

[2019] PBRA 74

Application for Reconsideration by Lewis

Application

1. This is an application by Lewis (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 2 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:
 - a) The Decision Letter dated the 2 May 2022;
 - b) A request for reconsideration in the form of written representations dated the 20 May 2022; and
 - c) The dossier, numbered to page 571, which was considered by the oral hearing panel.
4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made, and I am satisfied that the written representations provide reasonable explanation as to the proposed grounds for reconsideration.

Background

5. The Applicant is now 46 years old. On 20 October 2006, when he was 31 years old, he received an Indeterminate Sentence for Public Protection (IPP), with a requirement that he should serve a minimum of 1 year, 9 months and 22 days before he could be considered for release by the Parole Board. The Applicant's minimum term expired on the 10 August 2008 and the oral hearing panel's review was the sixth review by the Parole Board.



6. The sentence was imposed following conviction for attempted rape and two offences of assault by penetration (the Index Offences). No separate penalty was passed in respect of a conviction for an offence of assault occasioning actual bodily harm (AOABH) which was included in the sentencing exercise.
7. A panel of the Parole Board considered the Applicant's case at an oral hearing on the 22 April 2022 and did not direct his release but did recommend to the Secretary of State that the Applicant be transferred to an open prison. I am grateful to the Applicant for setting out the background to delays in the final hearing taking place and it is clear that the panel made efforts to ensure that a fair hearing could take place on the 22 April 2022.

Request for Reconsideration

8. The application for reconsideration is dated the 20 May 2022.
9. The grounds for seeking a reconsideration are that the decision was irrational. No procedural unfairness is alleged. The detail of the application is as follows:
 - a) The panel did not place proper weight on the professionals' opinions that the Applicant would receive more support in specialist designated accommodation than he would in an open prison;
 - b) The panel appeared to be in a rush to finish the hearing;
 - c) Disproportionate weight was given to supposed deficits in the plans to manage the Applicant on his release;
 - d) The panel failed to provide sufficient reasons for its decision; and
 - e) The panel's decision was outside the range of reasonable decisions.

The reply on behalf of the Secretary of State

10. The Secretary of State confirmed on the 30 May 2022 that he would not be making any representations in response to the application.

The Relevant Law

11. The panel correctly sets out in its decision letter dated the 2 May 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. The Secretary of State has since amended the test for open conditions, however, the test applied by the panel at the oral hearing on the 22 April 2022 was the correct test in place at the time.
12. 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)).

13. 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."

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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.

16. 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."*

Discussion

The panel did not place proper weight on the professionals' opinions that the Applicant would receive more support in a PIPE Approved Premises than he would in an open prison.

17. At the oral hearing, all professional witnesses supported the Applicant's release on licence. The Applicant argues that the panel did not properly take into consideration the external support that would be available to the Applicant and that this support would have been greater than the support that might be on offer in an open prison.

18. Within its Decision Letter, the panel set out, in some detail, the oral evidence it considered from the professional witnesses supporting the Applicant's release. It is clear from the panel's account of the evidence that it was very much alive to the level of support that would be on offer to the Applicant in the community and to the potential issues should the Applicant be transferred to an open prison.

19. In its assessment of the risk management plan, the panel noted the detail of the plan and accepted that it was a "significant" plan with "extensive proposed additional licence conditions". However, the panel found that the plan was "largely dependent upon external management, and that the [specialist designated accommodation] would likely be the [Applicant's] only support. Nothing else specific



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



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



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

had been put in place to give [the Applicant] any added support, and [the Applicant] questioned the need for some of the additional [licence] conditions ...". The panel determined that the risk management plan would be insufficient to safely manage the Application's current risk.

