

[2021] PBRA 114

Application for Reconsideration by Maher

Application

1. This is an application by Maher (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 13 July 2021 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 Decision Letter dated 13 July 2021;
 - A request for reconsideration in the form of an email sent to the Parole Board on 26 July 2021;
 - The Dossier, numbered to page 689, of which the last document is the Decision Letter. The panel considered a dossier which ran to 680 pages; and
 - An email from the Secretary of State offering no representations in response to the application.

Background

4. The Applicant is now 25 years old. On 6 November 2017, when he was 22, he received a sentence for Offenders of Particular Concern (SOPC), consisting of a custodial term of 5 years and 4 months and an extension period of 1 year, for an offence of engaging in conduct in preparation for terrorist acts. His parole eligibility date was 12 November 2020, his conditional release date is 22 August 2022, and his sentence expiry date is 23 August 2023.
5. The Applicant had purchased an air ticket to travel to take part in the conflict in the Middle East. This was the culmination of several years of radicalisation and increasing interest in this conflict. He was arrested at the airport in April 2017 before he boarded his flight.
6. The Applicant has no other convictions.

Request for Reconsideration

7. The application for reconsideration was sent on 26 July 2021.



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8. The grounds for seeking a reconsideration are as follows, and I set them out virtually verbatim:

- (1) *"The prison needed us to leave the prison by 5.00 pm. This resulted in the COM [Community Offender Manager] having to give rushed evidence as her evidence was last.*
- (2) *The Imam was not invited to attend the hearing as a witness, despite him having completed the recent work with the Applicant.*
- (3) *The panel have preferred the evidence of the psychologist however, she does not recommend any further core risk reduction work, she recommended that [the Applicant] needed a further period in Category C conditions, however due to covid restrictions, [the Applicant] has been in a Category C establishment but unable to prove himself in there.*
- (4) *A hearing should have been listed for 2 days due to the amount of witnesses giving evidence."*

9. Grounds (1), (2) and (4) seem to be complaints of procedural unfairness. Ground (3) seems to be a complaint of irrationality. I will deal with them accordingly.

Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release.

11. The hearing took place on 24 June 2021, conducted by video link due to Covid-19 restrictions in place at the time. The Secretary of State and the Applicant were represented throughout. The panel consisted of an independent member, a psychologist member and a judicial member. During the hearing the Applicant asked that the panel have sight of reports from the prison Imam in respect of his engagement with a particular programme. The panel agreed to this request and, following the oral evidence at the hearing, adjourned for the information to be provided. The parties agreed to submit written representations after the additional material had been provided. The Secretary of State chose not to submit any representations at that stage. The Applicant's representative did so, and her representations now form part of the dossier. In the light of the complaints of procedural unfairness I have carefully considered those representations, which are dated 2 July 2021. They contain no suggestion of procedural unfairness. There is no mention of the matters set out as Grounds (1), (2) and (4) above.

12. The panel concluded the review on 12 July 2021. At the oral hearing the following people gave oral evidence: the Prison Offender Manager (POM); the Community Offender Manager (COM); the National Security Division Offender Manager (NSD COM); the prison psychologist who had undertaken consolidation work with the Applicant after he had completed a programme focusing on the factors that had led to his offending; the prison psychologist who was the author of an assessment in February 2021; and the Applicant.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 13 July 2021 the test for release: the panel must be satisfied that it is no longer necessary for the protection of the public that the Applicant should be confined.

Parole Board Rules 2019

14. 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)).

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.

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.

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

21. Omitting to put information, in the form of a witness being called or otherwise, 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 witness's evidence, had he been before the panel, would have been capable of altering its decision. 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. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

22. The Secretary of State has said he intends to offer no representations in regard to the application.

Discussion

23. As to procedural unfairness (Grounds (1), (2) and (4)), the absence of any suggestion that the proceedings were unfair in the considered written submissions on behalf of the Applicant at the end of the evidence, together with the lack of any suggestion as to the way in which the matters complained of, even if true, were detrimental to the Applicant, make this an unsustainable complaint. Panels of the Parole Board are well-used to gathering the information they need within restrictive time limits. It is not suggested, and it was not suggested at the time, that any information necessary for the panel's decision has not been obtained. With regard to the Imam, the application at the hearing was for the panel to have sight of his reports, not to hear from him, and that application was granted.

24. As to Ground (3), the complaint is that the panel preferred the psychologist's view of the case to that of other witnesses. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses, even if those witnesses are unanimous. It is the panels' responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

25. The fact that there was no recommendation for further work to be done does not show that the panel's decision was irrational. The issue of further work is separate from the issue of public safety. The panel decided, on the evidence, that the Applicant should not be released until there was further evidence of testing in custody, restrictions during the Covid pandemic having provided only limited

opportunity for such testing. Such testing would allow for consistent monitoring of the Applicant's willingness to engage with professionals and for those involved in his case to explore his motivation and intent in the light of all the information now known, which includes his evidence at the hearing. That is a rational, justifiable and justified decision.

Decision

26. 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.

Patrick Thomas
6 August 2021