

[2020] PBRA 172

Application for Reconsideration by Otten

Application

1. This is an application by Otten (the Applicant) for reconsideration of a decision of a panel at an oral hearing dated 21 September 2020 not to direct release and not to recommend progression to open conditions.
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 grounds for the application together with a dossier running to 417 pages (the "LR dossier") and a dossier running to 408 pages, (the "PB dossier"). I have also looked at an earlier (Version 13) dossier.

Background

4. The Applicant has a lengthy history of sexual and violent offending. His last conviction prior to the index offence was in 1995, when he was sentenced to a total of 10 years imprisonment for the buggery of a female, attempted rape and assault occasioning actual bodily harm.
5. On 29 July 2005, when aged 36, he received a mandatory life sentence with a minimum period to serve of 3 years 6 months less time spent in custody on remand before he could apply for parole, for the attempted rape of a female.
6. The minimum period expired on 10 September 2008. The Applicant did not apply for release but did apply for a recommendation he be moved to open conditions.
7. The Applicant is now aged 51.

Request for Reconsideration

8. The application for reconsideration is dated 21 October 2020.
9. The application is based firstly, on procedural unfairness and secondly, on irrationality. I have reformulated the grounds very slightly.
10. The grounds in support of procedural unfairness are as follows:



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- (a) The panel failed to consider three risk assessment reports prepared by a psychologist instructed on behalf of the Applicant.
- (b) The panel failed to request information concerning a trial and retrial of a rape allegation which had taken place in 1992 and 1993, at both of which the Applicant had been found not guilty.
- (c) The panel placed excessive reliance on the Applicant's oral evidence.

11. The grounds in support of irrationality are as follows:

- (a) The panel failed to give adequate reasons for departing from the recommendations of the professional witnesses.
- (b) The panel placed excessive reliance on the Applicant's oral evidence.

Current parole review

- 12. The Secretary of State referred the case to the Parole Board in October 2018. The last review had been on 10 December 2017. This was the eighth review by the Parole Board.
- 13. The panel heard oral evidence from the stand-in Offender Supervisor, a prison psychologist, the Offender Manager, and the Applicant. He was represented and he applied for a recommendation for a transfer to open conditions.

The Relevant Law

- 14. The panel correctly sets out in its decision letter dated 2 October 2020 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

- 15. 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)).
- 16. 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

17. 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."

18. 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.

Procedural unfairness

19. 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.

20. 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.

Other

21. 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."*

22. 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 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.

The reply on behalf of the Secretary of State

23. The Secretary of State has made no representations in respect of this application.

Discussion

24. The three grounds in support of procedural unfairness focus on the actual decision and not on how that decision was made and accordingly, are incorrectly pleaded as grounds demonstrating procedural unfairness.

25. There is a little background to the first ground, 10 (a) above.

26. A psychologist had been instructed on behalf of the Applicant. She produced a full psychological assessment dated 17 September 2017 and an addendum, dated 19 August 2019.

27. On 27 August 2019, a Parole Board member directed that the psychologist should attend to give oral evidence.

28. The psychologist was not available to attend the oral hearing, so she prepared a very short report, noting that the Applicant's conduct remained exemplary, setting out the three main findings in her earlier reports and confirming that she still supported a move to open conditions.

29. That short report was referred to in the case directions form (Stakeholder Response Form) asking for the psychologist's attendance to be excused at the oral hearing. She was stood down on 11 September 2020.

30. The first ground for procedurally unfairness is based on the panel's failure to consider three psychological risk assessment reports; however, as I read the application, the real ground for procedural unfairness as opposed to irrationality is that the panel proceeded with an out of date dossier (Version 13) and as a consequence did not read the third, very short report nor the case directions form.

31. There are two Version 14 dossiers. One has been sent by the solicitor for the Applicant, the other is the dossier provided for the purposes of the reconsideration application. I shall refer to the first dossier as the LR (Legal Representative) dossier and the second as the PB (Parole Board) dossier. Both dossiers have been updated to include the decision letter. In both cases, the pagination at the top of the PDF document does not correspond with the pagination at the bottom of each page; in my experience, this is not uncommon. I shall refer to the page number at the bottom of the individual page. The two dossiers are not identical: as I have already indicated, the updated LR dossier consists of 417 pages and the updated PB dossier consists of 408 pages.

32. The discrepancy of 9 pages is made up in the following way.

33. In the LR dossier, at pages 50 to 53 (4 pages), there are two documents, a previous summary of reports in prison (showing the Applicant completing a piece of offending behaviour work in 2012) and the latest summary of reports in prison (showing the Applicant completing the work in 2012 and a further piece of work in 2014). On page 51, there is a short narrative summary of the Parole Board review of the Applicant's case in 2013.
34. In the PB dossier at pages 50 and 51 (2 pages), there is a single summary of reports in prison showing the completion of both pieces of work in 2012 and 2014; there is no summary of the 2013 review.
35. In the LR dossier between pages 82 and 88 (7 pages), there is a Sentencing Planning and Review Report prepared by the prison psychology department and dated the 20 September 2012. This is not to be found in the PB dossier.
36. It seems therefore, the panel did not have two documents, one undated but not dealing with any matter after 2013 and the other dated 2012. The two documents comprise a total of 9 pages and explain the discrepancy between the dossiers.
37. This unusual and worrying situation raises two questions: (i) did the panel have the report of the independent psychologist dated 11 September 2020 and, less importantly, the case directions form of the same date, and (ii) although not raised on behalf of the Applicant, what effect do the missing documents have on the reliability of the panel's decision.
38. I have taken into account the following factors.
- The missing pages so far identified, explain exactly the discrepancy between the two dossiers. This suggests that the 6 pages referred to in the application for reconsideration must have been in both dossiers otherwise the discrepancy would have been 15 pages.
 - The report of the psychologist instructed by the Applicant's solicitor appears in the index of both dossiers under the heading "Independent Psychological Report".
 - In the PB dossier, her report appears between pages 391 and 392, that is, within the total of 399 pages referred to in the decision letter.
 - The response to the case directions form is signed by the panel chair and is also referred to in the index.
39. In those circumstances, I am quite satisfied the report of the psychologist was in the bundle considered by the panel. I am also satisfied that the bundle before the panel was not Version 13 but a variant of Version 14.
40. The Sentencing Planning and Review Report had been intended to update the Parole Board with the Applicant's then level of risk and his engagement with his sentencing planning targets. The likelihood is it was prepared for the review in February 2013.

