

[2022] PBRA 179

Application for Reconsideration by Hassan

Application

1. This is an application by Hassan (the Applicant) for reconsideration of a decision of an oral hearing dated the 25 October 2022 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 dossier of 576 pages, including the decision letter, the grounds in support of the application, the Reconsideration Decision Proforma and the decision of the Reconsideration Panel dated the 19 April 2022.

Background

4. On the 27 February 2014, the Applicant was given an extended determinate sentence, comprising a custodial term of 9 years and an extended licence of 4 years for robbery.
5. He and two accomplices carried out a planned robbery of a shopkeeper who was transferring approximately £250,000 from his shop to his home. He was attacked and beaten with bricks, sustaining serious long-term injury.
6. The Applicant had a history of acquisitive and violent offending including robbery.
7. He was released on automatic licence on the 11 March 2020.
8. On the 20 August 2020, he was stopped by the police driving an Audi with two passengers, both of whom had previous convictions for supplying Class A drugs. 500 grammes of cocaine were found in the car. A bag containing £25,000 and police body armour were found in a VW Golf parked close by and owned by one of the other two men.

9. On the 21 August 2020, the Applicant was recalled to custody. He was subsequently prosecuted for possession with intent to supply Class A drugs but was found not guilty.

Request for Reconsideration

10. The grounds for seeking a reconsideration are based on irrationality and procedural unfairness and are as follows:

Procedural unfairness: Delay in issuing the Decision

There had been a delay between December 2021 and March 2022 in issuing the panel's decision. In those circumstances, the decision would not have been made when the information given at the oral hearing had been fresh in the minds of the decision makers, with the risk that this would impact on the quality of the decision. Additionally, the delay caused significant unfairness in this case.

Irrationality

The panel failed to give adequate reasons for its conclusions and in particular for disagreeing with the unanimous professional opinion in favour of release.

Procedural unfairness:

The panel placed undue weight on the alleged recall offences and disregarded the account the Applicant gave of those matters to the banner panel.

Current parole review

11. The Secretary of State's referral is undated but asked the panel to consider release. This was the Applicant's first review since his recall. The Applicant had taken part in an oral hearing on the 14 December 2021.
12. On the 10 March 2022 the panel issued a decision letter. On the 25 March 2022, the Applicant made an application to set the decision aside under the reconsideration mechanism.
13. On the 19 April 2022, the reconsideration panel set aside the decision and directed a new trial before a different panel.
14. On the 11 October 2022, the panel heard evidence from the prison offender manager, the Applicant and the community offender manager.

The Relevant Law

15. The panel correctly sets out in its decision letter dated the 25 October 2022 the test for release.

Parole Board Rules 2019

16. 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)).

Irrationality

17. 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."

18. 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.

19. 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

20. 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.

21. 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

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 Public Protection Casework Section on behalf of the Secretary of State offers no representations in response to Mr Hassan's reconsideration application.

Discussion

24. The first ground has not been easy to understand. It may be helpful to repeat the essential chronology. It appears the Applicant took part in an oral hearing on the 14 December 2021. On the 6 January and the 8 February 2022, Panel Chair Directions were issued indicating there would be delay because the panel chair was ill.

25. On the 10 March 2022 the panel issued a decision letter. On the 25 March 2022, the Applicant made an application to set the decision aside under the reconsideration mechanism. His first two grounds rested on irrationality and the third, procedural unfairness. The wording of the third ground (as drafted by the reconsideration panel) was

"There had been a delay between December 2021 and March 2022 in issuing the panel's decision. In those circumstances, the decision would not have been made when the information given at the oral hearing had been fresh in the minds of the decision makers, with the risk that this would impact on the quality of the decision".

26. The application for reconsideration succeeded on the first ground of irrationality and in those circumstances it was unnecessary to consider except briefly the other two grounds. The decision of the reconsideration panel is dated the 19 April 2022.

