

[2023] PBRA 109

## Application for Reconsideration by O'Neill

### Application

1. This is an application by O'Neill (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 28 April 2023 not to release the Applicant following an oral hearing on 18 April 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the application for reconsideration, the response from the Secretary of State, the dossier and the decision dated 28 April 2023.
4. I have also listened to an audio of the hearing and reviewed the Parole Board timetable for the relevant date (18 April 2023).

### Background

5. On 28 March 2006 the Applicant was sentenced to life imprisonment for the offence of murder. The Applicant was aged 21 when the index offence was committed. The Applicant's minimum term of imprisonment expired on the 28 July 2020. The index offence was committed with others. This is the Applicant's second parole review. He was previously before the Parole Board in May 2021 when a recommendation was made for him to progress to open conditions. The Applicant was subsequently returned to closed conditions amidst alleged concerns around his behaviour and non-compliance.

### Request for Reconsideration

6. The application for reconsideration is undated but was provided via email on the 25 May 2023. It consists of personal handwritten submissions from the Applicant.
7. The grounds for seeking a reconsideration are that the decision is irrational and procedurally unfair. This is on the basis that the panel placed insufficient weight on the professional recommendation of the witnesses and the Applicant's positive progress, preferring instead uncorroborated negative evidence.



8. The Applicant also submits that the decision was procedurally unfair because the oral hearing was rushed and insufficient time was given for the Applicant to review an updated police report. In particular the applicant submits:
- i. He was only given 5 minutes to review an updated police report which was provided on the day.
  - ii. He was told that if his hearing overran it would be adjourned, to allow the afternoon hearing to convene. The Applicant submits this put undue pressure on him, negatively impacting his ability to engage with the hearing and provide best evidence.
  - iii. That the Board used unchallenged and uncorroborated evidence against him.
  - iv. That certain documents were missing from the parole dossier, namely additional personal submissions.

### **Current parole review**

9. The Applicant's case was considered at the Member Case Assessment (MCA) stage on 12 July 2022 at which time it was sent to an oral hearing.
10. On the 8 August 2022 a Stakeholder Response Form was submitted requesting a face to face oral hearing. This was approved on the same date by a Duty Member of the Parole Board.
11. At the oral hearing on 18 April 2023 the panel heard evidence from the Prison Offender Manager (POM); the Community Offender Manager (COM); a Psychologist commissioned by the Applicant and an Addictions Therapist, also instructed by the Applicant. The oral hearing took place face to face at the prison. The panel consisted of two independent panel members.
12. Closing legal submissions were provided at the hearing on the 18 April 2023.
13. The Applicant also read a pre-prepared statement at the end of the hearing.

### **The Relevant Law**

14. The panel correctly sets out in its decision letter dated 24 April 2023 the test for release.

#### *Parole Board Rules 2019 (as amended)*

15. The application for reconsideration is made on the grounds of irrationality and procedural unfairness.

#### *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.



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.

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

### *Irrationality*

18. 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."*

19. 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.

20. 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**

21. By email dated 24 May 2023 it was confirmed that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

### **Discussion**

22. The Applicant's oral hearing took place on the 18 April face to face at the prison at the Applicant's behest. The case was listed to start at 10.00 and was listed for 3.30 hours. A second case was listed at 14.00 for 2.30 hours.

23. For the purposes of this review I have requested, and listen to, the audio recording of the Applicant's hearing from the 18 April 2023. Having listened to the recording I am able to make the following findings:



- i. The Applicant was legally represented throughout his oral hearing on the 18 April 2023.
- ii. On the 18 March 2023 the hearing was listed to start at 10.00. There is no evidence within the recording to suggest that the hearing did not start on time.
- iii. At the start of the hearing the Panel Chair makes initial introductions and states 'This isn't a race', 'If you need time tell me'.
- iv. During the initial introduction (within 5 minutes of the start of the hearing as per the recording) the Panel Chair confirms the contents of the Applicant's parole dossier.
- v. At that time the legal representative confirms that she has not seen the police report, nor has the Applicant.
- vi. This document (which runs to 24 pages) includes a Crime Occurrence Report and an Incident Log.
- vii. This police report pertains to an assault against the Applicant when he was located in open conditions and subject to Release on Temporary Licence (ROTL).
- viii. In response the Panel Chair suggests an adjournment for the report to be provided and instructions taken.
- ix. The Panel Chair asks the legal representative how long she requires. She states '5 minutes'.
- x. The recording is then stopped. No time is given.
- xi. The recording is restarted at 'just after 11.10'.
- xii. The Applicant's legal representative confirms she is content to proceed.
- xiii. The hearing continues and is completed. Closing submissions are provided on the day.
- xiv. No concerns are raised about the hearing being rushed by the legal representative or the Applicant in closing submissions.
- xv. The Applicant is afforded time at the end of the hearing to read from personal submissions.

