

[2020] PBRA 57

Application for Reconsideration by Gumus

Application

1. This is an application by Gumus (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 25 March 2020 following an Oral Hearing on 20 March 2020 when the Panel declined to direct his release but recommended a progressive move to open conditions but only in limited circumstances.
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. There is a dossier now paginated to 350 and containing at p.340 the Panel's written decision comprising 11 pages.

Background

4. On 5 September 2008 he was sentenced to a term of imprisonment for public protection for offences of sexual activity with a child and sexual assault. The Applicant has two previous convictions for similar offences against young girls of a similar age committed in 1998 and 2001.

The minimum term was set at two and a half years less time spent in custody on remand and the Tariff Expiry Date was 24 July 2010. The Applicant is therefore nearly ten years over tariff.

Request for Reconsideration

5. The application for reconsideration filed on the Applicant's behalf by his solicitor is dated 7 April 2020.
6. The grounds for seeking a reconsideration are as follows:

Procedural Unfairness:

"[The Applicant] *believes that the incorrect process was followed for the following reasons;*

The Parole Board relied on an undated report from 2017, and the report was not completed because [The Applicant] was unable to participate due to his own

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medical reasons.”

Irrationality:

“[The Applicant] *believes that for a number of reasons the decision was irrational:*

1. [A training course addressing sex offending] *can be completed in the community. The completion of the course in the community is far more beneficial for all parties because it will mean that there is an increased level of engagement from Probation to help him with his learning from other courses that he has completed.*
2. [The Applicant] *has tried to complete [a training course addressing sex offending] whilst in the prison in 2014. [By an addendum email dated 15 April 2020 the solicitors for [The Applicant], due to a “minor typo”, sought to alter the date to 2017].*
3. *He has very strong family and friends as part of his support network in the community to help him upon release.*
4. *The Parole Board recognised the positive attitude of [The Applicant] and the reduction in his risk.*
5. *The Parole Board had accepted that his risk could be managed outside of the closed prison estate.*
6. [The Applicant] *can undertake considerably more work in the community including having a key worker in the [designated accommodation] where he can complete further 1:1 work.*
7. *There is a robust risk management plan in place to manage his risk in the community, and it is submitted there was no evidence to suggest that this risk management plan could not manage his risk.*

For these reasons it highlights that his risk is low enough to be managed in the community, and that he had met the test for release.”

Current parole review

7. The Applicant’s case was referred to the Parole Board by the Secretary of State for review on 28 December 2018. This was the Applicant’s sixth review.
8. A two member Panel considered the case on 20 March 2020. The Panel was provided with a dossier numbered to 339 pages. There were no documents considered which could not be disclosed. The Panel heard evidence from the offender manager, the stand-in offender supervisor, and from the Applicant’s solicitor who legally represented him and who attended by telephone. The Applicant asked for release or, in the alternative, a move to open conditions. The Secretary of State was not represented and did not provide a view to the Panel. There was no victim impact statement provided.

The Relevant Law

9. The Panel correctly sets out in its decision letter dated 25 March 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

10. 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)).
11. 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

12. 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."

13. 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.
14. 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

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. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
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.

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

The reply on behalf of the Secretary of State

17. On 9 April 2020 it was confirmed that the Secretary of State offers no representations in response to the application for reconsideration.

Discussion

Procedural Unfairness:

18. '[The Applicant] *believes that the incorrect process was followed for the following reasons*';

'The Parole Board relied on an undated report from 2017, and the report was not completed because [The Applicant] was unable to participate due to his own medical reasons'.

19. This is presumably a reference to the Forensic Psychological Risk Assessment Formulation and Risk Management Plan ('the report') prepared by a Forensic Psychologist in training, which is in fact dated 30 August 2017 and was included in the dossier.

20. The report was fully considered in March 2018 by a previous oral hearing Panel and the current Panel quotes extensively from its predecessor Panel's decision letter dealing with the report and the evidence it heard from the forensic psychologist.

