

[2020] PBRA 188

Application for Reconsideration by Lees

Application

1. This is an application by Lees (the Applicant) for reconsideration of a decision of an oral hearing dated 16 November 2020 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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to life on 1 February 2005 following conviction (after a guilty plea) for murder. A minimum term of 12 years was imposed. His tariff expired on 31 January 2017.
5. He was released on licence on 5 April 2017. His licence was revoked on 10 May 2019 and he was returned to custody on 13 May 2019.
6. The Applicant was 19 years old at the time of sentencing and is now 35 years old.

Request for Reconsideration

7. The application for reconsideration is dated 17 November 2020 and has been submitted by solicitors acting for the Applicant.
8. The application contains large extracts from the decision letter and recitals of the evidence from the hearing and the basis for seeking reconsideration is far from clear. It does however submit that the decision not to release the Applicant was both procedurally unfair and irrational. My distillation of the grounds on which these submissions are advanced is as follows:

(a) Professional witnesses supported release and it was irrational for the panel not to follow their recommendations;

(b) It was irrational for the panel to conclude, on the evidence before it, that the Applicant "*deliberately lied and maintained [his] lies*" (and thereafter to rely on that conclusion as one of the reasons not to direct release); and



(c) The panel did not apply “*appropriate anxious scrutiny*” to the entire dossier, and this amounted to procedural unfairness.

9. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.
10. No application is made in respect of the panel’s decision not to recommend a move to open conditions. It is correctly acknowledged this this aspect of the overall decision is not amenable to reconsideration in any event.

Current Parole Review

11. The Applicant’s case was referred to the Parole Board by the Secretary of State in June 2019 to consider whether to direct his immediate release and, if immediate release was not directed, to advise the Secretary of State on whether he was ready to be moved to open prison conditions.
12. The first hearing on 8 October 2019 was adjourned on the day at the request of the Applicant’s legal representative for further reports and development of a risk management plan.
13. The panel reconvened on 19 February 2020. It heard oral evidence from the Applicant, his Offender Manager (OM) and his Offender Supervisor (OS). On 21 February 2020. The case was further adjourned. A further oral hearing (which was conducted remotely by telephone due to COVID-19 restrictions) took place on 3 November 2020 which took further oral evidence from the Applicant, his OM and OS, together with two further witnesses from the police. The Applicant was legally represented throughout.
14. The panel concluded that the Applicant did not meet the test for release and did not recommend progression to open conditions.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 16 November 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

16. 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)). This is an eligible decision.



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**.

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.

Procedural unfairness

21. 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.

22. 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.

Anxious scrutiny

23. The judicial foundation for the concept of anxious scrutiny was set out in **Budgaycay v Secretary of State for the Home Department [1987] AC 514** (an asylum case) in which Lord Bridge said (at 531),



"...when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny".

24. It has since gained significance in asylum and Article 3 (prohibition of torture) claims. In **WM (Democratic Republic of Congo) v Secretary of State for the Home Department [2006] EWCA Civ 1495**, Buxton LJ said at para. 7,

"...the consideration of all the decision makers...must be informed by the most anxious scrutiny that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution".

25. Anxious scrutiny has also been applied in other 'life or death' cases: **R (Rogers) v Swindon NHS Primary Care Trust [2006] EWCA Civ 392**; **HE v A Hospital NHS Trust [2003] EWHC 1017 (Fam)**.

26. In **R(YH) v Secretary of State for the Home Department [2010] EWCA Civ 116**, Carnwath LJ said at para. 24:

"Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an "axiomatic" part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account".

The reply on behalf of the Secretary of State

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

Discussion

28. I will deal with each of the grounds for reconsideration in turn.

(a) Failure to follow professional witnesses

29. 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 if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

30. 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 (Admin)**.

31. In this case, the Applicant's OS and OM were both supporting release. The panel disagreed. It was perfectly entitled to do so. The decision letter sets out comprehensive reasons for doing so given. These reasons are soundly based on evidence as well as being rational and reasonable or at least not so outrageous in the sense expressed above.
32. Although not specifically submitted as part of the Application, I also find that the reasons given by the panel in supporting its conclusions were clear and thorough and therefore the panel has discharged its procedural obligation to give reasons.

(b) Conclusion that the Applicant "deliberately lied and maintained his lies"

33. I have identified two primary areas of contention raised around the Applicant's evidence, namely his employment status and his account of the circumstances that led to his recall. The employment matter is more straightforward so I will deal with that first.
34. At the February hearing, the Applicant's OS said the Applicant has said he had been offered his job back if re-released. His OM said she was working on the basis that his job would be available and offered to confirm this after the hearing. The Applicant told that panel that his employer would be *"letting me back - same company, same position. As soon as I'm released"*.
35. After the February hearing, but before the decision had been finalised, the Applicant's OM reported that the Applicant has, in fact, resigned from his job on 10 May 2019 (the day on which his licence was revoked) and that before he could be re-employed, he would have to go through a formal application process. His former employer did say they would be happy to re-hire him if there was a suitable vacancy at the time. This was clearly at odds with the oral evidence the Applicant had given to the panel.
36. At the November hearing, the Applicant gave a more detailed account of his employment, stating, in short, that he had always thought he would have to reapply but would be certain to succeed. He denied any intention of deceiving his OS, OM or the panel.
37. The panel concluded that although it had *"clearly been misled as to [his] employment position, it is prepared, on balance, to give [him] the benefit of the doubt and find it was not done deliberately"*.
38. Therefore, the panel had accepted that the Applicant had not set out to mislead in relation to his employment. It follows that this should not have been a central factor in its decision-making. Neither was it so. The panel is careful to make a distinction between the Applicant's evidence in relation to his employment and his evidence regarding the circumstances of the recall. There is nothing to suggest that the panel has acted irrationally in its analysis of the Applicant's employment circumstances.



