

[2022] PBRA 10

Application for Reconsideration by Alker

Application

1. This is an application by Alker (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 1 November 2021 not to direct his 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, the dossier and the application for reconsideration. I have also made further enquiries of the panel chair and witnesses and have considered their written responses, to which I will make further reference in the **Discussion** section below.

Background

4. The Applicant is serving a life sentence imposed on 13 October 2003 following conviction for murder to which he pleaded guilty. He also received a concurrent four-year determinate sentence for perverting the course of justice, to which he also pleaded guilty, now served. The life sentence tariff expired on 14 December 2014. This is his fourth parole review.
5. The Applicant was aged 43 at the time of sentencing. He is now 61 years old.

Request for Reconsideration

6. The application for reconsideration is dated 9 December 2021 and has been submitted by solicitors acting on behalf of the Applicant.
7. It advances five grounds for reconsideration:
 - a) The decision was procedurally unfair as a psychologist who had worked with the Applicant was not called as a witness despite application being made for him (or an appropriate colleague) to attend and that application being refused;
 - b) The decision to refuse permission for the psychologist witness was irrational;
 - c) The decision was procedurally unfair as the Applicant was not fit to source a legal representative for the hearing;

d) The way in which evidence taken was flawed since it amounted to cross examination rather than evidence gathering; and

e) The decision was irrational as it was at odds with the recommendations of report writers.

8. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in July 2020 to consider whether to direct his release or, if release was not directed, to consider whether he should be transferred to open prison conditions.

10. The case proceeded to an oral hearing before an independent member, a judicial member and a psychologist member on 22 October 2021. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), and a prison psychologist. The Applicant was not legally represented.

11. The Applicant was seeking a recommendation for a move to open conditions. All witnesses supported a move to open conditions. The panel did not direct the Applicant's release nor make a recommendation for open prison conditions.

The Relevant Law

12. The panel correctly sets out the test for release in its decision letter dated 23 November 2021.

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**.

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.

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

Irrationality

18. 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."

19. 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.

20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

The reply on behalf of the Secretary of State

21. The Secretary of State has submitted no representations in response to this application.

Discussion

Ground (a): Psychologist not called as a witness

22. Since February 2017, the Applicant has been working within a special unit for high-risk offenders with personality disorder (the 'Unit'). He completed a piece of work with a consultant forensic psychiatrist (Dr C) who then handed over to Dr B, a clinical psychologist, who became the Applicant's responsible clinician in May 2019. In November 2020, Dr B left the service, and the Applicant was allocated a new clinician (Ms P).

23. The dossier contains a report by Dr B (dated 5 March 2021) setting out the Applicant's progress within the Unit. This follows on from previous reports by Dr C from 2019. A section entitled 'Treatment Outcomes and Recommendations' sets out the benefits and

perceived drawbacks of release, transfer to open conditions and remaining in closed conditions. These are clear and are written for the benefit of the panel's deliberations. The report does not set out Dr B's preferred option and, as such, does not provide a recommendation to the panel.

24. It is submitted that the panel did not properly explore the Applicant's progress within the Unit. The application points to a passage in the decision stating 'the panel explored the progress [the Applicant] had made with both Dr C and Dr B', with one possible interpretation being that it could not possibly have done so without either of them being present.
25. This extract comes from a passage in which the panel records the evidence given by the prison psychologist and goes on to document that she considered the Applicant to have made significant progress in addressing certain problematic aspects of his personality. It is my view that the correct interpretation of this section is 'The panel explored the panel explored the progress [the Applicant] had made under the care of both Dr C and Dr B with the prison psychologist who considered he had made significant progress in addressing his problematic personality traits'.
26. It is submitted that the prison psychologist had limited contact with the Applicant compared to Dr B and Dr C, but the panel nonetheless chose to rely on her report. However, not only did her report support open conditions but records that the Applicant 'was happy and understood the recommendation for open conditions'. Taking this view together with her oral evidence testifying to the Applicant's significant progress, it is difficult to see how the Applicant was disadvantaged: he wanted a recommendation for open conditions and the prison psychologist supported it, both verbally and in writing. I find no procedural unfairness here.
27. It is further submitted that it was procedurally unfair for the Parole Board to have refused an application for someone from the Unit to attend to give evidence. I have made extensive enquiry of the panel chair, witnesses and the Secretary of State on this matter. In short, their evidence all said the same thing: no application for further witness attendance was made.
28. Moreover, the witness list was available from 27 May 2021 when the case was directed to oral hearing. This would have given around five months for an application for additional witnesses to have been made. None was. There can be no procedural unfairness arising from the Board's purported refusal of a non-existent application. This ground fails.

