

[2021] PBRA 60

Application for Reconsideration by Lynck

Application

1. This is an application by Lynck (the Applicant) for reconsideration of a decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the decision). The letter by which the Decision was communicated is dated 31 March 2021 (the decision letter).
2. I have considered the application on the papers comprising: a dossier of 360 numbered pages including the decision letter, and written submissions by the Applicant's solicitors dated 27 April 2021 in which reconsideration is requested.

Background

3. In October 2007 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection, with a minimum tariff that expired in December 2011. The Applicant was sentenced after his conviction of an offence aggravated burglary. The Applicant was aged 26 when he received the sentence in October 2007 and he is now aged 39.
4. The Applicant was released during the indeterminate sentence in November 2018 on an indefinite licence that was revoked after two days, leading to his immediate return to prison.
5. The Applicant was released in April 2019 on an indefinite licence that was revoked in May 2019, but on that occasion, he was not returned to prison until December 2019. The reasons given for the revocation of the Applicant's licence were that he had breached the conditions of his licence requiring him to adhere to a curfew requiring him to be present at probation service approved premises at specified times and to reside at those premises. The Applicant was not returned to prison for some six months thereafter, following his arrest in December 2019 for alleged offences of possession of an offensive weapon, theft, and assault occasioning bodily harm (ABH).

Current parole review

6. The decision was made on the Secretary of State's (the Respondent's) referral of the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release, and if not to advise on his suitability for open conditions. That was said to be the seventh such referral of the Applicant's case by the Respondent during the sentence received by the Applicant in October 2007.



7. The decision was made by a panel of the Board that considered the Applicant's case at an oral hearing in March 2021 (the Panel). The Panel was comprised of three members of the Board. The hearing was conducted remotely by telephone link due to the current COVID-19 restrictions.

Application and response

8. The 27 April 2021 written submissions assert that the Decision is marred by procedural unfairness and request an order for reconsideration.

9. By an email dated 6 May 2021, the Public Protection Casework Section notified the Board that the Respondent offered no representations in response to the Applicant's reconsideration application.

The Relevant Law

10. 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.

Irrationality

11. 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."

12. 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.

13. 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

14. 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.

Discussion

15. The Applicant puts his case for reconsideration on the following grounds:

- a) Unfairness arising from technical deficiencies within the hearing conducted by telephone only and the Panel's reliance upon evidence provided by the Applicant in those circumstances.
- b) Unfairness arising from the Panel's reliance upon the circumstances of the alleged offending as evidence of risk of serious harm was conducted without procedurally fair safeguards and without fair weighting of other available evidence. I consider that the complaint regarding the Panel's weighing of evidence is more accurately described as a complaint that the Decision is marred by irrationality.

16. I turn first to consider the complaint of unfairness arising from technical deficiencies within the hearing.

17. The Applicant's legal representative asserts in the 27 April 2021 submissions that he *'alluded to deficiencies in the quality of the hearing and, in particular, [the Applicant's] evidence in his closing submission and urged the Panel to exercise caution in interpreting his evidence with this in mind.'*

18. The submissions do not contain a statement of truth and accuracy, and as a matter of good practice at least that ought to be the norm when any assertion of fact is made in legal proceedings.

19. However, I have no reason to doubt the truth of the assertion that the representative alluded to such deficiencies. The assertion that the representative did so is moreover supported by the written correspondence between the Applicant's Prison Offender Manager, his Community Offender Manager and the Parole Board that is referred to and reproduced in the submissions, in which the Offender Managers refer to the hearing being conducted via a poor telephone line and to the Applicant not being able to hear clearly what was said, including questions that were asked of him.

20. It is a matter of concern that the Decision Letter does not refer to deficiencies in the quality of the hearing or to the representative's submissions regarding such deficiencies. The Decision Letter does not therefore indicate the Panel's assessment of whether such deficiencies were a feature of the hearing and, if there were such deficiencies, the Panel's reasons for considering that the hearing had been conducted fairly.

21. I consider that a prisoner not being able to hear clearly what was said, including questions that were asked of him, during an oral parole hearing is likely, absent special circumstances, to result in the proceedings being fundamentally flawed. That may be the result whether or not the prisoner's oral evidence featured in the Board's material reasoning, because the prisoner must be able to hear what is said by all other attendees during such a hearing to enable the prisoner to comment, whether directly or on instructions to a representative, on anything that is said.

22. The potential for unfairness is, I consider, heightened when a hearing is conducted remotely, when the prisoner has no immediate capability of communicating privately with their representative. The potential for unfairness is, I consider, heightened further still when the hearing is conducted via audio links, as opposed to a video links where difficulties in hearing or comprehension may be apparent from non-verbal signs.

23. In the Applicant's case, the decision letter reveals that the Applicant was questioned by the Panel on various matters of obvious relevance to the issues for determination and that the Panel made a finding, based on the Applicant's evidence, that he was not a credible witness and that the Panel considered that it was able to identify a number of occasions when it was sure that the Applicant had misled the Panel.
24. Other regrettable features of the decision letter are that the occasions when the Panel was sure that the Applicant had misled the Panel are not identified, and that the Panel's reasons for finding the Applicant to lack credibility on those occasions are not explained.
25. Another regrettable feature of the decision letter is that the Panel does not explain why the Panel considered that it was unnecessary to make a finding of fact in relation to the allegations of offending by the Applicant in the community prior to his most recent return to prison, which sits ill with the Panel's material concerns about the Applicant finding himself *'in that position'*.
26. However, and in any event, I consider that the application succeeds on the grounds of unfairness arising from technical deficiencies within the hearing.

Decision

27. The Decision is marred by procedural unfairness.
28. The application for reconsideration is, accordingly, allowed.

Timothy Lawrence
20 May 2021