made on 29 March 2022.

9. In the meantime, the Applicant's case had been referred by the Secretary of State ('the Respondent') to the Board to decide whether to direct the Applicant's re-release on licence.
10. On 13 April 2022 the case was considered at the Member Case Assessment ('MCA') stage by a single MCA member. Regrettably, the MCA member had not been informed of the police's decision and therefore adjourned the case for the police investigation to be completed. This was the first of a series of unfortunate events which resulted in significant delay to the conclusion of this review of the Applicant's case.
11. On 1 July 2022 the case was considered again by the same MCA member who directed that the case should proceed to an oral hearing. She also directed that all police reports surrounding Ms M's allegations should be provided, as should witness statements and any photographs. She estimated that the oral hearing should take 3.5 hours.
12. The police reports and Ms M's very detailed witness statement were duly produced, as were some photographs which did not take matters much further. The purpose of these documents being directed and produced was to enable the oral hearing panel to consider whether it would be appropriate, notwithstanding that no criminal charge had been preferred against the Applicant, to attach any weight to the allegations.
13. The standard of proof required in criminal proceedings (proof so that the jury can be sure of guilt) is higher than that required in parole proceedings. Parole proceedings are classified as civil proceedings, and in civil proceedings the proof required is proof on balance of probabilities. That means that to make a finding of fact that a disputed allegation is true the court or tribunal must be able to conclude that it is more likely than not that that is the case.
14. In due course the case was allocated to the panel (which comprised two independent members of the Board) to conduct the oral hearing. The hearing was listed for hearing by video link on the afternoon of 2 May 2023.
15. By that time a report had been obtained by the Applicant's solicitors from a chartered and registered psychologist who had carried out a psychological risk assessment of the Applicant. The solicitors wished the psychologist to give oral evidence at the hearing. It was realised by the panel chair and the Applicant's legal representative that the addition of the psychologist to the other witnesses who were to give evidence might make it difficult to complete the hearing in one afternoon. The Applicant and his solicitor were understandably anxious to avoid any adjournment of the hearing, and it was agreed that a tight timetable for the hearing might enable it to proceed as scheduled.
16. That plan was disrupted by the late arrival of one of the witnesses (the Applicant's community offender manager ('COM')) and a series of technical problems throughout the hearing. Some oral evidence was taken from the prison offender manager ('POM'), the Applicant, and the COM, and the hearing was then adjourned. It could not be resumed until 31 July 2023.

17. At the adjourned hearing oral evidence was given by the psychologist, and further oral evidence was given by the COM and the Applicant. All three professional witnesses (the psychologist, the POM and the COM) supported the Applicant's application for re-release on licence.
18. At the conclusion of the hearing, it was agreed that the Applicant's legal representative would provide her closing submissions in writing, and it was anticipated that the panel's decision would be issued within the usual 14-day time limit.
19. The legal representative's closing submissions, which ran to eight pages, were duly provided, and added to the dossier on 2 August 2023.
20. On 18 August 2023 the panel chair issued adjournment directions stating that she was dealing with a personal matter and there would be a short adjournment for the decision letter to be finalised. The adjournment review date was specified as 23 August 2023.
21. The decision letter had not been issued by 7 September 2023, on which date the POM and the Head of Offender Management at the prison where the Applicant was detained e-mailed the Board enquiring about progress and stating that the Applicant was very anxious about the delay.
22. Later that day the panel chair issued further adjournment directions stating that she had been suffering from a persistent illness but had returned to Parole Board work and was catching up with decision letters. A new adjournment review date was specified as 13 September 2023.
23. Further chasing letters were sent and on 14 September 2023 the Board's case manager informed the Applicant's legal representative that the decision letter would be issued 14 days after the review date: this would have been by 27 September 2023.
24. The decision letter was not issued by that date and the matter was escalated to the Board's senior management. Eventually the decision letter was issued on 6 October 2023, 46 days after the original 14-day time limit had expired.
25. When issued, the decision explained that the panel's conclusion was as follows: "*The panel is satisfied it remains necessary for the protection of the public that [the Applicant] remains confined. Release is not directed. The panel went on to consider the test for open conditions. The panel is not satisfied the risk has reduced to a level where risk can be managed in open conditions given the outstanding work to be completed. A transfer to open conditions is not recommended*".
26. In the decision letter the panel made a finding of fact [see above] that it was more likely than not that Ms M's allegations of domestic violence were true. This finding was clearly central to the decision. The allegations had been the subject of detailed argument in the legal representative's closing submissions.
27. The panel stated in the opening section of its decision letter that the dossier contained 551 pages and that no additional pages had been added at or since the hearing. That was clearly not correct. As noted above the legal representative's closing submissions had been added to the dossier on 2 August 2023, as had a further report by the COM. The dossier in fact ran to 563 pages at the time when the panel's decision was made.

28. A little later in the opening section of the decision letter the panel stated that the Applicant's legal representative would provide her closing submissions in writing after speaking to the Applicant. The panel did not mention that she had already done so, and there was no mention anywhere in the decision letter of any of the contents of those submissions.
29. I have made an enquiry of the Board's case manager as to whether and if so when she had e-mailed the legal representative's submissions to the panel members (and if so whether she had received any acknowledgement from either of them). She stated that she had e-mailed the submissions to them on 2 August 2023 and that there had been no acknowledgment.
30. This matter will be discussed further below. It is sufficient at this stage, to complete the history, to record that on 27 October 2023 the legal representative submitted detailed representations in support of this application for reconsideration of the panel's decision.

