

[2021] PBRA 189

Application for Reconsideration by Glen

Application

1. This is an application by Glen (the Applicant) for reconsideration of a decision of an oral hearing panel dated 15 November 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 15 November 2021;
 - The Application for Reconsideration with separate Grounds dated 6 December 2021; and
 - The Dossier, numbered to page 274, of which the last document is the Decision Letter.

Background

4. The Applicant is now 48 years old. In October 2007, when he was 34, he received a sentence of imprisonment for public protection, with a tariff expiry date of 17 July 2009, for an offence of sexual assault on a male child. He was released on licence on 9 April 2018 and recalled on 17 March 2021. He had breached his licence by forming and concealing from his Community Offender Manager (COM), a relationship with a woman who had a 6-year-old son. The Applicant has a history of sexual offending against boys.

Request for Reconsideration

5. The application for reconsideration is dated 6 December 2021.
6. The grounds for seeking a reconsideration are as follows:
 - (1) The panel misdirected itself regarding the statutory test for release;
 - (2) Irrationality: the panel failed to take account of facts that were so obviously material to their decision; and/or
 - (3) Failure to give adequate reasons.
7. There follow grounds for seeking a reconsideration of the panel's decision not to recommend a move to open conditions. Since such a decision is not subject to the



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reconsideration process (see below), I will not discuss that part of the application further, save to comment that the grounds advanced avowedly mirror the grounds set out above.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board on 14 April 2021 for consideration of release or, if immediate release was not directed, of a recommendation for open conditions. This was the first consideration by the Board since the Applicant's recall.
9. The two-member panel met remotely, during the Covid pandemic, with the Applicant's consent given by his legal representative, on 9 November 2021. It considered the dossier, which then contained 249 pages, to which have been added the legal representations following the hearing and the decision letter itself. The panel heard evidence from the Prison Offender Manager (POM), the COM, the prison psychologist, and from the Applicant. The Applicant was represented by counsel throughout the hearing. The Secretary of State was not represented and made no submissions to the Parole Board.

The Relevant Law

10. The panel correctly sets out in its decision letter 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. The panel said it could only direct release if it was satisfied that *"it is no longer necessary for the protection of the public that [the Applicant] remain confined."*
11. At the point in the decision letter where the panel explained its reasons for refusing release the panel said *"The test is whether [the Applicant needs] to remain confined for the protection of the public from serious harm or whether [his] risk can be managed safely in the community."*
12. Complaint is made that in its discussion of the benefits to the Applicant of transferring to open conditions the panel said *"[He] could prove to professionals (and [himself]) that [he] could manage relationships and that [he] could communicate openly without resorting to subterfuge and manipulation, **which is a critical part of remaining offence free in the future.**"* [Emphasis added in the Grounds for the Application.] I discuss this below.

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)).

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,

"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.

Other

21. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board**

[2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin). The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

22. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State

23. The Secretary of State has indicated that he does not intend to make any representations in this case.

Discussion

24. The first complaint is that the panel misdirected itself regarding the statutory test for release.

25. In **R (Bousfield) v Parole Board [2021] EWHC 3160 (Admin)** at Paragraph 51, Lane J. comments "*It is a moot point whether applying an incorrect legal test, such as relating to the burden and standard of proof, falls within the head of 'irrationality', such as to be within the scope of review under Rule 28.*"

26. Be that as it may, the fact here is that the panel did not misdirect itself regarding the statutory test for release: see Paragraphs 10 and 11 above. If there was a misdirection, it relates to the issue of a recommendation for open conditions, which cannot be the subject of a reconsideration under Rule 28. It requires a wilful misreading of the decision letter to translate what is set out in Paragraph 12 above to the test for release.

27. In any event, I do not consider that what is set out at Paragraph 12 above was or was intended to be an expression of any legal test. It was a (perfectly justified) comment on one of the things that being in open conditions would enable the Applicant to demonstrate. It was not a statement of the test to be applied to his suitability for release or, indeed, for open conditions. It was not a misdirection.

28. Ground (1) is not made out.

29. Ground (2) is that the panel failed to take into account facts that were obviously relevant to its decision. The details are summarised as a complaint that 7 of the 8 bullet points set out by the panel focus on the reasons for recall, not the future risk.
30. This is not an easy complaint to follow. It must be reasonable for a panel to look closely at the conduct of a prisoner during a period of licence before recall in order to assess the risk he presents if re-released on licence. A panel cannot ignore past behaviour when considering future risk and may properly assess it as having greater evidential value than assertions that the prisoner will not do it again.
31. What the Applicant did was to form a relationship with the mother of a young child. This could properly be regarded as offence-paralleling behaviour with respect to the index offence and one of his earlier convictions (in 1993), and the legal submissions after the hearing conceded that there was ample evidence of grooming in his previous offending. He denies that he entered into this relationship with any sexual intentions towards the little boy. Anyone with common sense, and particularly anyone with experience of sex offenders, would not be surprised to find that such denials, very possibly sincerely put forward, are being made right up to the point where an offence of the kind under consideration takes place. The Applicant concealed this relationship from his COM for 6 months and lied about it during a polygraph test. The panel was not obliged to accept what he said about his intentions.
32. Nor is it particularly surprising that the mother denied noticing any grooming behaviour. Whether she noticed any such behaviour or not (and grooming can be a very subtle procedure), she would be unlikely to admit it to herself or anyone else.
33. The panel was aware of these matters. The legal submissions on the Applicant's behalf included an acceptance that *"the panel clearly needs to consider [the Applicant's] conduct during the three years from release ... until recall in considering the statutory test."*
34. The complaint goes on to assert that the panel did not assess the Applicant's likely compliance as he appeared before the panel. The panel specifically agreed with the professionals' assessments that the Applicant presented a high risk of serious harm to children, and a high risk on the sexual risk assessment for contact offences. And the panel specifically said that it was not convinced that the proposed risk management plan was sufficiently robust to manage his risk. The Applicant accepted that he has inappropriate thoughts and they are never going to go away.
35. Complaint is made that the panel failed to mention the account of the mother in its decision letter. There is no doubt that the panel was aware of this evidence. It is mentioned in the legal submissions. A panel is not obliged to refer to every piece of evidence it takes into account, provided the overall conclusion is justified by the totality of the evidence. The mother did not give evidence before the panel, and the panel was entitled to look at the reality of her situation in assessing what weight, if any, should be given to what she had said to others. There was a proper evidential basis for the panel's conclusions.
36. The Grounds include a complaint that the panel considered that there was further work to be done. Yet the Grounds contain this: *"The panel's position is that as a*



logical consequence of his deceitful conduct while on licence [the Applicant] must have further work to do. It is accepted that is a conclusion the panel could properly reach on the facts of the case." What is said is that the panel did not go on to consider whether the further work could be done in the community. That, with respect, is not the question the panel was addressing. The panel was rightly addressing the question whether the risk undoubtedly posed by the Applicant could be managed in the community before he had done further work. Its decision, fully justified on the evidence, was that it could not.

37. Ground (2) is not made out.

38. Ground (3) is put as a failure to give adequate reasons, but also as a failure to take account of further facts or address them so as to make it clear what the panel accepted and what it rejected.

39. This is essentially a rephrasing of Ground (2), as the details given demonstrate.

40. It is correct that a panel must explain its reasoning. This panel did so. See the bullet points mentioned in the Grounds.

41. Ground (3) is not made out.

Decision

42. 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 QC
23 December 2021