Ground (b): Decision to refuse permission for witness was irrational

29. It is submitted that it was irrational that permission was refused for Dr B or a member of the Unit to attend as a witness. Irrationality, in the context of an application for reconsideration, applies to the overall decision not to direct release and not the decisions made along the way (unless, of course, any such decisions taint the overall rationality of a panel's conclusion). In this instance, the panel did not decide on additional witness attendance because it was never asked to do so. This submission must fail.

Ground (c): Legal representation

30. It is submitted that it was procedurally unfair for the hearing to proceed, noting that the Applicant may not have been fit to source a legal representative even though directions made when the case was directed to oral hearing encouraged him to do so.
31. It is a matter for the Applicant whether to seek legal representation. While he may have been unwell for weeks prior to the hearing, the parole review opened in July 2020, and the Parole Board's encouragement to seek representation happened in May 2021. The Applicant had adequate time to seek representation prior to the hearing. He was well-enough to do so within 21 days after the hearing.
32. The panel's decision does not note any concerns raised by the Applicant about his lack of representation, nor his capacity to appoint a legal representative.
33. There is no procedural unfairness here and this ground fails.

Ground (d): Oral evidence taken at the hearing

34. It is submitted that the way in which evidence was taken at the oral hearing was flawed, alleging that witnesses were interrupted repeatedly and not allowed to present their evidence as desired, or at all. It is submitted that the method of questioning was procedurally incorrect as it amounted to cross examination rather than evidence gathering.
35. Rule 24(2) provides that a panel may ask any question to satisfy itself of the level of risk of a prisoner and must conduct itself in a manner it considers most suitable to the clarification of the issues before it and the just handling of procedures. This may involve probing witnesses to determine the veracity of their evidence or interrupting witnesses who drift off point or when their evidence needs to be challenged. Although this may be perceived as some form of cross examination, questioning to ascertain probity of evidence is nonetheless permitted by rule 24.
36. While rule 24 does not permit a panel to conduct itself in such a high-handed way as to undermine the overall procedural fairness of its decision making, there is nothing on the evidence before me which merits further recourse to the recording of proceedings. No specific instances were offered and it is not for me to seek out procedural unfairness; it is for the Applicant to make out his case and he has not done so here. This ground fails.

Ground (e): Irrational departure from recommendations of witnesses

37. Finally, it is submitted that the decision was irrational as it departed from the recommendations of the witnesses, all of whom supported a move to open conditions.
38. Rule 28 can only be applied to the decision not to direct the Applicant's release. The Applicant was not seeking release. The Applicant was seeking a recommendation for open conditions which was not granted; the decision not to make any such recommendation cannot be subject to reconsideration.

39. The panel nonetheless had a duty arising from the terms of the Secretary of State's referral to consider the test for release regardless of the Applicant's wishes. It could only consider the question of open conditions after deciding that the Applicant did not meet the test for release.
40. The decision not to direct release must be procedurally fair and rational even if the Applicant is not seeking release.
41. It is not wholly clear whether the grounds raised in the application for reconsideration are pleaded in relation to the decision not to direct release or the decision not to recommend open conditions. I can only consider them in relation to the panel's decision not to direct release.
42. Regarding the matters of procedural unfairness raised above, **R(Grinham) v Parole Board [2020] EWHC 2140 (Admin)** provides that if procedural unfairness is found, it also has to be shown that the decision not to direct release might have been different. Even if I had found procedural unfairness (which I have not), I cannot see that the decision not to direct release would have been any different. There was no support for release and the Applicant was not seeking release.
43. Insofar as irrationality is concerned, the panel's overall decision not to direct release cannot be said to be irrational in any way as it concurred with the views of all witnesses. I cannot conceive that any other panel (let alone all other sensible panels) would have concluded otherwise.

Decision

44. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
14th January 2022