

[2023] PBRA 206

Application for Reconsideration by Williams

Application

1. This is an application by Williams (the *Applicant*) for reconsideration of a decision dated 18 October 2023 of a panel of the Parole Board (the *Panel*) following an oral hearing held remotely by video on 17 October 2023. The Panel decided not to direct the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019, as amended by the Parole Board (Amendment) Rules 2022 (*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 following papers:
 - an application for reconsideration dated 6 November 2023 (the *application*) submitted by the Applicant's solicitors;
 - the Panel's decision dated 18 October 2023;
 - a dossier of 368 numbered pages; and
 - emails dated 24 October 2023, 30 October 2023, 31 October 2023, and 1 November 2023 to and from the Parole Board case manager responsible for the administrative case management of the Applicant's case (*case manager*).
4. I have also listened to the Panel's recording of the hearing which was approximately two and a half hours in duration.

Background

5. The Applicant was convicted after a trial of the attempted rape of an adult female who was a stranger to him. He followed the victim off a bus in the early hours of the morning and approached her as she walked home alone. He pushed her onto the front steps of a house and attempted to rape her. The victim managed to struggle free and run for help.
6. In November 2018, the Applicant was given an extended sentence of eleven years comprising a custodial term of seven years and an extended licence period of four years. The Applicant's parole eligibility date was in March 2023, his conditional release date is in July 2025, and his sentence expiry date is in June 2029.



7. According to his police national computer record, and taking account of the index offence, the Applicant has 20 convictions for 23 offences of which eight are drug offences and four are weapon offences. The Applicant also has a history of aggressive, violent, and public order offences.
8. The Applicant maintains his innocence of the index offence.

Request for Reconsideration

9. The application for reconsideration is dated 6 November 2023.
10. The application states that:
 - (a) on page 2 of the decision, the number of pages in the dossier is given as 293;
 - (b) at the outset of the hearing on 17 October 2023, the number of pages was confirmed and said to be 368 pages;
 - (c) a report dated 12 October 2023 (*COM Report*) from the Applicant's community offender manager (*COM*) was added to the dossier on 13 October 2023;
 - (d) an OASys Assessment dated 12 October 2023 (*OASys Assessment*) was added to the dossier on 13 October 2023;
 - (e) in questioning the Applicant, the Panel did not ask him about his move-on plans or the proposed additional licence conditions which formed part of the proposed risk management plan (*RMP*);
 - (f) the COM was "*not taken through*" the RMP or the proposed additional licence conditions by the Panel;
 - (g) the Applicant's legal representative questioned the Applicant and the COM about the RMP and the proposed additional licence conditions;
 - (h) after the decision was issued, the Applicant's legal representative emailed the case manager about the discrepancy between the number of pages stated to be in the dossier on page 2 of the decision and the actual number of pages in the dossier;
 - (i) on 24 October 2023, the case manager informed the Applicant's legal representative that the chair of the Panel (*panel chair*) was on leave and would reply on her return;
 - (j) on 30 October 2023, the case manager informed the Applicant's legal representative that the Panel was willing to consider "*the version [of the dossier] that contained the additional pages*" and to review its decision in the light of the further information; and
 - (k) on 1 November 2023, the case manager said that she had spoken to the panel chair who advised that the COM report had been received late and had not been seen by the Panel before it made its decision.
11. The ground for seeking a reconsideration is that the Panel's decision is procedurally unfair. In summary, the application submits that in reaching its decision, the Panel had not considered the proposed risk management plan which was "*significant evidence that may have had a potential bearing on the decision to be made.*" On that basis, it is submitted that "*the review of the Applicant's case was unfair*". The points set out in paragraph 10 above are made in support of the Applicant's case.

12. The application confirms that no submission is being made on the Applicant's behalf that the decision of the Panel was irrational.

