

[2023] PBRA 79

Application for Reconsideration by McGann

Application

1. This is an application by McGann (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 22 March 2023 (but issued on the 24 March 2023) not to release the Applicant following an oral hearing on 08 April 2023.
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 application for reconsideration, the response from the Secretary of State, the dossier, and the decision in ***R(Bailey and Morris) -v- Secretary of State for Justice and the Parole Board 2023 EWHC 555(Admin)***(the Bailey decision). Clarification was also sought about why the decision letter was amended under the slip rule. This information was provided by the case administrator over email.

Background

4. The Applicant received a sentence of imprisonment for public protection (IPP) on 7 November 2008 for the offence of GBH. The Applicant's tariff expired on 19 July 2012. He was first released in July 2012 but has since been recalled on three separate occasions, the most recent being in March 2020. Prior to recall he had remained in the community for some four years on licence. The Applicant was recalled following the commission of further offences. He received a further extended determinate sentence (comprising 30 months custodial period and a one-year extension) for inflicting GBH and being in possession of an offensive weapon. These offences were committed with another, the Applicant's brother. The Applicant's PED for this new sentence was on the 10 August 2022. His sentence will end in June 2024.

Request for Reconsideration

5. The application for reconsideration is dated 12 April 2023.
6. The grounds for seeking a reconsideration are that, as a result of the effect of Rule 2(22) of the Parole Board (Amendment) Rules, and the subsequently judgment in the Bailey decision, which was issued between the Applicant's hearing date (8 March 2023) and the written decision being submitted (24 March 2023), the panel acted irrationally



and unfairly by failing to obtain recommendations from all professional witnesses before concluding the Applicant's review.

7. It is further submitted by the Applicant's legal representatives that the panel's findings that professionals were unable to make recommendations due to the '*rules and guidance in place at the time*' was '*demonstrably incorrect*', following the Bailey ruling.

Current parole review

8. This was the second review by the Parole Board following the recall of the Applicant in March 2020.
9. At the oral hearing the panel heard evidence from the Prison Offender Manager (POM); the Community Offender Manager (COM); a prison psychologist and a psychologist commissioned by the prisoner.
10. The decision was first issued on the 22 March 2023 but amended under the slip rule. This is because the panel wrongly attributed a recommendation made by the Psychologist commissioned by the Applicant to have been made by the Prison Psychologist. This typographical error was corrected by the panel chair and the decision resubmitted on 24 March 2023.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 22 March 2023 the test for release.

Parole Board Rules 2019 (as amended)

12. The application for reconsideration is made on the ground of procedural unfairness and irrationality, but I shall also consider illegality as it may be a relevant consideration.

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.

Procedural unfairness

15. 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.

16. 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.

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

Irrationality

18. 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."

19. 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.

20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State (the Respondent)

21. By letter dated 18 April 2023 the Respondent submitted that it is for the panel to make a decision on the evidence it has and that clear assessments of risk were supplied to the panel by the report writers on which the panel could make up their minds. The



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Respondent further submitted that recommendations, or the lack of them, should not affect a panel's ability to assess risk and determine whether a prisoner is safe to be released and to suggest otherwise would be to assume that the Parole Board had previously fettered its discretion.

Discussion

22. For the purposes of this decision, Bailey established the following matters. On its true construction Rule 2(22) only provided that report writers were not obliged to include recommendations in their reports. It did not mean that report writers were entitled not to comply with a direction from the Board to produce a report which did include a recommendation. Nor did it mean that report writers could refuse to answer at a hearing if asked to provide a recommendation. Advice from the Secretary of State that report writers should not provide recommendations on request from the Board prior to or during a hearing was wrong and should not have been followed. Further the Court held that rule 2(22) was unlawful as it had been made by the Secretary of State for the purpose of preventing a party to litigation in which the Secretary of State was also a party from obtaining evidence which may benefit their case.
23. In practice, following the introduction of this rule, it became impossible for Panels to obtain the opinion of witnesses who appeared before them who in the past had made recommendations on the ultimate issue that the panel had to decide. This was the situation in this case at the time of the Applicant's oral hearing. Based on the information at the hearing the professional witnesses (other than the Independent Psychologist) felt unable to provide a recommendation due to the '*rules and guidance at the time*'.
24. In the period that Rule 2(22) was in force this was a familiar situation with professional witnesses demurring from providing recommendations.
25. Ultimately the decision as to release is for the panel and not for witnesses. A panel will not and should not simply accept a recommendation, if made, without careful consideration of the reasons behind it. It is only if the panel agrees with the reasons for the recommendation that the panel would choose to adopt it in its decision.
26. The making of a recommendation by professional witnesses, which is what has happened for a long time, provides a useful framework for the consideration of the witness' evidence. A witness will be asked what their recommendation is and then asked the reasons for it. They will often then be asked about other matters which may tend to suggest that the recommendation is not well founded. The panel having considered the reasons for the recommendation will then decide whether they agree with it or not. A panel will not simply count up those who are recommending release as against those who are recommending no release. It is the reasons for the recommendation rather than the recommendation itself which are of the most significance to the panel.



