

[2022] PBRA 73

Application for Reconsideration by Austin

Application

1. This is an application by Austin (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 12 May 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 written decision reasons ('the reasons') dated 12 May 2022; a request for reconsideration in the form of written representations from the Applicant's legal representative dated the 20 May 2022; the dossier, now numbered to page 769, of which the last document is the Decision; the email in response to the application from PPCS dated 31 May 2022; and an email from the Panel Chair to the Case Manager dated 29 April 2022 which I requested to see as I wanted to understand what had led to the email at page 753 of the dossier.

Background

4. The Applicant is now 67 years old. On 22 January 2004, when he was 49 years old, he received a discretionary life sentence following conviction for kidnap of a 20-year-old female. He was convicted after trial. His minimum term was set at 3 years, 6 months, and expired in July 2007.
5. The Applicant had numerous previous convictions including for offences of rape and false imprisonment.
6. The Applicant's case was referred to the Parole Board by the Secretary of State in May 2018 and this was the 8th review of his case. At the previous review dealt with by way of a hearing in October 2017, the panel had recommended transfer to open conditions (the decision letter for the current review incorrectly refers to this as a 2018 panel and decision). However, he did not transfer to open conditions for some time, going initially to a closed prison for assessment in September 2018 and then eventually an open prison on 21 November 2018.
7. There were various delays to this case for a variety of reasons. The initial oral hearing was adjourned at the request of the Applicant's legal representative. There were then further adjournments including obtaining a psychological assessment,



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



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



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

delays due to the Coronavirus pandemic and an adjournment to enable the Applicant to complete further work to address his risk. A face-to-face oral hearing was convened during that time on 12 December 2019 where evidence was taken from the Applicant, his probation officer in the community and the official responsible for his case in custody.

8. Also, during the course of the review, in August 2021, the Applicant was recalled to closed conditions following a report that he had consumed alcohol whilst on a period of temporary release. The Secretary of State considered this recall and found there to be 'no evidence of a significant increase in his risk of serious harm' and returned him to open conditions by way of decision letter dated 29 September 2021. He was back in open conditions at the point that the oral hearing was convened.
9. The next oral hearing took place by video link on 23 November 2021. The Applicant indicated that he hoped to be released as a result of the parole review. The panel heard evidence from the Applicant's probation official in the community, the officer responsible for his case in custody, a psychologist employed by the prison service and a police officer. The Applicant also gave evidence to the panel. The Applicant was legally represented.
10. Although it is not referenced in the decision letter, the Applicant's legal representative made clear in their representations that the panel identified gaps in information which it required and indicated that they ought to be provided and then 14 days allowed for closing submissions. Further information was certainly received and can be seen in the dossier including an updated OASys (a probation service assessment report) on 7 December 2021. Then on 8 December 2021 the Panel Chair provided an adjournment notice indicating that they had limited availability to draft the decision letter and setting a review date for 20 December 2021. On 10 and 18 December the Applicant's probation officer in the community provided email updates about an aspect of the risk management plan. The Applicant's legal representative then provided written closing submissions on 22 December 2021. The probation officer in the community provided a further update by email (undated in the dossier copy at p750).
11. The Panel Chair completed one further adjournment notice on 25 February 2022, indicated that they were unwell and setting a review date of 4 March 2022. No further directions for updates were made at that time. I could then see from the dossier that the probation officer in the community had sent through an email indicating there was an up-to-date risk assessment on 29 April 2022. This appeared to be in response to a request and so I asked for, and was provided with, the Panel Chair's email dated that same day which asked for some limited information from the probation officer, all of which was answered within the email in the dossier.
12. The formal decision letter was not completed until 12 May 2022. In its reasons, the panel noted the support for release from the witnesses at the oral hearing, however, it disagreed with the recommendations made and did not direct his release. The panel recommended that he remain suitable for open conditions.


Request for Reconsideration

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

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

 info@paroleboard.gov.uk

 @Parole_Board

 0203 880 0885



13. The Applicant's grounds for reconsideration are:

1. The decision was procedurally unfair in not providing the written decision reasons in accordance with Parole Board Rules.
2. The decision was irrational because disproportionate weight was attached to issues which arose whilst the Applicant was on temporary release.
3. The decision was irrational because it was at odds with all the recommendations from the professional witnesses.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 12 May 2022 the test for release and the issues to be addressed which were in place at the time when making a recommendation to the Secretary of State for a progressive move to open conditions (these have since been changed to the 2022 Directions).

