

[2023] PBRA 166

Application for Reconsideration by Beard

Application

1. This is an application by Beard (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board dated the 19 June 2023 not to direct release and not to recommend open conditions.
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 dossier, decision letter, the application for Reconsideration and the Forensic Psychological Assessment Report dated 29 November 2022. I have also listened to the recording of the hearing.

Background

4. On 7 February 2011 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP), with a minimum tariff of 8 years and 114 days, which expired on 1 June 2019. His sentence was imposed following his conviction of sexual offences against a child, namely three counts of oral rape, two of vaginal rape, one of anal rape and two offences of sexual touching. The offences were committed against a child known to the Applicant over a period of eighteen months to two years, ending when the child was aged 10.
5. In January 2020 the Applicant was released on licence at the direction of the Parole Board, but his licence was revoked on 2 February 2022 and he was returned to prison on 3 February 2022. The hearing on 9 June 2023 was the Applicant's first review since recall.

Request for Reconsideration

6. The application for reconsideration is dated 5 July 2023, following the decision letter dated 19 June 2023. I am told that due to an administrative error the application



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was not received by the Reconsideration team at the Parole Board until 25 August 2023. I therefore accept that the request was made in time in accordance with rule 28(3) Parole Board Rules 2019.

7. The grounds for seeking a reconsideration are as follows:

Procedural unfairness

- (a) The review faced lengthy delays.
- (b) The review was procedurally unfair because the Applicant's legal representative did not submit a Psychological Risk Assessment dated 29 November 2022, on the instruction of his solicitors.
- (c) The Applicant's legal representative only asked limited questions and did not make appropriate submissions.
- (d) The panel asked leading questions with no exploration.
- (e) The Applicant feels the panel had reached its decision before hearing the evidence.

Irrationality

- (f) The decision of the panel was irrational because all witnesses supported the Applicant's release.

Current parole review

- 8. The original referral from the Secretary of State for Justice (the Respondent) is dated 13 January 2022. On 8 March 2022 the referral was considered by a Parole Board member and directed to an oral hearing.
- 9. The oral hearing took place on 9 June 2023. The panel consisted of three independent members. The panel considered a dossier of 343 pages. The hearing was held remotely over video link. The panel heard evidence from a Prison Offender Manager (POM), Community Offender Manager (COM) and the Applicant. The Applicant was legally represented throughout the review.

The Relevant Law

- 10. The panel correctly sets out in its decision letter dated 19 June 2023 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.

Parole Board Rules 2019 (as amended)

- 11. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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



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panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

12. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
13. 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**.

Irrationality

14. 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."

15. 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.]
16. 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

17. 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.
18. 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.

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

The reply on behalf of the Respondent

20. On 31 August 2023 the Respondent confirmed that he had no representations in relation to this application.

Discussion

Procedural unfairness

Ground (a) - The review faced lengthy delays.

21. The Applicant's case was referred to the Parole Board by the Respondent on 28 February 2022. It was first reviewed by a Parole Board member at the Member Case Assessment stage on 16 May 2022 and directed to an oral hearing which was originally listed on 19 September 2022. That date coincided with the funeral of HM Queen Elizabeth II. It was therefore administratively cancelled in a notice dated 14 September 2022 and relisted on 9 June 2023.

22. It is unclear on the material available to me why there was a delay of 9 months between the first listed hearing and the eventual effective hearing date. There may of course be a number of reasons why there was a delay, but I have seen no evidence in the material before me that the delay was caused by the panel.

23. I have also seen no evidence that because of the delay, the procedure was fundamentally flawed. The impact of the delay was that the Applicant was in custody awaiting the reconvened hearing, but that in itself does not render the procedure fundamentally flawed. It also did not produce a manifestly unfair, flawed or unjust result, because the panel was able to consider the evidence in the dossier and take full evidence from the witnesses, with the Applicant being able (through his instructed legal representative) to question those witnesses and the panel to hear his challenge to any evidence, before reaching its decision. This ground therefore fails.

Ground (b) - The review was procedurally unfair because the Applicant's legal representative did not submit a Psychological Risk Assessment dated 29 November 2022 on the instruction of his solicitors.

24. The assessment undertaken by the Psychologist was not at the direction of the Parole Board. It was in accordance with instructions from the Applicant's legal representatives, and therefore was evidence within the control only of the Applicant and his legal representatives. No application was made to the panel to admit the Psychologist's report.
25. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.
26. Furthermore, decisions made by the Applicant's legal representatives in relation to instructions received, advice given or how to manage evidence obtained by them, are not a matter for the Parole Board to interfere with. Those matters are an integral part of the professional relationship between client (here the Applicant) and legal representative, and are subject to privilege. It follows therefore that the fact that the report of the Psychologist was not provided to the panel is not something that falls within the panel's ambit and cannot be said to amount to procedural unfairness by the Parole Board. This ground therefore fails.