41. It contained a summary of the Applicant's case history; as far as I can make out, all that information appeared in other documents in the dossier before the panel. It also contained a current assessment of the Applicant's risk. Subsequently, there were further assessments of risk and by 2016, the level of risk, on one of the tests, had actually decreased.
42. In addition, the report noted the Applicant's increased motivation to engage with his case management team and gave the opinion that at that stage he had not yet addressed his risk fully and was not yet suitable for open conditions. Over the following years, those assessments altered in response to new information.
43. The fact that two documents were not before the panel does not in my judgement establish there was a procedural unfairness. This is for two reasons.
44. First, the documents dealt with matters which would not have affected the panel's decision. The summary of a parole hearing seven years ago and planning for the Applicant's treatment six years ago were by 2020 insignificant.
45. Second, and more importantly, the omission to put information before a panel is not a ground for procedural unfairness – **Williams** (mentioned in paragraph 22). In that case, the Secretary of State sought a reconsideration of the decision to release a prisoner on the ground that the panel had not been told the prisoner had allegedly assaulted a prison officer and that as a consequence his offender manager no longer supported release.
46. In his decision, Sir John Saunders accepted that had the information been before the panel, it would have been capable of altering its decision. Notwithstanding that, procedural unfairness under the Rules relates to the making of the decision by the Parole Board and there was nothing to indicate that those further documents were available or necessary, and so there was nothing to indicate that there was any procedural unfairness.
47. Ground 10 (b) depends on there being a rule of law, or Natural Justice or procedure requiring a panel to give notice of a line of questioning and/or to make their own enquiries about the topic prior to the hearing. There is no such rule. The allegations were some time ago but that is a matter the panel would take into consideration when evaluating the Applicant's account to it.
48. The written representations suggest the panel put considerable weight on this aspect of the evidence. However, in 11 pages, the decision letter makes only two references to the topic: at page 5, "*The panel asked you about your 1992 rape trial, the 1993 re-trial and the acquittal. You said you could not remember anything about it*", and at page 10, "*The panel was not always convinced by your veracity in evidence. For example, it did not accept that you remembered absolutely nothing about your rape trial in 1992 and your re-trial and eventual acquittal in 1993*".
49. Ground 10 (c) suggests that by asking the Applicant about his mental health difficulties, the panel required him to act as an expert witness; this is nonsense; the panel included a psychologist and was well able to evaluate his replies. The



Parole Board Guidelines on Allegations of March 2019 are irrelevant as the questions was not directed towards seeing whether facts could be established but seeing what the Applicant could or chose to remember.

50. Turning to the grounds alleging irrationality, ground 11 (a) fails. In its decision letter, the panel acknowledged the recommendations were in favour of progression to open conditions and the panel set out the advantages from the point of view of public protection of such a move.

51. The panel then gave its reasons for not following those recommendations. They included the following.

- The panel explained it had given the most weight to the crucial risk-related factor which was the progress of a prisoner in addressing and reducing his risk. In this context, the Applicant needed to but had failed to appreciate fully the link between his personality traits and his offending behaviour.
- Although the Applicant had completed 1-1 work, it was of a much lower intensity and duration than the structured work that earlier had been considered to be of great importance.
- Some of the Applicant's views on risk were not realistic. Given his history of offending whilst he had a girlfriend, the panel did not accept that having a girlfriend would stop him being attracted by the idea of rape.
- The Applicant had not been completely truthful with the panel.
- On the basis of his behaviour since doing offending behaviour work, the panel was not persuaded the Applicant would talk about his sexual thoughts and urges with professionals.
- The Applicant's relationship with his Community Offender Manager was not yet sufficiently robust.

52. I consider that the extent of the reasoning given by the Panel for concluding that the risks posed by the Applicant could not be managed in open conditions easily met an acceptable standard in public law.

53. Ground 11 (b) also fails. In very many cases, the evidence of the Applicant and the impression he/she makes on the panel is of crucial importance. This was an experienced panel with a range of professional expertise. The panel had considered the reports of the independent psychologist, because the panel said that before the hearing it had considered the dossier. The decision letter is comprehensive, shows insight and is balanced.

54. At its heart, this application for reconsideration is an invitation to disagree with the panel's refusal to recommend progression to open conditions. This is not a matter which can dealt with by way of the reconsideration process – **Rule 28 (1)** and **Barclay**.

Decision

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

James Orrell
16 November 2020