15. 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)).

16. Under Rule 25(6) of the Parole Board Rules 2019 a decision of the oral hearing panel must be recorded in writing with reasons, and that record must be provided to the parties not more than 14 days after the end of the hearing.

Irrationality

17. In **R (on the application of 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

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

Other

24. 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.*"
25. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710** and **Stokes [2020] EWHC 1885 (Admin)**.

The Reply on behalf of the Secretary of State

26. The Secretary of State confirmed by way of email dated 31 May 2022 that he did not wish to make any representations in response to the application.

Discussion

27. There is no doubt that the decision was not provided within the timescale set down in the Parole Board Rules as noted above. Whilst there were two adjournment notices completed, the decision was still not provided to the parties within 14 days of any review date.

28. A breach of the rules in this way would not automatically result in a decision being procedurally unfair. I have to consider whether the delay in providing the written reasons in this particular case was sufficient to render the matter procedurally unfair as submitted by the Applicant. The Applicant submits that it is not clear from the recorded decision whether the panel met to discuss the case and therefore whether the members had a clear recollection of the evidence given at both the hearing in November 2021 and in December 2019. The Applicant submits that he *"has a reasonable expectation that a panel of the Parole Board will act with due diligence in issuing a decision and it is important in the interests of fairness that this is not only done but seen to be done"*.
29. The decision was issued nearly six months after live evidence was heard. Although it is clear some further evidence was received, it is not clear whether the panel fully considered it as the decision letter of the panel does not reference much of the further information received within the evidence section. The panel indicated it considered a dossier at 664 pages and a further OASys. In fact, by that point, the dossier was at 753 pages. In addition, much of the further evidence was received in 2021 which is still some months before a decision was recorded in writing.
30. I accept that it is not at all clear whether the panel met again to discuss the case or how a decision was reached following the time lapse between the hearing and the written decision.
31. The panel clearly placed a great deal of weight on the issue which arose on temporary release in August 2021 as it forms a large part of the conclusion in the written reasons. At the point of the hearing, this was quite a recent development but by the time of the decision it had occurred almost nine months earlier. The panel did not direct updates about more recent periods of temporary release and whether any issues had arisen. The panel concluded that the Applicant did not meet the test for release but remained suitable for open conditions where there would need to be *"as much community testing as possible"*.
32. The panel also noted that a fresh psychological report *"would be of value"* to the next panel considering the case. The panel had psychological assessments for this review from the same psychologist in March 2020 and January 2021. By the time the decision was made, the most recent assessment was 16 months old. There is no indication in the adjournment notices or the decision letter whether an update was considered by the panel following the months after the hearing had been held.
33. It is clear that the Applicant's legal representative had chased the decision during the delay. The application references the legal representative receiving an email in March 2022 from the Parole Board Head of Operations which stated that if the Applicant wanted the case to be relisted before a new panel the legal representative could indicate the same. At that stage, the Applicant's legal representative could clearly have asked for a fresh panel to consider the case but I accept that this case had a long history and that it was not known when a decision would be issued and so it was difficult to make an informed decision about whether to risk a longer delay by having a fresh hearing before a different panel.

34. In the circumstances outlined I find that the matter was procedurally unfair. The delay between the hearing and the written decision was significant. The updates within 2022 were extremely limited and the Applicant was not offered an opportunity to make any further submissions which could have: addressed any developments; indicated whether further directions should be put in place including updated reports regarding temporary release or a further assessment from the psychologist; and addressed whether a further hearing ought to be held to update the panel in fairness to the Applicant. This prevented the Applicant from putting his case properly. The panel also did not explain how it reached a decision nearly six months after hearing live evidence without detailed updated reports or consideration whether it needed updates in the form of further live evidence. Consequently, the case was not dealt with justly.

35. Given my findings above, I do not propose to deal with the remaining grounds outlined in the Applicant's submissions in any detail as it is unnecessary.

Decision

36. Accordingly, applying the tests as defined in case law, for the reasons discussed above, I conclude that the decision was procedurally unfair. The application for reconsideration is therefore granted.

Cassie Williams
13 June 2022