20. The Applicant submits that the panel did not take proper account of the support that would be on offer from his Probation Officer in the community. The plan was that she would have regular video meetings with the Applicant and would visit him monthly. However, the panel was clearly aware of this and had made reference to it within its Decision Letter. The support from the Probation Officer would primarily be on a remote basis because of the extensive distance (by my calculation, over 170 miles) between the Probation Officer's office and the location of the designated accommodation.
21. Any reading of the Decision Letter establishes that the panel took proper account of all available evidence and the submissions made by the Applicant's legal representative. However, the panel established its own concerns which led it to reach a different conclusion to those of the professional witnesses. Within its Decision Letter, the panel sets out those concerns and it determined that the Applicant did not meet the test for release.
22. 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. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
23. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)**, both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.
24. It is suggested in Wells that rather than ask "*was the decision being considered irrational?*" the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.
25. Panels of the Board are wholly independent and are not obliged to adopt opinions and recommendations of professional witnesses. It is the responsibility of a panel, whose members will have acquired considerable experience in the assessment of risk, to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence presented to it and to decide what evidence it can accept and what evidence it cannot accept.

26. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. It follows that I must decide whether on a reading of the panel's decision, I am satisfied that the conclusions it reached are justified by the evidence it considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.
27. Any reading of the Decision Letter demonstrates that the panel applied itself to its responsibilities in this case. In my view, the panel provided a clear explanation as to why it disagreed with the professional witnesses and why the Applicant did not meet the test for release. The Applicant may disagree, however, his complaint does not meet the high standard of irrationality.

The panel appeared to be in a rush to finish the hearing.

28. The Applicant submits that the Decision Letter gives the impression that the panel had already decided the outcome before hearing oral evidence and that the oral hearing was "*rushed through*". The Applicant states that the hearing took slightly longer than three hours and that the panel's questioning of him was no more than 30 minutes. He notes that at the last oral hearing (the 5th review of his case in 2018), the oral hearing had lasted the entire day and that his own evidence had lasted for some two hours. The Applicant also submits that the Panel Chair was "*in a particular rush to speed through the hearing*" and that following the oral hearing, the Applicant became aware that the Panel Chair had previously been concerned in chairing his review in 2017 which had resulted in a decision that he should remain in closed conditions.
29. I note, as set out in the Applicant's own submissions, that the panel had taken care to ensure that an effective and fair hearing could take place on the 22 April 2022. Earlier hearings had been adjourned to achieve this.
30. There is nothing within the Decision Letter to indicate that the panel had already decided, prior to hearing oral evidence, that it would not be directing his release. In fact, it is clear that the panel took careful note of the oral evidence in reaching its decision.
31. The panel had before it a dossier of 571 pages which provided extensive detail about the Applicant's case. It was a matter for the panel as to what questions it needed to put to the Applicant and the other witnesses, without necessarily having the need to rehearse evidence that was already available within the dossier. The Applicant was legally represented at the hearing and that representative had also represented the Applicant at his oral hearing in 2018. It was open to the Applicant's legal representative to put questions to him and to the other witnesses and there is nothing before me to suggest that the Applicant's legal representative was

prevented from doing so. There is nothing before me to establish that the Applicant's legal representative raised any concern or complaint at the oral hearing about the issue that he now seeks to argue.

32. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

33. Whether or not the Panel Chair had been involved in an earlier review of the Applicant's case is not persuasive in terms of suggesting that the Applicant's case had already been determined prior to the hearing of oral evidence. It is not unusual for panel members to have been involved in earlier reviews of a prisoner's case.

34. In my view, the Applicant's submission does not demonstrate irregularity.

Disproportionate weight was given to supposed deficits in the plans to manage the Applicant on his release.

35. This point seeks to rehearse that the panel failed to consider the evidence of all professional witnesses as to the level of external support that would be available to the Applicant on release.

36. As I have explained, the panel was alive to the level of support, and it took proper account of the oral evidence. Ultimately, it did not agree with the recommendations made in this case, however, it provided a careful explanation as to why it did not agree. There was nothing irrational in the panel's approach.

The panel failed to provide sufficient reasons for its decision.

37. I have dealt with this point within my assessment of the other Grounds argued by the Applicant. As I have explained, in my view, the panel did provide sufficient reasons for its decision. It explained why it disagreed with the professional witnesses and it outlined the concerns that it had in this case.

38. This Ground fails.

The panel's decision was outside the range of reasonable decisions.

39. As will I hope will be clear from the discussion above, I cannot agree. None of the panel's conclusions came anywhere near the threshold for 'Wednesbury unreasonableness.'

Decision

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

Robert McKeon
02 June 2022]

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

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

 info@paroleboard.gov.uk

 @Parole_Board

 0203 880 0885

