

[2020] PBRA 91

Application for Reconsideration by Phillip

Application

1. This is an application by Phillip (the Applicant) for reconsideration of a decision of a single member panel taken on the papers, dated the 7 May 2020, not to direct 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 dossier amounting to 160 pages, including the provisional decision letter, the Applicant's representations drafted by his legal representative and an email from them dated the 23 June 2020 explaining the background circumstances to the application.

Background

4. On the 21 May 2006, the Applicant was part of a group chasing the victim who, when he fell to the ground, was stabbed. On the 25 August 2006, whilst on bail, that Applicant committed one of a number of dwelling house burglaries. On the 7 September 2006, he burgled the home of an elderly and vulnerable couple and committed an offence of rape.
5. On the 30 January 2007, the Applicant was sentenced for these offences to Imprisonment for Public Protection with a minimum period to serve of six years less time spent in custody on remand before he could apply for parole. The minimum period expired on the 10 September 2012.
6. On the 8 July 2016, the Applicant was released on licence; he was recalled on the 4 May 2017 following allegations made by a former partner of criminal damage and assault.
7. On the 8 July 2019, the Applicant was released on licence for a second time but recalled on the 12 March 2020 for poor behaviour and non-compliance with his licence conditions.

Request for Reconsideration

8. The application for reconsideration is dated the 1 June 2020.
9. The circumstances of the application are somewhat unusual. Initially, the legal representative applied for an oral hearing under rule 20(1). Unfortunately, he posted the application to the offices of the Parole Board which were, and remain (at the time of writing), closed because of the COVID-19 pandemic.
10. By the time the legal representative realised the position, the 28 day period for service of the application had expired and as a consequence the panel decision remained provisional, subject only to reconsideration - rule 20(3)(a). Exactly the same document in support of that application was then served in support of an application for reconsideration of the panel decision under rule 28(1). This application has been deemed to be in time.
11. The grounds for seeking a reconsideration are as follows:
 - (a) *The Applicant contends he missed or rearranged appointments with his probation officer solely because of ill health or because he was viewing suitable accommodation.*
 - (b) *The Applicant states he exhibited no parallel offending behaviour whilst on licence. This appears to have been accepted by the panel.*
 - (c) *The Applicant says he missed appointments in respect of offence related work solely because of ill health or because he was viewing suitable accommodation.*
 - (d) *The Applicant accepts he was in breach of the residence condition of his licence but would now be prepared to have an electronic tag.*
 - (e) *The Applicant states he has not been able to build up a good working relationship with his Offender Manager. This appears to be, at least in part, because she insists that he should do work addressing possible alcohol problems and the Applicant feels this is unnecessary.*
 - (f) *The Applicant appears to think he did not have to disclose a relationship with a woman with whom he had occasional sexual contact because, in his view and hers, this was not a relationship.*
 - (g) *The Applicant states that his conduct whilst recently in prison has been good.*
 - (h) *The Applicant wishes to have an oral hearing.*

12. Of course, these grounds were drafted as submissions for an oral hearing. For the purpose of this application, I regard grounds (a) to (g) to be a complaint of irrationality and ground (h) to be a complaint of procedural unfairness.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board on the 23 April 2020 to decide whether to direct release or if that was not appropriate to consider whether to recommend a transfer to open conditions.

14. In the provisional decision letter, the panel correctly states the test for recommending a transfer to open conditions but does not actually carry out the balancing exercise. However, the Applicant makes no complaint on this basis.

The Relevant Law

15. The panel correctly sets out in its decision letter the test for release.

Irrationality

16. 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."

Procedural unfairness

17. 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.

18. 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.

Other



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19. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one.
20. All four of the decisions, which are amenable to reconsideration under the Parole Board Rules 2019, concerned decisions whether a person is “suitable or unsuitable” for release, and not a decision whether or not to direct an oral hearing – **Hassan [2019] PBRA 36** and **Modeste [2019] PBRA 60**.

The reply on behalf of the Secretary of State.

21. The Secretary of State stated replied they made no representations

Discussion

22. The panel identified the Applicant’s areas of risk of future offending which included thinking he had the right to have sex as and when he wanted, aggression and violence, not having anywhere suitable to live and a negative lifestyle. The panel concluded that the Applicant presented a high risk of sexual reconviction because he had not yet demonstrated any understanding or motivation towards addressing areas that placed him at risk of further offending.
23. The particular matters which caused the panel anxiety included:
 - (a) The Applicant’s engagement with supervision was poor.
 - (b) He had not attended appointments for offence related work on a weekly basis.
 - (c) He had not engaged with drug and alcohol services. He had made it clear he would not complete the training course addressing relationships and the handling of emotions.
 - (d) On one occasion he had been found intoxicated and half naked in his designated accommodation; he had regularly provided low to medium alcohol readings when test and provided positive tests for illegal drugs; whilst on licence he had been issued with approximately 20 warnings about his conduct.
 - (e) He moved to different designated accommodation on the 19 February 2020; on the 4 March 2020 an unannounced police check revealed he was not in residence. The police returned at 8:45 am the next day and found the Applicant with a woman whom he had had met in a club and had had a sexual account encounter with.

- (f) The Applicant was defensive when challenged about disclosing relationships with women. He had expressed reluctance to be fitted with an electronic tag.
- (g) On the 8 March 2020 he had booked into a hotel with a woman, having failed to disclose the relationship to his Offender Manager. He invited a couple back to the hotel bedroom where the man caused damage to the room.
- (h) The panel took note that Probation were not supporting the Applicant's release, no suitable premises have been identified for him to go to and the recommendation from the Offender Supervisor was that he should do further work on his offending before being released.
24. The panel was entitled to take all those matters into account as determinative.
25. By contrast, the grounds for reconsideration are in part mitigation and in part reasons why the panel might possibly have considered releasing the Applicant. However, the test for irrationality is a high one and the fact that the decision might have gone the other way comes nowhere near reaching that test.
26. There was no application for an oral hearing after the initial decision not to direct one. No second decision took place (and cannot now take place because it would be out of time) and so strictly there is no decision to reconsider.
27. Having said that and looking at the matter broadly, there had been no request for an oral hearing prior to the decision to conduct the case on the papers, there was no support for release from Probation and there was outstanding offending work.
28. The grounds for seeking an oral hearing identified in general terms some areas of factual dispute but these were all matters of degree rather than substance and would not have affected the ultimate decision. Some of the submissions (for example, the Applicant's attitude to not disclosing relationships with women and his reluctance to join a training course addressing alcohol misuse tended to support the pessimistic view taken by Probation of his prospects if released.
29. In the circumstances, it is impossible to say that the procedure adopted by the panel treated the Applicant's case unfairly.

Decision

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

James Orrell
15 July 2020