Ground (c) – The Applicant's legal representative only asked limited questions and did not make appropriate submissions.

27. Again, this is a matter between client and legal representative, and not something that falls within the panel's ambit. I have seen no evidence that the panel prevented the Applicant's legal representative from asking questions. The decision of the Applicant's legal representative on how to conduct his case cannot be said to be the responsibility of the panel, and is not capable of amounting to procedural unfairness on the part of the Parole Board. This ground therefore fails.

Grounds (d) - The panel asked leading questions with no exploration.

28. Rule 24(2) (b) Parole Board Rules 2019 states that the panel at an oral hearing "may ask any question to satisfy itself of the level of risk of the prisoner", and Rule 24(2) (c) states that the panel must "conduct the hearing in a manner it considers most suitable to the clarification of the issues before it and to the just handling of the proceedings".

29. It is therefore a matter for the panel to decide what questions it needs to ask, and the way in which to ask those questions, provided the proceedings are conducted fairly.
30. The Applicant has not specified which questions of which witnesses were unfair, or which lacked "*exploration*". I have listened to the recording of the hearing, and could not find any evidence of inadequate questioning of witnesses so that the proceedings were fundamentally flawed. Indeed the panel asked a number of open and follow-on questions to explore answers given by the witnesses.
31. The forensic approach of a parole panel will be unique to its own constitution. Each member of the Board has his or her personal style, developed with experience and training towards achieving an effective technique. Questions must be appropriate for the individual witness and relevant to the issues. The panel starts from an informed position – a question need not be asked if a point covered in the dossier does not require amplification. If anything important had been overlooked, the Applicant's representative had the opportunity to remedy this by asking more questions of the applicant and the other witnesses.
32. Furthermore, the decision letter of 19 June 2023 sets out detailed information about the evidence provided by each witness, including the Applicant's own oral evidence to the panel. There is clear evidence in the decision letter of the panel having explored and then analysed the evidence of each of the witnesses and the Applicant, including asking the COM to clarify and explain his understanding of the imminence of risk in the Applicant's case.
33. I therefore do not agree that the panel failed to ask sufficient questions to satisfy itself of the level of risk posed by the Applicant. This ground therefore fails.

Ground (e) - The panel had reached its decision prior to the hearing, and therefore the Applicant perceived bias against his application.

34. Alleging actual bias is a serious allegation and to establish it would require compelling evidence which does not exist here. If apparent bias is established, then that would render the hearing unfair. The test for apparent bias is set out in **Porter -v- Magill [2001] UKHL 67**, namely would a fair-minded observer who was aware of all the relevant facts conclude that there was a real possibility that the tribunal was biased.
35. In their decision letter of 19 June 2023, the panel clearly sets out the positive factors in the Applicant's case which they took into account. The letter lists, in the conclusion section, seven "*factors of concern*" and nine "*positive factors*". By identifying the positive factors it has noted, I am satisfied that the panel has looked for evidence to support the Applicant's application, as well as evidence to indicate risk.

36. The panel also refers to the representations made on the Applicant's behalf by his legal representative, and confirms that these were taken into account in its decision making. I cannot therefore agree that the panel had prejudged the Applicant's application because it has clearly set out in its decision letter the steps it took to reach its decision, which included consideration of the oral evidence and submissions it heard. This ground therefore fails.

Irrationality

Ground (f) - The decision of the panel was irrational because all witnesses supported the Applicant's release.

37. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the POM and COM. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

38. 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.

39. 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**.

40. The decision letter in this case clearly sets out, as "*positive factors*", that the witnesses assessed that the Applicant's risk could be managed in the community, and that they also assessed that all core risk reduction work had been completed.

41. The panel also, in the conclusion section of its letter, also set out its rationale for disagreeing with their opinions. It explains that:

"the panel was concerned about the lack of in depth exploration with professionals of the circumstances surrounding the recall and about current sexual thoughts or preoccupation. The panel considers that there will need to be

more exploration with professionals of [the Applicant's] sexual interests and how to manage them."

42. It is evident therefore from the decision letter that the panel carefully considered the evidence of the professional witnesses but disagreed with their conclusions and recorded clearly the reasons for their disagreement. This ground therefore fails.
43. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
44. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
45. The test of irrationality is a high one, and in essence would require me to find that no other sensible panel, having the same material before it, would have reached the decision made by this panel. Having considered this panel's carefully reasoned conclusion, I do not find that the test is met.

Decision

46. 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.

Victoria Farmer
19 September 2023