

[2023] PBRA 219

Application for Reconsideration by Walker

Application

1. This is an application by Walker (the Applicant) for reconsideration of a decision of an oral hearing panel dated 10 December 2023 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, (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 decision letter;
 - The application for reconsideration dated 15 December 2023; and
 - The dossier, which contains 246 numbered pages ending with the decision letter.

Background

4. On 22 May 2014, when he was 34 years old, the Applicant received a sentence of 12 years' imprisonment, made up of a custodial period of 7 years with an extension period of 5 years, for an offence of wounding with intent to cause grievous bodily harm. He attacked a neighbour with a knife.
5. The Applicant is now 43 years old. He had previous convictions, including multiple offences of robbery and attempted robbery, and an assault with intent to rob using a hammer, for which he received a 4-year sentence in 2004. During that sentence he assaulted his cellmate. His conviction for that offence, in 2006, was his last before the index offence. Shortly after sentencing for the index offence, he assaulted a fellow prisoner and received a concurrent 4-month sentence.
6. The Applicant was released on licence on 25 March 2020. He was recalled to custody in September 2022. His mental health had deteriorated, and he expressed paranoid thoughts about his neighbours in shared accommodation, which was similar behaviour to that which accompanied the index offence. He refused to engage with mental health, his accommodation was withdrawn and his whereabouts were unknown. The Applicant has received two adjudications since recall, both in December 2022, for fighting, and for threatening words and behaviour.



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Request for Reconsideration

7. The grounds for seeking a reconsideration are as follows:

- (1) The hearing was procedurally unfair as the panel chair did not explore the possibility of an adjournment to enable an assessment of the Applicant's mental health, despite stating in Panel Chair Discussions (*sic*, should be Directions) that this could be considered and would be discussed at the hearing.
- (2) It was irrational on the evidence not to conclude that that a psychiatric assessment was needed, and to conclude the review without one.

Current parole review

8. This parole review was the first since the Applicant's recall. His sentence expiry date will be in October 2025. The Secretary of State (the Respondent) referred his case for consideration of release.
9. An independent member of the Parole Board conducted the oral hearing on 21 November 2023. The Prison Officer Manager (POM) and the Community Offender Manager (COM) gave evidence, as did the Applicant. The Applicant was legally represented at the hearing.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release.
11. 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.
12. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

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. This decision is eligible for reconsideration.
14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include extended sentences (rule 28(2)(b)).

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.
18. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesday ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

Procedural unfairness

19. 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.
20. 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.

21. The overriding objective is to ensure that the Applicant's case was dealt with justly.
22. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.

The reply on behalf of the Respondent

23. The Respondent has emailed to say that he does not wish to make any representations in this case.

Discussion

24. Cases in which the Applicant to the Parole Board has been represented by a lawyer are highly unlikely to generate a successful application for reconsideration 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). All the more so, if the lawyer actively advanced the course of action now complained of.
25. In this case the application asserts that, before any evidence was given, the Applicant's representative told the panel that, in her opinion, a psychiatric assessment was not necessary, as the (2019) psychiatric and psychological reports within the dossier were very clear that the Applicant does not have a mental health condition.
26. The complaint is that the panel chair had earlier indicated that there would be discussion at the hearing about the necessity for an adjournment for a fresh psychiatric report. Despite his representative's concession, the Applicant still suggests (through the application) that a discussion should have taken place and would have resulted in an adjournment. If this is what the representative thought at the time, or at any stage of the oral hearing, she had every opportunity to say so.
27. The complaint being that there was no discussion at the beginning of the hearing, the fact is that the representative pre-empted the discussion by submitting that no psychiatric assessment was necessary. If the representative changed her mind about that as a result of the evidence given by the COM, which was to the effect that she, the COM, considered that a psychiatric assessment was necessary to inform the risk management plan (RMP), then the representative could have said so. She does not suggest that the panel did anything to prevent her.
28. The representative accepts that she made no application for the case to be adjourned for a psychiatric assessment. She says she confined herself to saying that if the panel thought such an assessment necessary the Applicant would comply

with one if offered. She now complains that the panel did not grant an application she never made. Such a complaint cannot result in a finding of procedural unfairness.

29. That leaves the issue of whether the panel was irrational when it decided not to direct release.

30. This must be the correct formulation of the issue: I cannot direct reconsideration on the basis of an allegedly irrational failure to adjourn for further information. I can direct reconsideration on the ground of irrationality, as defined above, only on the basis of the alleged irrationality of the decision to direct or not to direct release. This, no doubt, is why the Applicant's submission is based primarily on procedural unfairness.

31. Thus formulated, the answer must be that no irrationality is demonstrated, or even suggested. On the evidence the panel heard, there is no basis for suggesting that its decision not to release was irrational in the sense discussed above. The panel found that:

"[T]he risk management plan has limitations because of the lack of understanding of the reasons behind the deterioration in [the Applicant's] behaviour. The panel accepts that he was managed safely for some time, however, there have been concerns about his custodial behaviour which mirror some of the concerns in the community and indeed previous offences. The panel considers that in such circumstances, [the Applicant] needs to engage with the mental health team in order to determine whether there is any current mental illness, comply with any recommended treatment and demonstrate a period of stability before developing a risk management plan that he is prepared to comply with in conjunction with his COM."

32. This finding was plainly open to the panel on the evidence, and the application does not assert otherwise. A decision not to release based on such a finding cannot be considered irrational.

Decision

33. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly I refuse the application for reconsideration.

Patrick Thomas KC
27 December 2023