The reply on behalf of the Secretary of State

13. On behalf of the Secretary of State, the Reconsideration Team of the Public Protection Casework Section (PPCS) made representations in a letter dated 9 November 2023. PPCS confirms that the COM Report was submitted on 13 October 2023 which was after the due date for its submission but before the hearing date. Having liaised with the COM, PPCS states that the COM gave oral evidence at the hearing which covered the contents of the COM Report.

Current parole review

14. On 16 May 2022, the Respondent referred the Applicant's case to the Parole Board. On 28 February 2023, the Applicant's case was directed to an oral hearing. A remote hearing by video took place to review the Applicant's case on 17 October 2023. The Applicant was seeking early release at his review.
15. The Panel was comprised of an independent member and a judicial member. At the hearing, evidence was taken from a stand-in for the Applicant's prison offender manager (POM), the Applicant's POM from a previous prison, a prisoner-commissioned psychologist, a programmes treatment manager, and the COM. The Applicant also gave evidence to the Panel.
16. In 2019 or 2020, the Applicant was assessed as suitable for the Horizon programme (an intervention delivered to male sex offenders assessed to present a medium risk of reoffending). However, the Applicant was unable to access the programme. A programme needs assessment was subsequently undertaken in February 2023, and the Applicant was assessed as suitable for the Kaizen programme (an intervention delivered to male sex or violent offenders assessed to present a high or very high risk of reoffending). Initially, the Applicant expressed a willingness to complete the Kaizen programme but later changed his mind.
17. To date, the Applicant has not undertaken any accredited programme or intervention to address his sexual offending.

The Relevant Law

18. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
19. The Panel correctly sets out the test for release in its decision dated 18 October 2023. The test is in fact automatically set out in the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

20. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A)).
21. 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)).

Procedural unfairness

22. 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.
23. 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.
24. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Discussion

25. On the face of it, there appears to have been a procedural unfairness in the way the Applicant's case was decided. When the decision was issued, the Applicant's legal representative noticed that the number of pages in the dossier was incorrectly recorded as 293 when in fact the dossier comprised 368 pages at the date of the hearing. He emailed the case manager on 24 October 2023 and said that although the Panel had indicated at the hearing that it had a dossier of 368 pages, he was now concerned that the Panel had not seen the COM Report and the OASys Assessment. He stated that this concern was strengthened by the Panel not having asked the COM any questions about the RMP including the proposed additional licence conditions.

26. The panel chair was on leave when the Applicant's legal representative emailed the case manager. On the panel chair's return from leave, the case manager emailed the Applicant's legal representative on 30 October 2023 as follows:

"Unfortunately, some of the Panel have now deleted their dossiers and are unable to check up to which page they based their decision on. She [the panel chair] has requested what you would like her to do regarding this. She is happy for the Panel to consider the version which has all the pages you have and then review their decision in the light of that."

27. The panel chair was incorrect in offering to review the Panel's decision since the Panel was functus officio following the issuing of its decision. The panel chair also referred to "some of the Panel" having deleted their dossiers implying that "some" had not. The Panel comprised two members only and it is unclear whether the panel chair had checked the position with her co-panellist.

28. The Applicant's legal representative emailed the case manager on 31 October 2023 as follows:

"I was simply seeking to clarify that the Panel had received the complete dossier of 368 pages given that the number of pages detailed in the decision letter was shown as 293 and that during the Hearing neither Panel Member asked any questions of the COM in terms of the risk management plan/proposed licence conditions and which in my experience when there is an application for release that is somewhat unusual."

If the Panel Chair is able to confirm that the complete dossier had been received by the Panel including the latest report from the COM and updated OASys I would not request any further action but clearly if not then I will need to consider how best to proceed on behalf of [the Applicant]."

29. On 1 November 2023, the case manager emailed the Applicant's legal representative as follows:

"From speaking with the Panel Chair, it would appear that the COM report came in late and that she did not see these reports before making the decision. It would be best to either go through Reconsideration or the Set Aside process, but you would need to make an application to them directly."

