

[2022] PBRA 26

Application for Reconsideration Osborne**Application**

1. This is an application by Osborne (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 6 January 2022 not to direct release or recommend progression to open conditions.
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 491 pages (including the decision letter) and the ground of the application dated the 30 January 2022.

Background

4. On the 13 March 2008, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for robbery of a lone barman in a public house. The minimum tariff was set at 22 months and 15 days and expired on the 28 January 2010.
5. The Applicant was aged 25 at the time of sentence. He had been released twice, in 2016 and 2019 and recalled on both occasions.
6. He is now aged 39.

Request for Reconsideration

7. The application for reconsideration was received on the 31 January 2022.
8. The grounds for seeking a reconsideration are based both on irrationality and procedural unfairness, although some of the matters complained of are capable of being irrational only.

The grounds for irrationality are

- a) The panel was not entitled to find (as it did) that the Applicant had assaulted a former partner, Victim A;

- b) The panel was not entitled to place weight (as it did) on unproven allegations; and
- c) The panel wrongly rejected the recommendations of the professional witnesses;

The grounds for procedural unfairness are

- a) The panel had a duty (which it ignored) to inform the parties that it considered the release plan inadequate.

Current parole review

9. The Secretary of State referred the case to the Parole Board on the 23 November 2020 requiring the Board to consider release or alternatively progression to open conditions.
10. The oral hearing took place on the 8 November 2021. The panel, which included two independent members and a psychiatrist member, heard evidence from the Applicant; the Community Offender Manager, a Chartered and Registered Forensic Psychologist, and a Senior Prison Probation Officer. The Applicant was represented throughout by the same legal representative as currently acts for him.

The Relevant Law

11. The panel correctly sets out in its decision letter dated the 6 January 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.

Parole Board Rules 2019

12. 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

13. 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."

14. 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.

15. 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

16. 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.

17. 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.

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

The reply on behalf of the Secretary of State

19. The Secretary of State did not make any representations in this case.

Discussion

The finding the Applicant had assaulted Victim A

20. The Applicant does not dispute the panel was entitled to embark on a fact-finding exercise and refers in passing to the Parole Board's Guidance on Allegations.
21. It is clear from the pleaded grounds, the Applicant anticipated the panel might make a finding of fact and made written submissions accordingly.
22. Paragraph 6 of the Guidance states panels must record in the decision letter their analysis and conclusions regarding allegations, including any impact allegations have on the parole decision.
23. The panel had sufficient information before it to make a finding of fact, approached the problem cautiously and set out extensively in the decision letter the evidence it had taken into account.
24. The matters the panel took into account included:

- a) The Applicant had been arrested on suspicion of assault occasioning actual bodily harm and stalking in respect of Victim A.
 - b) On 22 October 2020, the Applicant was taken to hospital with injuries including human bite marks on his torso. He alleged he had been attacked by unidentified people for an unknown reason on the 19 October 2020. He did not report this to his supervising officer.
 - c) Victim A did not want the matter to proceed on the basis a prosecution would impact on her mental health and was unnecessary as the Applicant had been recalled to prison but she did not retract her allegations against him.
 - d) There were several witness statements contained in the police file from witnesses who appeared to be independent.
 - e) One witness described a man fitting the Applicant's description intoxicated in the street and being aggressive and abusive towards Victim A.
 - f) The witness described a large bruise to Victim A's right eye consistent with her allegation and with a photograph in the dossier which Victim A had published on social media.
 - g) The Applicant gave evidence before the panel and in addition to not being able to explain why he had been attacked on the 19 October, implied that Victim A had instigated the attack and that she did have not the bruised eye when she went into the street.
 - h) The panel found the Applicant's evidence on those matters incredible.
25. I have considered what has been said in the pleaded grounds but I cannot say the panel was not entitled to come to the conclusion it did.
26. The panel very largely, but not exclusively, confined the impact of the fact finding to its assessment whether the recall had been justified, a decision that is not an eligible decision within rule 19 (1).

Unproven allegations

27. The Analysis of Offending Behaviour section of the decision letter mentions three unproven allegations of violence in which the matter was not proceeded with because the complainant and / or a witness refused to make a statement. As these allegations appear in the dossier, it might have been considered unusual if the decision letter had not dealt with them. The panel stated it had placed only "minimal weight" on the allegations although they might indicate more extensive offending on the part of the Applicant.

28. The unproven allegations were not referred to thereafter.

29. At paragraph 3.9 of the decision letter, the panel noted the Chartered and Registered Forensic Psychologist view, reproduced below, but did not seek to disagree with it,

"She suggested that his risk of violence toward adult males was less imminent, since there had been no reports or concerns of this for many years and he appeared to have ceased association with some of his former associates and had maintained a period of time without difficulty in the community prior to recall".

30. The panel may have used the word "minimal" but a fair and comprehensive reading of the decision letter indicates the panel actually put no weight on these allegations.

