

[2020] PBRA 128

Application for Reconsideration by Cornforth

Application

1. This is an application by Cornforth (the Applicant) for reconsideration of a decision of an oral hearing dated 3 August 2020 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 22 December 2011 following conviction for robbery, to which he pleaded guilty. A minimum term of one year and 230 days was imposed. His tariff expired on 8 August 2013. The Applicant was 33 years old at the time of sentencing and is now 42 years old.

Request for Reconsideration

5. The application for reconsideration is dated 26 August 2020 and has been submitted by solicitors acting for the Applicant.
6. The ground on which reconsideration is sought is that the panel failed to follow the Parole Board's published 'Guidance on Allegations' when considering an incident that led to the Applicant's return from open conditions to closed conditions. It is submitted that the procedure adopted by the panel in making a finding of fact in relation to that incident was unfair. As the panel gave substantial weight to this finding when deciding not to release the Applicant, it is submitted that the overall decision was procedurally unfair. It is also submitted that, in making a finding of fact, the panel's determination of the evidence before it as constituting 'a reasonable body of evidence' was irrational.

Current Parole Review

7. The Applicant's case was referred to the Parole Board by the Secretary of State in August 2018 to consider whether or not it would be appropriate to direct his release



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

and, if release was not directed, to advise the Secretary of State on his continued suitability for open conditions.

8. The Applicant was, at that time, in open conditions, a panel of the Parole Board having recommended progression following an oral hearing in January 2018. This recommendation was accepted by the Secretary of State in March 2018 and he transferred on 10 April 2018.
9. He progressed through the open regime and secured employment in the community. However, on 31 July 2019 he was suspended from work following allegations concerning his behaviour towards a 19-year-old female colleague.
10. An adverse development report (7 August 2019) noted that the Applicant was placed on report, but the adjudication was dismissed. He was dismissed by his employer. He was returned to closed conditions in order to work on developing his levels of insight into his risks.
11. In October 2019, the Secretary of State sought advice from the Parole Board on the Applicant's continued suitability for open conditions. The general parole process referral from August 2018 was combined with the advice case, and the case proceeded to an oral hearing on 10 July 2020. There was insufficient time to complete the hearing and the panel reconvened to complete the hearing on 27 July 2020. Both hearings were conducted by remote telephone conference due to the COVID-19 restrictions on face-to-face hearings. The decision letter of 3 August 2020 did not direct the Applicant's release, nor recommend a transfer back to open conditions.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 3 August 2020 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.

Parole Board Rules 2019

13. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)). This is an eligible decision.
14. 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**.


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,

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 info@paroleboard.gov.uk

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"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.

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.

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

The reply on behalf of the Secretary of State

20. The Secretary of State has submitted no representations in response to this application.

Discussion

21. The primary submission advanced on the Applicant's behalf concerns the application of the Parole Board's Guidance on Allegations (March 2019, v1).

- 22.Paragraph 8 of the Guidance deals with relevance. A relevant allegation includes (amongst other things) alleged behaviour associated with risk factors, particularly risk factors already associated with the prisoner. The allegation in this instance is a relevant one as relationships and attitudes towards women are a documented risk factor and the allegation concerned the Applicant’s behaviour towards a 19-year-old female.
- 23.Paragraph 9 of the Guidance provides that a panel faced with a relevant allegation will need to disregard it, make a finding of fact or make an assessment of it (to decide whether and how to take it into account as part of the parole review). Paragraph 15 goes on to say that panels must apply the ‘balance of probability test’ when making a finding of fact. Paragraph 18 of the Guidance notes that a panel may make an assessment of the level of concern if it is not in a position to make a finding of fact because making such a finding would be unfair or because there is insufficient evidence to make a finding on the balance of probabilities.
- 24.The panel did not disregard the allegation.
- 25.The decision letter states that “*the panel considered that, on the balance of probability, the allegations made were credible*”. Although it does not explicitly state the panel was making a finding of fact, the inclusion of the ‘balance of probability’ test is sufficient for me to find that they were doing so as consideration of this standard of proof is only relevant to making a finding of fact within the Guidance.
- 26.Although the matter did not result in a proven adjudication, the standard of proof in an adjudication is ‘beyond reasonable doubt’ (PSI 05/2018, para. 2.59). It is therefore entirely possible for a panel to reach a finding of fact on balance of probability for a matter that has not resulted in a proven adjudication without any inconsistency and without introducing any unfairness.
- 27.Paragraphs 11-17 of the Guidance deal with findings of fact. Paragraph 11 sets out that findings of fact may be necessary if capable of being relevant to the parole review, and if the panel is in a position to make a finding of fact, and if the prisoner has a fair opportunity to contest the allegations.
- 28.The allegation is, as already determined, a relevant one. The Applicant had a fair opportunity to give his own oral evidence about the matter, and his legal representative offered both written and oral submissions on his behalf.
- 29.The only outstanding point from paragraph 11, then, is whether the panel was in a position to make a finding of fact. Paragraph 11(b) sets out that a panel will only be able to do so when it has a ‘reasonably sufficient body of evidence’ on which it can properly make such a finding.
- 30.The panel noted that it did not have any direct evidence from the complainant. There is no direct evidence from the Applicant’s employer. The ‘chain of report’ of the allegation is from the complainant to the employer’s HR Manager, to the duty officer at the prison, to prison security and then to the panel. The Applicant also put forward, both in personal written representations and in oral evidence, his account of his interactions with the complainant.