30. The question is whether the Panel had the same dossier of 368 pages as the Applicant's legal representative at the hearing.

31. I am satisfied that the Panel did have both the COM Report and the OASys Assessment at the hearing and that the panel chair was mistaken in her recollection. I have reached this conclusion for several reasons. Having listened to the recording of the hearing, the most compelling of these is that when the panel chair takes evidence from the COM, she starts by saying, "Thank you for your report which we received relatively recently". It is perfectly clear to me from this statement that the panel chair had the COM Report. Since the OASys Assessment was added to the dossier on the same date as the COM Report, I am satisfied, on the balance of

probabilities, that the documents would have been downloaded together by both members of the Panel.

32. In addition, and reinforcing my conviction that the Panel had both documents, I note the following:
- (a) the Applicant's legal representative states that he and the panel chair had agreed that they both had a dossier of 368 pages at the outset of the hearing. It is unfortunate that this matter was discussed by the panel chair and the Applicant's legal representative before the recording of the hearing was started. Having listened to the recording, before any evidence was taken, the panel chair announces, "Mr - [the Applicant's legal representative] *and I have checked that we have the same dossier.*" Again, it is unfortunate that the panel chair does not specify the number of pages in the dossier but it is clear that the Applicant's legal representative was satisfied at the time that the Panel had the same dossier as he did. It is good practice to ensure that the number of the pages in the dossier is confirmed with both the Applicant's legal representative and the Applicant after the recording has been started;
 - (b) the COM Report and the OASys Assessment were added to the dossier on 13 October 2023. This has been confirmed by the Parole Board. The hearing took place on 17 October 2023 giving the Panel several days to download both documents. In my view, it is improbable that the Panel would not have checked whether any new documents had been added to the dossier in the days before the hearing. This is particularly the case here for two reasons. First, the COM Report had been directed by the Member Case Assessment panel on 28 February 2023 and was due by 22 August 2023 (eight weeks before the hearing). The Panel would therefore have been expecting the COM Report, and, if they had not received it, I would have expected this to have been raised at the beginning of the hearing by the panel chair. Secondly, receipt of the COM Report was made more important by the fact that the previous probation service report was written over 15 months earlier in July 2022 by the Applicant's former COM and was therefore significantly out of date; and
 - (c) in paragraph 3.1 of the decision, the Panel refers to "*a very full risk management plan*" which again indicates that they had received and read the COM Report and the OASys Assessment.
33. The application states that the Panel did not question the Applicant or the COM about aspects of the RMP including the proposed additional licence conditions. The application suggests that the reason for this is that the Panel did not have the COM Report. I do not agree with this proposition. If a report is comprehensive and covers the key issues of relevance to the panel's consideration of a prisoner's application, it may be unnecessary to ask questions. Therefore, not asking questions of the Applicant or COM does not mean that the Panel did not have the COM Report or the OASys Assessment. At the hearing, aspects of the RMP were examined by the Applicant's legal representative by asking questions of the COM, and the COM has confirmed that he discussed the contents of the COM Report in the hearing.

34. As to what explains this unusual situation, my hypothesis is that the panel chair completed parts of the oral hearing decision template, including the number of pages in the dossier, before the COM Report and the OASys Assessment were added to the dossier. She then omitted to amend the number of pages in the dossier to reflect the additional documents before the decision was issued. There is no procedural unfairness in this case because the Panel and the Applicant's legal representative had the same dossier, as was agreed by them before any evidence was taken. If the panel chair's recollection of the case and of the hearing had been accurate or the recording of the hearing had been checked before responses were sent to the Applicant's legal representative, this issue could have been resolved easily. Although the Panel was *functus officio* once the decision had been issued, the number of pages noted on page 2 could have been corrected pursuant to the slip rule in Rule 30(1) of the Parole Board Rules.

Decision

35. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

H Emrys
01 December 2023