

[2022] PBRA 42

Application for Reconsideration by Herridge

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Application

1. This is an application by Herridge (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 23 February 2022 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.

Background

4. The Applicant was convicted of rape of a female child under 13 years of age on 14 September 2007, for which he received a sentence of imprisonment for public protection together with an indefinite sex offender notice and an indefinite disqualification from working with children. He was also convicted of two further counts of rape of a female under 16 years of age for which he received no separate penalty. A minimum term of five years, less time spent on remand, was set which reportedly expired on 27 April 2012.
5. The Applicant was first released on licence on 12 January 2015 following an oral hearing. His licence was revoked on 29 January 2016, just over one year later, and he was returned to custody.
6. The Applicant was re-released on licence on 15 September 2016, again following an oral hearing. His licence was revoked on 16 October 2017, some thirteen months later, and he was returned to custody.
7. This is his second recall on this sentence and his second parole review since recall. The first review was concluded on 8 July 2020 with no direction for release.
8. The Applicant was aged 51 at the time of sentencing. He is now 65 years old.

Request for Reconsideration

9. The application for reconsideration is not dated. It has been submitted by solicitors acting on behalf of the Applicant and was received by the Parole Board on 16 March 2022.
10. It submits that the decision was both procedurally unfair and irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State in May 2021 to consider whether it would be appropriate to direct his release or, if release was not directed, to advise the Secretary of State whether he should be transferred to open prison conditions.
12. It is also necessary to set out the background to the previous parole review as aspects of it are material to the current Application.
13. The Applicant's previous parole review commenced in February 2018. It was deferred for police forensic examination of images found on the Applicant's mobile phone (no further charges arose). It proceeded to an oral hearing on 23 October 2018, at which the case was further adjourned for a psychological risk assessment to take place. This was written by a psychologist commissioned by HMPPS (the **prison psychology report**, 31 January 2019).
14. On 25 February 2019, the Applicant was granted a further adjournment for an independent report to be completed. This was written by a psychologist commissioned by the Applicant's legal representative (the **independent psychology report**, 8 May 2019).
15. The hearing reconvened on 24 September 2019. The Applicant gave oral evidence in which he admitted to taking covert photographs of young girls because he found them sexually attractive. Following these admissions, the hearing was further adjourned so the Applicant could be assessed for suitability for further offence focussed work. A programme needs assessment (PNA) was produced.
16. In the light of the Applicant's disclosure and after review of the PNA, the two psychologists produced a joint report highlighting areas of agreement and difference (the **joint report**, 16 April 2020).
17. The joint report concluded as follows:
 - a) Completion of an intervention addressing sex offending (**HSP**; an accredited high-intensity 1-1 intervention) would be beneficial, but not necessary or proportionate to the Applicant's level of risk.
 - b) If the Applicant was provided with "*support, routine, structure and a comprehensive risk management plan, including Maps for Change, and is supported in developing/strengthening good/protective factors*" his risks

could be managed in the community. (Maps for Change is a toolkit of exercises which can be used to structure supervision of adult male sex offenders).

c) Subject to the provisos set out at (b) above, the Applicant met the test for release.

18. The hearing convened again on 2 June 2020, before a three-member panel which included a psychologist specialist member.
19. The dossier for the current review contained the decision letter from the June 2020 hearing (the **previous decision**). It notes that the two psychologists changed their recommendations during the course of the evidence and withdrew their support for release, when it became apparent that core elements of the proposed risk management plan were not feasible due to the COVID-19 restrictions in place at the time.
20. It notes that the Applicant withdrew his application for release at this point, after having taken legal advice. The Applicant accepted that he should undertake HSP. The previous decision noted that the next panel may benefit from HSP post-programme reports and (depending on progress) an updated psychological risk assessment.
21. The current parole review was considered by a single Member Case Assessment (**MCA**) panel on 3 September 2021. This noted that the Applicant had now completed HSP, having moved establishments to do so. In directing the case to an oral hearing, the MCA panel directed there was no need for a specialist member (there being no disputed psychological evidence to consider) or a new psychological risk assessment (given that the joint report supported re-release in April 2020).
22. Panel Chair Directions (**PCDs**) set prior to the oral hearing did not vary the MCA assessment.
23. The case proceeded to an oral hearing before two independent members on 15 February 2022. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout.
24. The Applicant was seeking release. All witnesses supported his release. The panel did not direct the Applicant's release but did make a recommendation for open prison conditions.

The Relevant Law

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

Parole Board Rules 2019

26. 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)).

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**.