27. The present application seeks to reopen that third ground again on the basis the delay impacted on the quality of the decision-making.
28. Whether the delay from December 2021 to March 2022 impacted on the quality of the decision-making or not is irrelevant because a fresh hearing, or to use the old expression a hearing de novo, was ordered. The consequences were (a) in October there was a new panel, (b) evidence (which need not have been that given in December 2021) was considered and (c) the new panel was unaware of the contents of the first decision.
29. The second oral hearing, in respect of which this application is made and the only hearing this panel has to consider, took place on the 11 October and the decision was issued on the 25 October. In those circumstances, the suggestion that the delay in the earlier part of the year affected the decision making of the October panel has to be without merit.
30. The grounds tried to take the matter further by saying the delay created significant unfairness. If it did, the question would be what prejudice (of the sort to which the reconsideration panel can give relief) did the Applicant suffer. In the end, he had a new hearing and a subsequent decision made when the panel's joint recollection was fresh.
31. If the Applicant thought the delay had created an unfairness that the oral hearing panel could deal with, the matter should have been raised at the outset of the hearing. Then the interesting question would have been what would the Applicant have asked the panel to do to cure the prejudice: should the original decision stand or should the October review be adjourned? The self-evident remedy was to ensure the panel had sufficient material to come to a just and properly informed decision and then proceed to conduct the hearing and issue a decision within the timetable. This is what the panel did.
32. Turning to irrationality, the application sets out a number of factors favourable to the Applicant including:
- a) The fact the professionals agreed his risk could be managed in the community, his statistical risk scores were not high and the risk he posed was not imminent. It should be noted the probation officer's report ('Part C Report') dated September 2022 follows current HMPPS (His Majesty's Prison and Probation Service) Policy and makes no recommendation about suitability for release;
 - b) Approved premises were available;
 - c) The Applicant had been acquitted of the alleged offences which had led to the recall.

d) Suitable offending behaviour work existed in the community.

33. The Applicant accepts the panel was not bound to follow the recommendations of the professionals but asserts the panel failed to give adequate reasons for its conclusions or for disagreeing with the professionals.

34. Section 2 of the decision letter runs to twenty-one paragraphs and sets out a detailed and precise narrative of the Applicant's behaviour on licence and on return to custody.

35. The community offender manager's main concern was the Applicant's negative associates. She was surprised the Applicant had not known anything about one of his accomplice's involvement in criminal behaviour. She had thought the recall would be a wakeup call.

36. She also said the Applicant's compliance in the community was an unknown quantity and appears to have been in some difficulty in explaining to the panel why she was confident his risk could be managed to sentence expiry and beyond. She said she had not realised when she completed her July assessment that the Applicant had completed the Thinking Skills Programme in 2014. She had expected he would do it in custody before release.

37. The contents of the decision letter reveal the panel considered the evidence with some care.

38. The panel's principal reasons for coming to a different conclusion to the professionals were they did not believe the Applicant's account of how he got involved in the matter that led to his recall; the recall revealed signs of a former criminal lifestyle, negative associates and poor thinking skills; it was a concern that the Applicant was able to show such poor thinking after completing TSP; the speed with which he put himself back in to a risky situation.

39. The application is drafted more in terms of disagreement with the panel's conclusions rather than identifying a lapse into irrationality as explained in the authorities above. There is no suggestion the panel took into account irrelevant material, failed to take into account relevant material or misunderstood the evidence or, for that matter, the panel's conclusion was one to which no reasonable panel could have come on the evidence.

40. I have tried to see the evidence from the Applicant's point of view but I have come to the conclusion this was plainly a conscientious panel the members of which considered the evidence with great care and they were entitled to take the view they did on the evidence before them.

41. The Applicant also complains that a previous prison offender manager did not give evidence. The witnesses at a panel hearing are published well in advance and if the Applicant wanted this particular prison officer that would have been arranged. There are also criticisms of the Parole Board's case management and listing procedures. These are not matters for the reconsideration panel.

42. The third ground also based on procedural unfairness tends to promote disagreement rather than identifying actual procedural unfairness. The panel made it clear it was not giving weight to the alleged offences but to the Applicant's risky behaviour leading to recall. The panel had the advantage over this panel in seeing the Applicant and hearing how he dealt with the questions. There is no ground for suggesting it was not entitled to disbelieve him.

43. In the circumstances all three grounds fail.

Decision

44. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

James Orrell
22 December 2022