24. I will deal first with the Applicant's submission with regards to procedural unfairness and, in particular, the Applicant's submission that the hearing was rushed and he was unable to provide best evidence.

25. Having listened to the audio recording of the hearing, reviewed the listing allocations, and considered the Applicant's submissions I make the following findings.

26. I do not accept that the hearing was rushed.

27. On the 18 April 2023 the case was listed for 3.5 hours and started punctually. Whilst there were additional witnesses; the Addiction Therapist and the Independent Psychologist, and a delay for the police report to be read and considered, I consider a 3.5 hour allocation to be appropriate and in-keeping with MCA and Oral Hearing guidelines.

28. It is normal for multiple cases to be listed on a day and in my view the timetabling allocation on the 18 April 2023 was reasonable and in-line with best practise and Parole Board optimisation. It is also normal for Panel Chairs to warn participants



that if a morning case overruns, it will be adjourned and re-listed on another occasion. This is to ensure the effectiveness of the afternoon case. The intention is not to rush participants but to ensure that all cases are treated fairly. Again, this is in-line with best practise.

29. In relation to the missing police report, I consider the Panel Chair followed best practise. He rightly adjourned the case for the police report to be provided to the legal representative and discussed with the Applicant.
30. I note that the Panel Chair specifically asked the legal representative how much time she required to review the police report and discuss it with the Applicant, and that the hearing was adjourned for much longer than the five minutes requested by the legal representative (based on the reconvene time of 11.10). At no point did the Applicant, or his legal representative raise any concerns about the sufficiency of time allocated to review the police report at the hearing.
31. Furthermore, there is no evidence that the Applicant was rushed more broadly during the hearing. He was specifically told by the Panel Chair that if he needed time he was to 'tell me' and that the hearing 'isn't a race'. The hearing was completed within the 3.5 hours allocated and there was time for closing legal submissions, and an opportunity for the Applicant to read a personal statement. Had the hearing been rushed these would have been directed in writing. Again, at no point within these closing submissions did the issue of feeling rushed or being unfairly treated arise.
32. In relation to the Applicant's submissions that certain documents were missing from his parole dossier, I note that there are personal submissions outlining the Applicant's return to closed conditions at page 292 of the dossier, however if other additional documents were missing, this is something which the Applicant, or his legal representative ought to have properly raised with the Panel Chair at the start of the hearing when the dossier was reviewed and pagination verified. Again, having listened to the audio recording no such concerns were raised, and the Applicant's legal representative agreed the parole dossier contents before the substantive hearing commenced. Furthermore, the Applicant was afforded time to provide his views about his recategorisation in oral evidence.
33. For all of these reasons I do not accept that there is sufficient evidence to find the decision procedurally unfair. I can find no evidence that the hearing was rushed, there were no such concerns raised at the hearing, and the Applicant was legally represented at all times.
34. Moving now to the issue of irrationality, the Applicant submits that the decision was irrational because the panel did not place sufficient weight on the recommendations of report writers and that it relied too heavily on other uncorroborated evidence which was negative, including the circumstances of the Applicant's recategorisation and assault.
35. Having carefully reviewed the panel's decision I am not so satisfied.



36. The decision is comprehensive, balanced, and unambiguous in my view. It runs to some 14 pages and carefully sets out the evidence heard during the oral hearing and the recommendations of report writers. There is also a detailed analysis of the proposed risk management plan and the test for open conditions. The conclusion is balanced and comprehensive, in my view.
37. The opinions of professional witnesses are referred to throughout the decision and appropriately scrutinised, in my assessment. However, in addition to the matters discussed with the professional witnesses, it is clear that during the hearing the panel itself identified other areas of concern, which it considered required further exploration. These concerns are helpfully set out in the conclusion of the decision and include concerns about the Applicant withholding certain information about the incident which contributed to his return to closed conditions, and his inability to consistently demonstrate that he can apply past learning. It is these concerns, which appear to have led the panel to conclude that the Applicant did not meet the test for release.
38. I find that in this case the panel has quite properly completed its own risk assessment, based on all the evidence before it. Whilst the views of professional witnesses are important, of course, the decision to release must lie finally with the panel. In this instance, after hearing extensive evidence from all parties and completing its own risk assessment, the panel remained concerned about the Applicant's ability to consistently apply learning from past interventions, and also his openness and honesty about the circumstances of his recategorisation as stated in paragraph 2.12 of the decision. In such circumstances, it seems to me that the panel has simply preferred its own risk assessment, over the recommendations and views of professional witnesses. Panels are not bound by the recommendations of witnesses and, indeed, would be failing in its duty if it did not complete its own independent assessment of risk as in this case. The key question is whether the decision letter explains the panel's reasoning for reaching an alternative view. After reviewing all of the evidence before me, I am so satisfied. The decision is comprehensive and unambiguous in my view, as already stated, and the conclusion clear.

## Decision

39. Refusal – For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Heidi Leavesley**  
**2 June 2023**



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