Procedural unfairness

28. 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.

29. 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.

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

Irrationality

31. 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."

32. 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.

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

Duty to give reasons

34. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.
35. When reasons are required, or where they are provided, even though not strictly required, those reasons must be both adequate and intelligible. They must therefore both rationally relate to the evidence in the case (**Re Poyser [1964] 2 QB 467, 478**) and be comprehensible in themselves (**Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153 (HL) 165**).
36. The duty to give reasons was most recently considered in the context of parole decision in **R(Wells) v Parole Board [2019] EWHC 2710**. Saini J acknowledged (at para. 38) that a panel of the Parole Board is not bound by the expert evidence before it, but that (at para. 40):

"The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting".

37. In **Wells**, Saini J also noted that (albeit in the context of general civil litigation) the observations of Henry LJ in **Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377 (CA) 381** regarding the duty to give reasons are apposite:

*"The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in **R(Dave) v Harrow Crown Court [1991] 1 WLR 98**) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not."*

and

"The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter...[W]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where...there is disputed expert evidence; but it is not necessarily limited to such cases."

38. In summary, a failure to give reasons may give rise to procedural unfairness, irrationality, or both. Reasons must relate to the evidence in a rational way and be adequate, intelligible, and comprehensible. The more a panel departs from expert evidence, the more heightened its duty to give reasons for doing so, particularly

when the liberty of the prisoner is at stake.

The reply on behalf of the Secretary of State

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

Discussion

Procedural unfairness – duty to give reasons

40. It is first submitted that the decision fails to give sufficient reasons why the recommendation of the joint report was not followed.

41. The decision notes the following:

"A post-programme risk assessment is not completed after the HSP, and the MCA member of the Parole Board did not direct one. The panel was content that they could proceed with this review without one on the basis that they had sight of the psychological reports completed at the time of the last review and the last Panel's decision letter reflecting what treatment needs [the Applicant] had outstanding."

42. As such, the panel acknowledges that the prison psychology report, the independent psychology report and the joint psychology report remain the primary psychological evidence before it. All these supported the Applicant's release.

43. While there is no HSP post-programme review, the dossier contains a letter from the HSP programme facilitator (a registered forensic psychologist) in positive terms, noting the Applicant's openness, progress in exploring his unhealthy sexual interests, and recognising his skills and knowledge.

44. On the face of it, the Applicant had done what had been asked of him by the previous panel (of his own volition, having withdrawn his application for release) to good report and without the panel feeling the need to seek further psychological evidence. The psychological evidence before the panel supported release.

45. The panel also heard recommendations for release from the Applicant's POM and COM.

46. The panel drew reference to the three psychological reports and (having decided no further oral evidence or updated reports were necessary) needed to explain why it did not agree with them in the face of their unanimous and confident support for release, augmented by the oral evidence of the Applicant's POM and COM. Of course, the panel is perfectly entitled to reach its own decision in the face of the evidence. But it cannot do so without explanation. In this instance, it is not simply a question of the panel having to explain why it preferred the views of one expert over another (as in **Flannery**, referred to in **Wells**) but a question of why it chose to depart from all expert evidence. If a heightened duty to give reasons arises when choosing between experts, that duty must be higher still when departing from the evidence of four professional witnesses.

47. Having read the decision carefully, I find that the panel has not discharged its duty. The decision does not engage in any meaningful analysis of the psychological reports and consequently the Applicant will most likely remain in some doubt as to why he has not been released. This is unfair in the sense expressed in **Wells** (drawing on **Flannery** and **ex p Dave**).

48. This ground therefore succeeds.

Irrationality

49. As I have already explained, a failure to give reasons can amount to both procedural unfairness and irrationality. I have already found procedural unfairness sufficient for this application to be granted but will also deal briefly with the irrationality point.

50. It is almost certainly the case that the panel, who I have no doubt approached this review conscientiously, reasonably, and sensibly, had a firm and logical set of reasons in its mind when reaching its conclusion not to release the Applicant. However, I cannot look into the panel's mind; the only way in which I can determine this application is on the evidence before me.

51. On the content of the decision (and I must stress, that decision alone) I cannot find a way in which its conclusion can be rationally and sustainably explained. My conclusion may have been different had the panel's reasons been more prominently and expansively articulated, but, in the absence of this, I cannot find a rational explanation.

52. This ground also succeeds.

Decision

53. Accordingly, applying the test as defined in case law, I find the decision not to release the Applicant to be both procedurally unfair and irrational. 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 by way of an oral hearing.

Stefan Fafinski
4 April 2022