

[2022] PBRA 110

Application for Reconsideration by Fofanah

Application

1. This is an application by Fofanah (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 19 July 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 19 July 2022;
 - b) A request for reconsideration from the Applicant in the form of written representations from his legal representative; and
 - c) The dossier, numbered to page 575, of which the last document is the Decision Letter. The panel had a dossier numbered to page 564, which included written closing submissions from the Applicant dated the 4 July 2022.

Background

4. The Applicant is now 39 years old. On the 17 November 2005, when he was 22 years old, he received a sentence of imprisonment for public protection following his conviction for robbery and possession of a firearm when committing an offence (the index offences). The sentencing court determined that he must serve five years prior to being considered for release by the Parole Board. In the same sentencing exercise, the Applicant received a two year determinate sentence for a wounding offence.
5. The background to the index offences is that the Applicant planned the offences, taking a loaded sawn-off shotgun to a shop and pointing it at the staff. When the shopkeeper tried to disarm the Applicant, he shot the shopkeeper, causing permanent injury.
6. The Applicant had no convictions prior to the index offence, although he has admitted to offences for which he has not been convicted. In addition, during the current sentence, when in an open prison, the Applicant was convicted of two attempted robberies and two offences of the possession of a firearm (an imitation weapon). These offences were committed during a period of temporary release from the open prison in August 2013. The Applicant had planned the offences and he received an extended




3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 @Parole_Board

 0203 880 0885

determinate sentence, comprising of nine and a half years custody and four years extended licence. His eligibility for release in respect of the index offences was from April 2010. However, the further sentence meant that he next became eligible for consideration of release in June 2020.

7. The panel's consideration of the case was the fifth review by the Parole Board and he asked the panel to direct his release. The panel considered the written evidence and the oral evidence at a hearing on the 9 June 2022. The oral evidence included a prison psychologist, a psychiatrist, the Applicant's Probation Officer in the community and the official supervising his case in custody. The Applicant also gave evidence to the panel and he was legally represented. In its Decision Letter of the 19 July 2022, the panel did not direct the Applicant's release or make a recommendation for his progression to an open prison.
8. At the time of the panel's review, the Applicant was in a closed prison. The fourth review by the Parole Board in 2020 had recommended that he be transferred to an open prison, however, the Secretary of State rejected that recommendation because he considered the Applicant did not meet the higher threshold for acceptance of an open prison recommendation for a Foreign National prisoner.
9. In its review of the case, the present panel considered the Applicant to present a high risk of serious harm. It did not accept the low assessed risk of further violent offending, believing this assessment to be underestimated. The panel had concerns that the Applicant's future plans for life in the community were focussed on financial rewards which it considered to be ambitious and possibly unrealistic. The panel did not accept the proposed risk management plan, believing that the Applicant would first need to be tested in less secure conditions.
10. Recommendations to the panel at the hearing were that the Applicant should transfer to an open prison where he could be tested. The panel reviewed the likely risk of abscond, noting that the Secretary of State's referral required a very low risk of abscond in Foreign National prisoner cases. The panel determined that the risk of abscond would not be very low and so, having not directed his release, did not recommend his progression to an open prison.

Request for Reconsideration

11. The Applicant's grounds for reconsideration are that the panel's decision was irrational and procedurally unfair, in that:

Procedurally Unfair

12. The decision was procedurally unfair because it was made without due consideration to the written closing submissions submitted following the oral hearing and there was no reference to those submissions.

Irrationality

13. The decision failed to take into consideration the information included in the written closing submissions.

The Relevant Law

14. The panel correctly sets out in its decision letter dated the 19 July 2022 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. Those issues had been revised by the Secretary of State and were detailed by the panel.

Parole Board Rules 2019 (as amended)

15. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).

16. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

17. 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

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.

Procedural unfairness

21. 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.
22. 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

23. 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

24. In an email of the 16 August 2022, the Secretary of State confirmed that he would not be making any representations.

Discussion

Procedural Unfairness

25. The Applicant submits that the panel's decision was procedurally unfair on the basis that the decision was reached without giving due consideration to the closing submissions or making any reference to them.
26. The basis of this submission is that the Applicant pursued the Parole Board case manager for the panel's decision at 10.40am on the 19 July 2022 and was advised, by email, at 12.35pm that the panel were awaiting '*promised closing submissions*'. The Applicant says that the written closing submissions had already been sent to the Parole Board on the 4 July 2022, however, another copy was emailed to the Parole Board at 12.52pm on the 19 July 2022. At 3.49pm on the 19 July 2022, the Applicant received the panel's Decision Letter. He notes the length of the written closing submissions and

believes that the panel could not have considered them properly in the time between them being emailed at 12.52pm and the Decision Letter being provided at 3.49pm.

27. The Applicant also complains that the Decision Letter did not address the detailed closing written submissions which had outlined the witness evidence and supported his wish to be released. In his view, there is no mention of the written closing submissions aside from a reference to them on page three of the Decision Letter.
28. The Applicant then sets out his belief that there was a strong case for his release and he explains his reasoning for this, including elements of the likely long term risk management in the community which were not referenced by the panel. In his view, this means the panel did not consider the information which had been detailed in the closing written submissions.