It does not use its finding on this point to support its conclusion that the Applicant deliberately lied in relation to other matters.

39. The panel gave more weight to the circumstances of the Applicant's recall.
40. The Applicant was recalled to custody for breaching his licence condition to reside as directed at a family member's address. That family member had told the Applicant's former OM that they had not had any contact with him for three weeks and he was not currently residing there. The recall was initiated on 10 May 2019.
41. That family member had also voiced concerns that the Applicant may have been dismissed from his employment and had been associating with known drug users.
42. The Post Recall Risk Management Report (22 May 2019) was completed by the Applicant's former OM. It notes that the police attended a property to arrest another individual on 11 May 2019, the day after the recall. It reports that the Applicant, who was also at the property, stated that he jumped out of the window when the police arrived as he did not want to be associated with the large amount of drug paraphernalia that was at the property. He said he was not aware that he had been recalled at that point and this only came to light when the police apprehended him and did a Police National Computer (PNC) check.
43. At the February 2020 hearing, the Applicant told the panel that, on the day of recall, a woman came out of the property as he was walking past and asked him for cigarettes. He said he gave her two cigarettes and "*the next thing*" the police arrived. He said he did not try to run away, gave his name, and learned of his recall at that point. He did not mention leaving the property through the window, nor his concerns about the nature of the premises.
44. After the February 2020 hearing, police evidence was disclosed which suggested that the Applicant was arrested at the rear of the property when he was seeking to escape through a window.
45. The Applicant's legal representative offered no further representations in relation to the circumstances of arrest prior to the reconvened hearing in November 2020.
46. At the reconvened hearing, the panel heard from two attending police officers who confirmed that the Applicant left the property through the rear window. No application was made for the disclosure of police body camera evidence.
47. The Applicant again told the panel that a woman came out of the property as he was walking past (on his way to the shops) and asked him for cigarettes. On his way back, she asked him into the property and the police arrived while he was there. He said he did not want to be in the property when the police arrived because of the drug paraphernalia there. He apologised to the panel for lying in the account he gave at the February hearing.
48. In its decision, the panel set out, as one of the factors to be considered in applying the test for release, the Applicant's credibility in relation to his period on licence and



his motivation for future compliance with his life licence conditions. It acknowledges that the Applicant's OM had only had a limited handover from his previous OM.

49. The panel also balanced the Applicant's assertion that he did not know he had been recalled against the fact that he resigned from his job on the same day and the Applicant's assertion that he did not associate with drug users against the fact that he was caught escaping from an address containing drug paraphernalia.
50. It concluded, in relation to the recall, that the Applicant "*deliberately lied and maintained [his] lies and, as a result, the panel is unable to accept much of [his] evidence*". The Applicant submits that this is an irrational conclusion.
51. Notwithstanding the account given to the Applicant's former OM (as documented in the Post Recall Risk Management Report) being more consistent with his oral evidence to the November 2020 hearing, the Applicant did nevertheless lie to the panel at the February 2020 hearing. This is put beyond doubt by the Applicant's subsequent apology for lying to the panel.
52. Moreover, the Applicant did not change his account of events between then and the November 2020 hearing, despite having had the opportunity to do so in his personal written submissions of 11 June 2020. The Applicant therefore maintained his lies.
53. It is therefore wholly reasonable for the panel to conclude that the Applicant deliberately lied and maintained his lies.
54. Having concluded this, it is far from irrational for the panel to go on to conclude that the Applicant's varying accounts of his time in the community casts doubts on the veracity of the remainder of his evidence.
55. The application also pointed out that the Applicant had recently been prescribed medication which may have had an effect of his functioning or memory recall, and this was not considered in the decision. There is nothing in the application suggesting that this point was advanced at the oral hearing as a reason for the Applicant's varied evidence; neither was it pleaded in closing submissions. The members of the panel are not pharmacologists, and neither should they be expected to be. There is no basis on which the omission of this (hitherto unmentioned) point from the decision casts any doubt on its rationality nor the procedure by which it was made.

(c) *Scrutiny of the dossier*

56. Finally, it is submitted that the panel "*erred in the procedure to apply appropriate anxious scrutiny to the entire dossier*" as it did not mention the Applicant's original version of recall events as documented in the Post Recall Risk Management Report.
57. The application does not make any submissions as to why the legal concept of anxious scrutiny (as developed by case law) should be applied in this case. I shall therefore treat the application as though it omitted the word 'anxious' (which, in any event, may be a red herring) and consider it (as I am bound to) in the light of **DSD** and the ordinary principles of procedural unfairness.



58. The fact that the decision letter did not specifically mention the Post Recall Risk Management Report (or the Applicant's evidence in relation to his account at that time) does not mean that the panel did not scrutinise it; neither is the decision letter the vehicle by which every piece of written and or evidence is recited. The decision letter is comprehensive and gives me no reason to think that the panel did not have the entirety of the dossier in mind when evaluating the totality of the evidence before it in reaching its final decision.

59. There is therefore insufficient evidence before me to support a finding of procedural unfairness on the part of the panel in its reading or analysis of the dossier.

Decision

60. 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.

Stefan Fafinski
10 December 2020