Failure to follow the recommendation of the professional witnesses

31. The position has been set out very clearly in the case of **Benson [2019] PBRA 46** where Sir John Saunders said,

"There are two matters which apply generally to all these applications. First, it is for the panel to assess the weight to be given to any piece of evidence, including the opinion as to risk given by the professional witnesses. It is for the panel to test the assessment and look at the reasons for it. So, even in a case where every witness is supporting release, it is for the panel to make their assessments taking into account all the evidence. The reverse is also true. If the panel disagrees with the evidence given by the professionals, it must give adequate reasons for doing so. Secondly, a decision letter is directed at the prisoner. Whilst it has to descend to sufficient details so that everyone, but particularly the prisoner, can understand the reasons for the decision, it is not necessary for every point which has been raised in the hearing to be discussed. What is necessary is that everyone is able to understand the reasons for the decision".

32. The submissions in support of the application tends to be a disagreement with the panel's conclusions rather than a foundation for a finding of irrationality.

33. The panel made clear that among their considerations were:

- a) The Applicant's unenviable record of convicted violent offending and that the panel had just found he had assaulted Victim A.
- b) The primary drivers of the Applicant's offending were likely to be his underlying traits of Antisocial Personality Disorder (ASPD).
- c) The commission of further offences on licence.

- d) The Applicant's risk would be imminent if he entered into an intimate relationship and could also be increased by external factors.
 - e) The Applicant had not completed any risk reduction work since his recall.
 - f) There was evidence the Applicant lacked honesty with his supervising officer which was essential for an effective management of his risk.
34. The pleaded grounds do not establish that the panel took into account irrelevant material, failed to take into account relevant material or misunderstood the evidence. It simply cannot be said that the decision makes no sense on the evidence of risk considered by the panel or that no other rational panel could have come to the same conclusion.

Procedural Unfairness

35. The hearing took place on the 8 November 2021 and on that day the panel heard all the oral evidence. A certain amount of documentary evidence was received after that date and it is necessary to consider the subsequent course taken by the proceedings.
36. On the 9 November 2021, a Panel Chair Direction (PCD) indicated the panel wished to see a document which apparently would provide evidence of the Applicant's controlling or intimidating behaviour towards a former partner.
37. The PCD also informed the parties that the panel had been sent, it seems inadvertently, a 43 page document entitled "offender transfer report".
38. The PCD stated "*The parties are at liberty to apply for any changes they would wish to see to the directions and timetable, and the present expectation that the case can be concluded on the papers without a further hearing*".
39. The panel also wanted information about the availability of identified approved premises and the availability of Mentalization Based Therapy both in the community and in open prison.
40. Those requirements made it reasonably clear that all options, that is, no release, a recommendation for open conditions and release to approved premises were still being considered.
41. The Applicant's solicitor had already been invited to file submissions.
42. On the 23 November 2022, a further PCD asked for the Secretary of State to confirm that he was content for the offender transfer report to be disclosed in its entirety to the Applicant.

43. The Applicant's closing submissions are dated the 12 December 2022. They invited the panel to accept the unanimous evidence of the professional witnesses and to direct release to an identified approved premises. The submissions also argued against a finding of fact in respect of Victim A's allegations and the submissions set out in a little detail the evidence of the Chartered and Registered Forensic Psychologist.
44. On the same date, the 12 December 2021, a third PCD directed that the case should be concluded on the papers, that the offender transfer report should be added unamended to the dossier and that further legal representations should be filed by the 4 January 2022.
45. On the 6 January 2022, the panel issued the decision letter refusing to direct release and refusing to make a recommendation for progression to open conditions.
46. It is submitted that the procedure adopted by the panel after the conclusion of the oral hearing was procedurally unfair in that it did not afford the Applicant an opportunity to engage fully in the proceedings, the professional witnesses were not given an opportunity to supplement their evidence and the panel had failed to indicate its view that the proposed risk management plan was inadequate.
47. Against that, the following points can be made.
48. First, the panel made it clear at each stage what it was seeking and did not raise an expectation that it would direct release. On the contrary, the fact it was seeking a quite wide range of information suggested it had not reached a conclusion.
49. Second, and crucially, the PCD dated the 9 November 2022 included a "*liberty to apply*" clause again making it clear that the Applicant could intervene procedurally and, for example, ask for the hearing to continue as an oral hearing.
50. Third, the Applicant's solicitor was twice invited to make submissions prior to the date for the panel's decision.
51. There is no absolute duty on the panel to inform the parties that it thinks the proposed risk management plan is inadequate. A risk management plan, however robust, can provide external controls but those can only go so far in providing the necessary protection for the public. What is required is an effective combination of external and internal controls. Panels frequently ask that risk management plans are reconsidered, but only if the panel first considers that the Applicant's internal controls are sufficient to warrant changes being made to the plan. In this case, it is clear the panel's conclusion was that the Applicant's internal controls were insufficient and for that reason his risk was not manageable in the community. This considered view was not going to be altered either by further evidence from the professional witnesses or a somewhat different risk management plan.

52. The procedure adopted by the panel was manifestly fair.

53. I am unable to uphold any of the grounds for reconsideration.

Decision

54. 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
23 February 2022