

[2022] PBRA 171

Application for Reconsideration by Delaney

Application

1. This is an application by Delaney (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 21 October 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. This is an eligible case and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier, the application for reconsideration, and a copy of an email from the Parole Board Case Manager to the Applicant's legal representative.

Background

4. The Applicant received a mandatory life sentence on 17 July 2002 following conviction for murder.
5. His tariff was set at 14 years (less time spent on remand) and expired on 21 January 2015. He was released on licence on 22 February 2016 following an oral hearing. He was recalled on 4 July 2020 and returned to custody on 6 July 2020.
6. He was recalled following allegations of controlling and manipulative behaviour towards an ex-partner. A police investigation into the allegations was under way at the point of recall.
7. The Applicant was 30 years old at the time of sentencing and is now 50 years old. This is his first review since recall.

Request for Reconsideration

8. The application for reconsideration is dated 8 November 2022 and has been drafted by solicitors acting for the Applicant. It is accompanied by a copy of an email from the Parole Board Case Manager to the Applicant's legal representative.
9. It sets out five grounds on which it submits the decision was irrational and/or procedurally unfair. These submissions are supplemented by written arguments to



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which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in July 2020 to consider whether to direct his immediate release. If the Board did not direct immediate release, it was asked to consider whether the Applicant was ready to be moved to open conditions.
11. On 11 November 2020, a single member panel reviewed the case on the papers and made a provisional decision not to direct the Applicant's release. On 18 November 2020, an application was made for an oral hearing. This was granted by a Duty Member on 10 December 2020.
12. The case proceeded to an oral hearing on 6 May 2021. The hearing was deferred for a charging decision to be made. A copy of the call log detailing the Applicant's contact with family and friends was directed.
13. In an undated document, the Crown Prosecution Service (**CPS**) indicated that the Applicant would not be charged, and no further action would be taken against him.
14. On 13 August 2021, a Duty Member redirected the case to an oral hearing. Directions were re-made for disclosure of the call log together with a report from the CPS explaining the charging decision and a summary of the information and evidence on which it made its decision.
15. On 29 October 2021, the case was deferred for a second time with further directions being made for completion of a psychological risk assessment (**PRA**).
16. The case was subsequently listed for 13 April 2022.
17. In preparation for the hearing a case conference was directed by the Panel Chair on 25 February 2022. It was noted that the Applicant's legal representative had raised concerns about evidential issues relating to the allegations which led to the Applicant's recall and aspects of the Applicant's behaviour following his return to custody. The Panel Chair noted that the panel had, at that stage, only seen summaries of the evidence rather than the first-hand evidence itself.
18. The case conference took place on 24 March 2022. The Applicant's legal representative reiterated his concerns about evidence. In consequence, further directions were set requiring disclosure of material including police/CPS evidence, and the investigation log.
19. On 7 April 2022, the hearing was adjourned at the request of the Applicant's legal representative. It was set to reconvene on 7 September 2022.
20. The case proceeded to an oral hearing on 7 September 2022, before a three-member panel consisting of two independent members and a psychologist specialist member. It was held remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, his Prison

Offender Manager (**POM**), his Community Offender Manager (**COM**), a prison forensic psychologist and a forensic psychologist commissioned by the Applicant.

21. On 15 September 2022, an adjournment notice was issued, directing information from the prison forensic psychologist regarding proposed further risk reduction work.
22. On 7 October 2022, written legal representations were submitted on behalf of the Applicant.
23. On 21 October 2022 the panel made no direction for release and no recommendation for open conditions. The decision was issued to the parties on 24 October 2022.

The Relevant Law

24. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

25. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
26. 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)).
27. 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

28. 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."

29. 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.

30. 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

31. 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.

32. 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.

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

The reply on behalf of the Secretary of State

34. The Secretary of State (the Respondent) has submitted no representations in response to this application.

Discussion

35. The first ground argues that the Respondent added evidence to the dossier after the oral hearing on 7 September 2022 (but before the panel made its decision) without notifying the Parole Board or the Applicant's legal representative. It is submitted that this was procedurally unfair.

36. Having checked the case management system, it appears that the evidence in question was the investigation log. This was the information first directed at the case conference on 24 March 2022. It was added by the Public Protection Casework Section (**PPCS**) on behalf of the Respondent on 13 September 2022. It comprises 118 pages and goes into a considerable amount of detail about the relationship between the Applicant and his ex-partner.

37. The Applicant's legal representative notes that he became aware of this when re-downloading the dossier following the hearing for the purpose of drafting an application for reconsideration. This is set out in his email to the Parole Board case manager (and the PPCS case manager) of 27 October 2022. He asks whether the

panel had sight of the application log before making its decision. A response from the Parole Board case manager dated 3 November 2022 states “*the panel did not see (and therefore did not take into account) the investigation log, it not having been notified about it being placed in the dossier post-hearing*”.

38. At the time of the hearing, the direction for disclosure of the investigation log was outstanding. It had not been revoked. The hearing took place without it, and the panel did not adjourn for it. The Applicant’s legal representative did not object.
39. The direction for disclosure of the investigation log was marked as complete by the PPCS on 13 September 2022.
40. It is an axiomatic principle of fairness that both parties to any proceedings begin on an equal footing regarding access to documentary evidence. This is even more important when the liberty of one of the parties is at stake, as is the case here.
41. I find that the Respondent knew that the investigation log existed before the hearing took place. The log related to matters from 2020 and its disclosure had been directed some six months previously. The log contained information that was material to the panel’s risk assessment. The panel was unaware of its existence and, crucially, so was the Applicant and his legal representative. I cannot say whether any of the Respondent’s witnesses would have been aware of its existence or its content.
42. I am satisfied that the panel made its decision on the evidence before it at the time (and make no criticism of the way in which it handled proceedings in relation to the stated ground for reconsideration).
43. However, the failure of the Respondent to inform the Applicant fully of the case against him at the time of the hearing when (a) the missing information existed, and this was known to the Respondent, (b) the information had been directed in a timely manner by the Parole Board, (c) that the direction had never been revoked, (d) the information had been specifically sought by the Applicant’s legal representative, (e) it was pivotal information in evaluating the events that led to the Applicant’s recall, (f) the Applicant is contesting his recall, and (g) the Applicant is serving a life sentence, contravenes the principles of natural justice to the extent that I find the proceedings to have been fundamentally flawed, and therefore procedurally unfair.
44. Having found sufficient reasons for the application to be granted, I do not need to consider the remaining grounds put forward within the application. For clarity, I make no findings regarding any further alleged procedural unfairness or irrationality.

Decision

45. Applying the tests as defined in case law, I find the decision not to release the Applicant to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel at an oral hearing.

Stefan Fafinski
06 December 2022