Irrationality

29. The submission on irrationality follows on from the submissions on procedural unfairness. The Applicant argues that the panel's decision was irrational because it failed to consider the Applicant's closing written submissions, evidenced by its failure to make any reference to them in the Decision Letter.
30. The Applicant submits that he presented a strong case for his release, addressing the concerns that had been raised. The Applicant is also critical of the panel for not providing the panel's assessment of his risk of serious harm towards different classes of people or its assessment of his risk of absconding. In his view, this means the panel's decision is incomplete because key information in terms of the risk assessment is missing.
31. The Applicant submits that no reasonable decision maker would reach a decision without assessing the Applicant's risk or would have reached the same outcome as the panel if they had considered the closing written submissions.
32. In my view, the assessment of the Applicant's grounds for irrationality and procedural unfairness can be taken together. The arguments broadly consist of two points, a) the panel didn't consider the written closing submissions in reaching its decision and b) the panel didn't provide its view on the risk of serious harm and the risk of absconding.
33. Following the oral hearing on the 9 June 2022, the panel agreed to the Applicant providing written closing submissions. It is usual for a legal representative to make closing submissions orally on the day of an oral hearing, however, sometimes a request is made by a legal representative to produce written submissions at a later point. Occasionally, panels may ask for written closing submissions rather than oral submissions, particularly where there are complexities that may require more detailed thought prior to any submission being made.
34. On the 20 June 2022, the panel issued an adjournment notice. It noted that the Applicant's legal representative had asked to provide written closing submissions by 16 June 2022. By the time of the 20 June 2022 adjournment notice, those submissions had not been received and so the panel set a revised filing date of the 4 July 2022.

35. The Applicant then produced his written closing submissions dated the 4 July 2022 and filed these with the Parole Board case manager, as directed. The submissions extended to thirteen pages and began by explaining that the Applicant's legal representative had asked for time to produce written submissions (rather than oral submissions) because the Secretary of State had introduced a new test for open conditions in the lead up to the Applicant's oral hearing. The Applicant then set out the evidence from the oral hearing and why he believed that he should be released. If release was not directed, the Applicant invited the panel to recommend that he should be progressed to an open prison. The Applicant also detailed further information he had gathered since the oral hearing had taken place.
36. In order to assess the Applicant's submission fairly I asked for and was provided with the email correspondence between the Applicant's legal representative and the Parole Board and the email correspondence between the Parole Board case manager and the panel.
37. My review of those email exchanges establishes that the written closing submissions were filed on the 4 July 2022 as outlined by the Applicant. The submissions were provided to the panel on the 5 July 2022 and the panel later confirmed that it had received the written submissions.
38. When the Applicant's legal representative was chasing the Decision Letter on the 19 July 2022 and was told that his closing written submissions were outstanding, it is clear from the correspondence that this was said in error.
39. In summary, the panel were in receipt of the written closing submissions on the 5 July 2022 and then produced its Decision Letter dated the 19 July 2022 on the 19 July 2022. In my view, the only criticism of the panel perhaps is that, in accordance with the Parole Board Rules (2019) which were in place at the time, it should have provided the Decision Letter within fourteen days of the filing date for the written closing submissions. Therefore, the Decision Letter was produced a day late and should have been produced, at the latest, by the 18 July 2022.
40. It may have been helpful to refer to the written closing submissions within the reasoning in the Decision Letter, however, this does not mean that the submissions were not considered by the panel. The panel sets out in the heading of the Decision Letter that it had received written closing submissions and it confirms this by recording the total number of pages within the dossier produced for the Parole Board's review. The total number included the Applicant's written closing submissions.
41. As stated in **Oyston [2000] PLR 45**, "... *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.*"
42. The Decision Letter produced in this case needed to explain to the Applicant and others why his release was not being directed and why no recommendation was being made for his progression to an open prison. Any reading of the Decision Letter establishes that the panel did exactly that. Much of the Applicant's complaint focuses on his belief that his release should have been directed or that his progression to an open prison

should have been recommended. He may disagree with the conclusions reached by the panel, but this does not demonstrate irrationality or procedural unfairness.

43. In terms of the Applicant's submission about the panel's evaluation of the risk of serious harm or his risk of abscond, there is little to substantiate his complaint. The panel sets out in its Decision Letter its view of the Applicant's risk of abscond which it did not consider to be very low. The Secretary of State had specifically stated in his revised terms of the referral to the Parole Board that any case involving a Foreign National prisoner would require a very low risk of abscond if a recommendation for a place in an open prison was to be accepted.
44. The panel sets out in its Decision Letter that the assessed risk of serious harm to the public and staff was listed as high. In paragraph 2.11 of the Decision Letter, the panel stated, "... *Based on his offending history, including the behaviour which led to his recall, the panel agreed with [the Applicant's] assessed risk of serious harm but considered that his risk of further violence was underestimated.*"
45. The panel quite properly and fairly reviewed the risk of serious harm and the risk of absconding in this case. It established its own view on the level of risk and it provided its reasoning for this in the Decision Letter. The panel's approach to this case could not be said to be irrational or procedurally unfair.

Decision

46. 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.

Robert McKeon
16 August 2022