- 31.As such, the allegations were not wholly unsubstantiated, but were founded on second and third-hand accounts, which the panel weighed against the Applicant's own account.
- 32.In the context of a workplace incident that led to suspension and ultimately dismissal, it is reasonable to expect there to be a documented trail of evidence collated and acted upon by the employer. This may include witness statements and records of meetings leading to the decision to suspend or dismiss the employee.
- 33.Given that it was reasonable to expect that better and/or more direct evidence would be available, I do not consider that the evidence before the panel was reasonably sufficient for it to make a finding of fact. If the panel was set on making a finding of fact, it was open to the panel to adjourn and direct further evidence, and to give the Applicant the opportunity to respond to it.
- 34.As an aside, the available evidence may have been enough for the panel to have properly assessed and assigned an appropriate level of concern, but it chose not to do so.
- 35.In the absence of a reasonable sufficiency of evidence to support the finding of fact, I find that the panel acted outside the Guidance. This amounts to procedural unfairness in making the finding of fact. Since the finding of fact was pivotal to the panel's decision not to release the Applicant, it follows that this was also procedurally unfair.
- 36.I do not consider the inferences drawn by the panel in response to the extant evidence to be outrageously defiant of logic. It is entirely possible that another panel, when faced with the same body of evidence would have reached the same conclusion (albeit one which would have been equally procedurally flawed in the circumstances of this particular case). I therefore do not find the panel to have acted irrationally.

Decision

- 37.Accordingly, whilst I do not find there to have been any irrationality, I do consider, applying the test as defined in case law, the decision not to direct release to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Directions

- 38.I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.
- 39.I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be



done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

40. The following further directions are now made:

- (a) The re-hearing should be expedited. It may proceed remotely as before.
- (b) The original decision must be removed from the dossier and must not be seen by the new panel.
- (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
- (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.
- (e) The paperwork relating to the dismissed allegation must be added to the dossier.
- (f) The Offender Manager is directed to obtain the following information from the Applicant's employer and ensure it is added to the dossier;
 - i. The report of the complaint made against him;
 - ii. Documentation of the decision to suspend his employment, with reasons
 - iii. Documentation of the decision to dismiss him from his employment, with reasons;
 - iv. Any other extant documentary evidence held by the employer, relating to the allegation, the suspension or the dismissal;
 - v. A report from the employer concerning the events in which the Applicant was involved (as set out in his personal representations (11 November 2019)); and
 - vi. A report from the employer regarding any other concerns regarding the Applicant's conduct throughout his employment, particularly (but not limited to) interaction with young/lone females.
- (g) A full psychological risk assessment must be undertaken to assess the risk of serious harm using appropriate structured assessment tools; an assessment of personality traits and the relevance of those traits to risk, conduct and responsiveness to treatment; an assessment of outstanding areas of risk; recommendations for an appropriate treatment pathway (if necessary); and an opinion on the manageability of risk in the community or in open conditions.

Stefan Fafinski
15 September 2020