

[2024] PBRA 74

Application for Reconsideration by Reilly

Application

1. This is an application by Reilly (the Applicant) for reconsideration of a decision of an oral hearing panel dated 6 March 2024 not to direct his release.
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 oral hearing decision, the dossier (consisting of 447 pages), and the application for reconsideration (dated 24 March 2024).

Background

4. The Applicant received two concurrent sentences of imprisonment for public protection on 1 February 2008 following conviction on two counts of robbery. He also received a concurrent determinate two year sentence for wounding/inflicting grievous bodily harm.
5. His tariff was set at three years and six months less time spent on remand and expired in May 2011.
6. The Applicant was 37 years old at the time of sentencing and is now 53 years old.
7. He was released on licence in February 2020 after an oral hearing but recalled to custody in June 2020. This is his second recall on this sentence.

Request for Reconsideration

8. The application for reconsideration has been submitted by solicitors acting for the Applicant.
9. It argues that the decision not to release the Applicant was irrational, procedurally unfair and contained an error of law.
10. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

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Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in November 2022 to consider whether or not it would be appropriate to direct his release. This is the Applicant's second parole review since his second recall to custody.
12. The case proceeded to an oral hearing on 29 February 2024. The panel consisted of two members. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**) and Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
13. The panel did not direct the Applicant's release.

The Relevant Law

14. 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

15. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
16. 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)).
17. 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

18. 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.
19. 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.

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

Irrationality

21. 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."

22. 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.

23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

Error of law

24. An administrative decision is unlawful under the broad heading of illegality if the panel:

- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

25. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Duty to give reasons

26. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.
27. When reasons are required, or where they are provided, even though not strictly required, those reasons must be both adequate and intelligible. They must therefore both rationally relate to the evidence in the case (*Re Poyser* [1964] 2 QB 467, 478) and be comprehensible in themselves (*Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 (HL) 165).
28. The duty to give reasons was most recently considered in the context of parole decisions in *R(Wells) v Parole Board* [2019] EWHC 2710. Saini J acknowledged (at [38]) that a panel of the Parole Board is not bound by the expert evidence before it, but that the duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting ([38 - 40]).
29. In summary, a failure to give reasons may give rise to procedural unfairness, irrationality, or both. Reasons must relate to the evidence in a rational way and be adequate, intelligible, and comprehensible. The more a panel departs from expert evidence, the more heightened its duty to give reasons for doing so, particularly when the liberty of the prisoner is at stake. This includes any restrictions placed on a prisoner's liberty by licence conditions.

The reply on behalf of the Respondent

30. The Respondent has submitted no representations in response to this application.

Discussion

31. The arguments advanced under the headings of irrationality and procedural unfairness essentially amount to the same thing: that the panel's evaluation of the evidence led to an irrational decision not to release the Applicant and that the decision was procedurally unfair for a lack of evidence-based reasons to support the decision.
32. The argument regarding error of law is that the panel did not give the Applicant a fair assessment of risk in accordance with *Osborn v Parole Board* [2013] UKSC 61. This is wholly misconceived: *Osborn* dealt with the circumstances in which the Parole Board is required to hold an oral hearing, not the way in which that hearing is conducted. The Applicant had an oral hearing for the reasons set out in the Member Case Assessment directions of 29 June 2023 which clearly reflect *Osborn* principles. The submission on error of law therefore fails.
33. It is argued that, in making its decision, the panel had two main concerns: (a) that the Applicant had not yet detoxed from methadone and (b) that it was not convinced that the Applicant would not abscond if things went wrong for him in the community.

34. Dealing first with the abscond matter, it is not accurate to say that the risk of abscond was a matter which led the panel not to direct the Applicant's release. The assessment of the Applicant presenting a more than minimal risk of abscond was dealt with after the panel had made its decision not to release him. While his abscond risk is clearly pivotal in the panel's decision not to recommend open conditions, that decision falls outside the scope of the reconsideration mechanism.
35. It is submitted that the panel failed to consider the Applicant's motivation and his self-referral to drug rehabilitation agencies. Paragraph 4.1 of its conclusion states that he "*appears very motivated to address his drug misuse*". Moreover, it is argued that the panel gave insufficient weight to the evidence of his COM who has worked with him for many years. Paragraph 4.3 of its conclusion noted that the panel "*was mindful of the recommendation of the Community Offender Manager who has known [the Applicant] for many years*". The panel balanced that recommendation against its own concerns and concluded that the Applicant did not meet the test for release. It cannot be said that the panel did not consider the Applicant's motivation or his COM's recommendation in reaching its conclusion.
36. Even though there was professional support for release, 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. However, following *Wells*, a panel should clearly explain its reasons for departing from recommendations and its stated reasons should be sufficient to justify its conclusions.
37. The panel sets out a number of concerns over and above the potential difficulty faced by the Applicant in detoxing from methadone successfully. These include the Applicant's ability to respond positively to the rehab regime, and his ability to comply with the terms of his licence. It also noted concerns about the consistency of his custodial behaviour (having been subject to proven adjudications for assaulting another prisoner and disobeying an order). The panel took the view that, despite being robust, the success of the risk management plan was contingent on the Applicant's ability to engage with it. It considered that his internal controls were not sufficiently well developed to manage his risks even within the robust risk management plan that had been proposed. This is clearly explained within its decision and, as such, gives no rise to a claim in procedural unfairness for want of reasons.
38. Finally, irrationality essentially requires a decision to be so illogical that every other reasonable panel would have decided otherwise. I do not find that to be the case here. The concerns raised by the panel were valid and its decision was well within the range of reasonable responses to the evidence before the panel. The legal test for irrationality sets a high bar which this case does not meet.

Decision

39. For the reasons I have given, I do not find the decision was procedurally unfair, irrational, or contained an error of law and accordingly the application for reconsideration is refused.

Stefan Fafinski
15 April 2024