21. The Psychologist met with the Applicant for a total of 5 hours on a number of occasions although he left one interview early and failed to attend the disclosure meeting. The consequent limitations of the assessment and report are acknowledged.

22. In written representations for the current review dated May 2019 the Applicant's solicitors do not argue that the report should not be relied upon but submit that an updated report should be directed. This application was carefully considered and rejected with full reasons at the initial Member Case Assessment stage of the review (dossier pp.204/5). That decision does not appear to have been challenged nor a fresh application made for an updated report. There also does not appear to have been any formal application made on the Applicant's behalf at the hearing that the Panel should place no reliance on the report.

23. As to the suggestion now made that the Applicant was unable to participate for

medical reasons, the Panel dealt with this issue at some length in the decision letter and made clear findings.

24. In any event, by the time of the hearing, this report's recommendations for work that the Applicant should carry out had been superseded by a subsequent Programme Needs Assessment which recommended completion of the training course addressing sex offending and the Panel's focus was understandably on the Applicant's continuing unwillingness (until the hearing itself) to undertake core risk reduction work and the fact that no such work had been completed.

25. I find there is no substance to these grounds.

Irrationality

26. '[The Applicant] *believes that for a number of reasons the decision was irrational*':

(a) '[The training course addressing sex offending] *can be completed in the community. The completion of the course in the community is far more beneficial for all parties because it will mean that there is an increased level of engagement from Probation to help him with his learning from other courses that he has completed*'.

27. The Panel found that the Applicant's offending was very serious and followed a pattern which saw him take advantage of vulnerable under-age girls for his own sexual gratification and it accepted the professional evidence that, absent the completion of core risk reduction work to address his motivation and triggers for his sexual offending, his very high risk of sexual re-offending could not be safely managed in the community. Such a finding would considerably outweigh any such suggested benefit.

(b) '[The Applicant] *has tried to complete [the training course addressing sex offending] in the prison in 2014*'. [Now altered to 2017].

28. It would have been helpful if the evidence for this assertion had been set out. In any event, the Panel made findings as to the Applicant's consistent refusal in more recent years to engage in core risk reduction work and the reasons for his non-cooperation.

(c) '*He has very strong family and friends as part of his support network in the community to help him upon release*'.

29. The Panel made findings as to the nature and quality of the support network available to the Applicant in the community at p.9 of the decision letter.

(d) '*The Parole Board recognised the positive attitude of [The Applicant] and*

the reduction in his risk'.

30. The Panel found progress and measurable improvement since the last review but did not specifically find a reduction in risk. Indeed, it again noted that the Applicant had not completed core risk reduction work and found that his risk to the public of serious harm may be underestimated.

(e) *'The Parole Board had accepted that his risk could be managed outside of the closed prison estate'.*

31. It is difficult to understand what point is being made here. The fact that in limited circumstances the Panel was prepared to recommend open conditions does not mean that it could go on to find the test for release made out. In fact, the Panel sets out full reasons why, in its opinion, the Applicant did not meet the test for release.

(f) *'[The Applicant] can undertake considerably more work in the community including having a key worker in the hostel where he can complete further 1:1 work'.*

32. The comment made above at paragraph 28 is equally applicable here

(g) *'There is a robust risk management plan in place to manage his risk in the community, and it is submitted there was no evidence to suggest that this risk management plan could not manage his risk'.*

33. The Panel found that the Risk Management Plan was under-developed and would need improvement while the professional opinion and the burden of the evidence, which the Panel accepted, was that there was no plan which could currently manage the risk posed by the Applicant and allow him to be safely released into the community.

(h) *'For these reasons it highlights that his risk is low enough to be managed in the community, and that he had met the test for release'.*

34. Each of the matters relied on here simply amount to further submissions in support of the Applicant's application for release and, whether considered individually or together, do not fulfil the test of irrationality or provide grounds for reconsideration.

Decision

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

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23 April 2020**

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