

[2022] PBRA 77

Application for Reconsideration by Parton

Application

1. This is an application by Parton (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 20 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 oral hearing decision, the dossier, and the application for reconsideration.

Background

4. The Applicant was sentenced on 11 January 2012 after conviction for arson being reckless as to whether life was endangered, several robberies and possession of a bladed article. He received a sentence of imprisonment for public protection, with a minimum tariff of three years less time spent on remand. His tariff expired in September 2014.
5. The Applicant was aged 22 at the time of sentencing. He is now 32 years old.

Request for Reconsideration

6. The application for reconsideration is dated 20 May 2022 and has been drafted and submitted by solicitors acting on behalf of the Applicant.
7. 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

8. This parole review has had a complicated procedural history, which I will set out below.
9. The Applicant's case was referred to the Parole Board by the Secretary of State in January 2020 to consider whether it would be appropriate to direct his release. The Secretary of State's pro forma case summary within the dossier states this is the Applicant's second parole review; however, the dossier also contains Parole Board



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decisions from 2015 and 2017, so this cannot be correct. In any event, it is not the Applicant's first parole review.

10. On 10 September 2020, the case was reviewed by a Member Case Assessment (MCA) panel who deferred the review as the Applicant was alleged to have escaped from a medium secure hospital unit in November 2019. The Applicant had been arrested a few days later and charged with escape from lawful custody and possession of an offensive weapon.
11. On 16 September 2020, the Applicant was sentenced to a 12-month custodial sentence for each offence, to run concurrently. This meant that he could not be considered for release until March 2021.
12. On 22 January 2021, a second MCA panel reviewed the case and directed an oral hearing which was subsequently listed for 23 June 2021.
13. On 1 June 2021, Panel Chair Directions (**PCDs**) were made. These noted that the Applicant was not legally represented at that time and should be assisted in obtaining representation. The PCDs also directed the Secretary of State to clarify the scope of the referral to the Parole Board.
14. On 15 June 2021, the Secretary of State confirmed that the Applicant was not eligible to be considered for open conditions due to his abscond in November 2019 and provided an updated referral to this effect. This made it clear that the panel's remit was confined simply to whether or not it would be appropriate to direct the Applicant's release. It advised the Parole Board to note that it was not being asked to comment on or make any recommendation about the Applicant's suitability for transfer to open conditions (pursuant to a revision to the Secretary of State's policy announcement on 21 May 2014).
15. On 23 June 2021, a panel convened to hear the Applicant's case. The Applicant was not legally represented, and, after discussion, the hearing was adjourned so that he could seek representation. Various other reports were directed, including an autism spectrum disorder assessment (the **ASD assessment**).
16. On 3 August 2021, a directions hearing took place. The Applicant had secured legal representation, but his representative had not been able to take instructions. The hearing was adjourned so that his representative could take instructions and for the ASD assessment to be completed.
17. On 24 January 2022, further PCDs directed the case to oral hearing. It was noted that the ASD assessment had not yet been provided. The hearing was listed for 21 February 2022.
18. On 16 February 2022, a Stakeholder Response Form (**SHRF**) was submitted on behalf of the Secretary of State. It noted that there had been difficulties in completing the ASD assessment and it was unlikely that the diagnostic report would be ready in time for the hearing. Its author, a clinical neuropsychologist, offered to share his initial views. No submissions were made by the Applicant or his legal representative. The panel was content for the clinical neuropsychologist to share his

initial views at the hearing and hoped that it would not need to adjourn for the assessment. It said the matter would be reviewed on the day of the hearing.

19. The dossier contains a 'Provisional Autism Opinion Report' dated 15 February 2022. This noted that "*Whilst it is difficult to provide any conclusive opinion as to whether [the Applicant] may have autism, there is some available information to suggest that he may well do*". It concluded by stating that "*Although [the] recommendation would be that a more detailed 'in person' assessment of autism is completed when circumstances allow and if [the Applicant] is willing to meet, an autism diagnosis would not capture all of [the Applicant's] difficulties*".
20. The decision records the fact that the hearing convened on 21 February 2022. The Applicant's legal representative made an application for the hearing to be adjourned so that the full ASD assessment could be completed. The panel refused this application on the grounds that the ASD assessment was not necessary for its task. The Applicant's legal representative agreed that the review could be concluded on the papers once the directed reports had been received. The Applicant was not keen to give evidence and no oral evidence was taken from other witnesses.
21. The only legal representations within the dossier are dated 30 September 2021 and seek the Applicant's release. There is nothing in the application for reconsideration that suggests any further written representations were made.
22. The dossier contains an 'Autism Opinion Report' dated 9 March 2022. This states that '*it is difficult to say with certainty that [the Applicant] has autism*' but that '*autism is a significant possibility*'. It goes on to say that '*no single diagnosis captures all of [the Applicant's] presenting issues and he has a complex profile of interacting difficulties*'. It suggested possible approaches to future management including a specialist unit within the closed prison estate or within a high- or medium-secure hospital setting. It noted that immediate therapeutic work dealing with past trauma, current interpersonal skills and substance misuse would be '*very significant in terms of his future risk management*'.
23. The Applicant's Community Offender Manager (**COM**) did not support release. His Prison Offender Manager (**POM**) agreed with the recommendation of the Autism Opinion Report that the Applicant should be moved to a specialist unit within the closed prison estate which caters to prisoners who have been diagnosed with autism and cannot engage in mainstream services and/or struggle to cope in prison.
24. The panel did not direct the Applicant's release on the papers.