The Relevant Law

31. The test for release (or re-release) on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The Parole Board Rules 2019 (as amended)

32. Under Rule 28(1) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
33. Reconsideration will only be directed if one of more of the following three grounds is established:
 - (a) It contains an error of law or
 - (b) It is irrational or
 - (c) It is procedurally unfair.
34. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
 - (a) A paper panel (Rule 19(1)(a) or (b)) or,
 - (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or,
 - (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).
35. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the grounds that the decision was both irrational and procedurally unfair.
36. The panel's decision not to recommend a move to an open prison is not eligible for reconsideration so I do not have to consider it.

Irrationality

37. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out as follows 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."*
38. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.
39. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.
40. Other cases establish that the reasons why a panel's decision may be found to be irrational include (a) the giving of manifestly disproportionate or inadequate weight to a relevant consideration and (b) a failure to provide adequate reasons for the rejection of the unanimous recommendations of professional witnesses.

Procedural unfairness

41. 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 from the issue of irrationality which focuses on the actual decision.
42. The kind of things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
 - (b) A failure to conduct the hearing fairly;
 - (c) A failure to allow one party to put its case properly;
 - (d) A failure properly to inform the prisoner of the case against him or her; and/or
 - (e) Lack of impartiality.
43. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The application for reconsideration in this case

44. The application was made by the Applicant's legal representative. In summary the grounds advanced are:

(1) Failure to provide adequate reasons for departing from unanimous recommendations of professional witnesses;

- (2) Procedural unfairness by failing to apply the correct test for release or re-release on licence;
 - (3) Procedural unfairness by failing to apply the correct approach to unproven allegations; and
 - (4) Procedural unfairness by chronic delay in issuing the decision letter.
45. Grounds (2) and (3) might have been better presented under the heading of errors of law but I will consider them anyway.

The reply on behalf of the Respondent

46. The Respondent is a party to parole proceedings (the other party being the prisoner) and is therefore entitled to make representations to the Board in response to an application for reconsideration by or on behalf of the prisoner. By e-mail dated 3 November 2023 the Public Protection Casework Section ('PPCS') of the Ministry of Justice ('MOJ') informed the Board that the Respondent did not offer any representations in relation to this application.

Documents considered

47. I have considered the following documents for the purpose of this application:
- (a) The dossier provided by the Respondent for the Applicant's case, which now runs to 611 pages and includes a copy of the panel's decision;
 - (b) The representations of the Applicant's legal representative in support of the application for reconsideration;
 - (c) PPCS' e-mail of 3 November 2023; and
 - (d) Two e-mails providing the additional information which I requested from the case manager.

Discussion

48. It is convenient first to discuss the legal representative's submission that the panel's decision was procedurally unfair. If I uphold that submission and allow this application on that ground it will be unnecessary to consider the issue of irrationality.
49. There was undoubtedly a most unfortunate delay in the issuing of the decision letter in this case, which will have caused considerable anxiety to the Applicant. I do not think that delay in issuing a decision is in itself necessarily a reason for directing reconsideration of a decision on the ground of procedural unfairness. Sometimes delays are unavoidable, for example because of illness. A lengthy delay inevitably causes considerable anxiety to the prisoner, which is of course regrettable. However, unless it can be shown that the delay has had other consequences amounting to procedural unfairness reconsideration will not usually be directed.
50. I have therefore looked to see whether anything else in this case can be said to have amounted to procedural unfairness. I am satisfied that there is one such factor which requires this case to be reconsidered.
51. The evidence seems to show very clearly that (possibly because of the panel chair's illness and the resulting delay) the Applicant's closing submissions were never

considered by the panel. That is a well-established basis for a finding of procedural unfairness.

52. The panel's own statements in its decision letter that (a) the dossier which it was considering only ran to page 551 and (b) that no further pages were added after the hearing amount to a clear indication that the panel did not consider the documents added to the dossier after the hearing.
53. Although my enquiries have shown that the legal representative's closing submissions were e-mailed to the panel members shortly after the hearing they were not acknowledged and there was no reference to them or any of their contents anywhere in the decision letter.
54. Equally significant is the absence of any reference in the decision letter to the COM's updated report which was also added to the dossier after the hearing. The panel had requested information about when it was that the Applicant commenced his intimate relationship with Ms M. In her updated report the COM stated that on 7 October 2021 the Applicant brought Ms M to his probation appointment, confirmed that they were now in an intimate relationship and provided probation with Ms M's details. This was an important piece of evidence to which the panel would surely have referred in their decision letter if they had considered it.
55. The inference from all of the above is that the legal representative's closing submissions and the COM's report were not considered by the panel.
56. I have considered whether it would be appropriate for me to seek information from the panel members about whether or not that was the case. I am satisfied that that would not be appropriate. Justice must not only be done, but be seen to be done and, if the panel members were now to contradict themselves and say that they did see and take into account the closing submissions, that would create a most unsatisfactory situation in which the Applicant and his legal representative would inevitably suspect that they were not being told the truth.
57. I am therefore satisfied that in the interests of justice (and of the Applicant and the panel members themselves) the appropriate course for me to take is to allow this application and direct reconsideration of the panel's decision on the ground of (no doubt inadvertent) procedural unfairness.
58. I would need a good deal of persuasion to find that any of the other grounds advanced by the solicitors would justify a direction for reconsideration, but since this case is going to be reconsidered anyway, I need say no more about them.

Decision

59. For the reasons which I have explained I am satisfied that this application must succeed and I must direct reconsideration of this case.

Jeremy Roberts
20 November 2023