27. In my assessment a failure to obtain a recommendation because of the effect of Rule 2(22) does not, automatically, give rise to ground for reconsideration. It will depend on the facts in the individual case.
28. Turning now to the specifics of the Applicant's case, the Applicant's hearing took place on the 8 March 2023, before the Bailey decision had been issued. At that time comprehensive evidence was taken by the panel and, quite properly in my view, it is noted that witnesses (other than the Psychologist commissioned by the Applicant) *'refused to provide recommendations in keeping with rules/guidance at that time'*. Those instructed argue that this is inaccurate in law. They submit that by the time the final decision was submitted by the panel on 24 March 2023, the rules had been amended in line with the Bailey decision. I have carefully considered this proposition but I am not persuaded by it. Paragraph 2.36 of the decision states *'the other witnesses felt unable to give a recommendation to the Board due to the rules and guidance at the time'*. The use of the term *'at the time'* is significant, in my view, suggesting at the time when the witnesses were asked, i.e. at the hearing on the 8 March 2023. The statement at paragraph 2.36 is therefore an accurate representation of the rules at the time of the oral hearing. I do not find, therefore, the panel's statement to be misleading or inaccurate in law. It fairly and properly reflects the rules/guidance at the time the evidence was taken.
29. Returning now to the Bailey decision, the Bailey decision was subsequently issued on the 15 March 2023, some 7 days after the Applicant's hearing. The Bailey decision (and updated guidance) was circulated by the Secretariat to Parole Board members on that same date. Those instructed argue that following the Bailey decision the panel ought properly to have reflected on the finding in the Bailey decision and adjourned the Applicant's case for updated recommendations from the **POM, COM**, and Prison Psychologist before finalising their decision. They further argue that the Applicant's case was finally balanced, and that these recommendations could have had a material impact on the panel's decision.
30. Unfortunately, I am not persuaded by this argument. I note that the hearing took place on the 8 March 2023. On that date, the panel would have held a post-panel discussion (as is best practise) and made a decision based on the evidence before it at the time. Thereafter the panel had 14 days to issue its decision in writing, in line with Parole Board rules. The written decision was first submitted by the panel on the 22 March 2023 but amended under the *'slip rule'*. This was due to a factual error as mentioned in paragraph 9 above, which in my assessment is immaterial to this analysis. A final, amended decision was provided on the 24 March 2023.
31. As mentioned in paragraphs 21, 22 and 23 above, the provision of a recommendation, whilst helpful is not essential to a panel's risk assessment, in my view. In this case the panel has provided a comprehensive written decision of some eighteen pages of typed prose. The decision contains extremely detailed analysis of the evidence heard, the weight placed upon that evidence, and a cogent explanation of their ultimate findings. I am satisfied that the investigation of the evidence carried out by the panel ensured a fair hearing and that the panel looked carefully at all factors in favour and against



release and have then asked themselves the ultimate question which was for them to answer. Although the written decision was indeed provided by the panel after the Bailey judgment, I am not persuaded that the panel's cited failure to adjourn for updated recommendations, renders the ultimate decision to be irrational or unfair. All relevant matters were considered in proper detail at the hearing. While recommendations may have been helpful, it does not follow that a case cannot be properly considered without them. As in this case, in my view. The panel's decision is unambiguous, and I do not accept it to be as finely balanced as suggested by those instructed based on the evidence before me. I also note, that following the Bailey decision the Applicant's legal representatives did not raise any concerns about the lack of recommendations of their own volition.

32.I have also considered whether the decision was unlawful in that it failed to take into account relevant information namely the recommendations of the professionals. While there could be cases where that renders the decision unlawful, I am satisfied it doesn't in this case as the possible reasons behind any recommendation have been considered by the panel in great detail.

Decision

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

Heidi Leavesley
28 April 2023