The Relevant Law

25. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

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.

The reply on behalf of the Secretary of State

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

Discussion

Procedural unfairness

35. It is first submitted that a prisoner suffering from several mental health conditions cannot be assessed for parole within the same framework as a cogent prisoner, and that the panel considered release on the *'usual criteria of whether [the Applicant] had made sufficient progress in reducing risk, etc.'*

36. There is a fundamental error in this submission. Panels of the Parole Board must apply the single statutory test for release and will direct release if satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. In doing so, rule 24(2)(b) provides that a panel may ask any question to satisfy itself of the level of risk of the prisoner. If a panel fairly concludes that a prisoner's risk is such that the public cannot be protected, then the prisoner will not be released. The test is not modified in response to the prisoner's mental health; neither does poor mental health detract from the panel's objective assessment of risk in all the circumstances of a prisoner's case.

37. It is also submitted that the panel refused the application to adjourn proceedings to await the outcome of the Autism Opinion Report and that a decision to refuse parole was made *'in the absence of the report, and certainly a report which [the Applicant] had not had the benefit of seeing or considering'*.

38. I find this submission surprising, given the hearing was adjourned on the request of the Applicant's legal representative on 21 February 2022 pending the disclosure of the Autism Opinion Report and the Applicant's legal representative agreed to conclude the review on the papers. The Autism Opinion Report was dated 9 March 2022. The panel's decision of 20 May 2022 was not made in the absence of the report. Indeed, it is referred to in the panel's decision.

39. The POM report of 13 April 2022 also notes that the Autism Opinion Report and its recommendation was discussed with the Applicant on 28 March 2022 and that the Applicant was averse to a transfer to the identified specialist unit. He also declined a meeting with his COM and reportedly made threats toward her. It is therefore not true to say the Applicant had not had the benefit of considering the report. Although he may not have read it in detail, or indeed at all, he was certainly sufficiently aware of its primary recommendation to consider it and then reject it.

40. It is also submitted that professionals recognised that treatment was *'either not feasible or would take several years to even commence'* and, as such, the panel *'merely rubber stamped their previous decision to refuse parole'*. I find nothing in the dossier that supports the assertion that treatment was not feasible or would take several years to commence. In fact, the prison psychologist (in a note dated 14 April

2022) reports that a referral to the identified specialist unit is being processed and concludes '*an appropriate treatment pathway is available to [the Applicant] when he is ready to engage*'. The Applicant's motivation appears to be the primary limiting factor.

41. The unnecessarily inflammatory assertion that the panel has 'rubber stamped' a previous decision not to direct release seeks to undermine the panel's function as an independent assessor of risk. It also ignores the recommendations of all professional witnesses that the Applicant could not be safely released. It merits no further consideration.
42. It is also submitted that the panel should have adjourned for a full risk management plan to be provided instead of taking '*the blanket view that as there was no plan then the prisoner should remain in closed conditions*'. The panel's decision clearly notes that it would be difficult to envisage any risk management plan that would be likely to be effective in managing the Applicant's risks in the community. The primary reason for refusing release is that the Applicant is yet to address his core risk factors. Even if the Applicant's COM were able to produce a community risk management plan, I cannot see that it would have made any difference to the panel's decision, given the universally agreed position among professionals that core risk reduction work was necessary before release could be safely considered.
43. It is finally submitted that the panel gave no weight to the fact '*that a long serving prisoner several years over tariff could be considered for open conditions*'. This is plainly nonsense. The Applicant was not eligible to be considered for open conditions by virtue of his prior abscond. This is clear in the terms of the Secretary of State's referral to the Parole Board dated 15 June 2021. The referral is in the dossier and the Applicant's legal representative should have been aware of it.

Irrationality

44. The application makes two submissions under the heading of irrationality. However, neither advances any argument which would amount to irrationality in law. I could simply dismiss both on that basis. However, in fairness to the Applicant, I will deal with them as if they had been correctly pleaded under the heading of procedural unfairness.
45. It is first submitted that the Applicant was not given a fair hearing or properly informed of the case against him, since he did not have the opportunity to consider reports disclosed after the adjournment. This is a repeat of a submission I have already considered and dismissed.
46. It is also submitted that the Applicant could have explained his disinclination to go onto schemes offered to him at an oral hearing instead of the panel making a decision on the papers. The Applicant's legal representative agreed for the case to be concluded on the papers. They made no further submissions in writing after reports had been disclosed. It is not open to the Applicant's legal representative to claim procedural unfairness following the conclusion of a process to which they agreed simply because they do not agree with the outcome.

Additional comments

47. The application offers additional comments. While these note concerns about future parole hearings, they make no further legal submissions and as such are irrelevant to my determination of the application before me.

Decision

48. The complaints of procedural unfairness and irrationality are not made out on the evidence before me.

49. Accordingly, this application is dismissed.

Stefan Fafinski
22 June 2022