

[2020] PBRA 41

Application for Reconsideration by Richardson

Application

1. This is an application by Richardson (the Applicant) for reconsideration of a decision following an oral hearing dated the 13 February not to direct release or to recommend his 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:
 - (a) An application to challenge a parole board decision from the Applicant dated 4 March 2020;
 - (b) Accompanying legal representations from the Applicant's solicitors also dated 4 March 2020;
 - (c) The oral hearing decision letter dated 13 February 2020; and
 - (d) A dossier comprising 446 pages all of which were disclosed to the Applicant.

Background

4. On 21 March 2012, the Applicant was sentenced to Imprisonment for Public Protection following his conviction for the offences of rape of a female under 16, sexual activity with a female child under 16 (x 2) and causing/inciting a female child under 16 to engage in sexual activity. The tariff expiry date is reported to have passed on 21 March 2019.
5. The Secretary of State referred the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct his release. This is the Applicant's first parole review.

Request for Reconsideration

6. The application for reconsideration is dated 4 March 2020.
7. The grounds for seeking a reconsideration are as follows:

Irrationality

- (a) The Panel was restrictive in their approach in determining risk reduction factors due to failing to provide sufficient evidence of a reduction of risk by not completing the required course.

Procedurally unfair

- (b) The Panel failed to follow their own Guidance on Allegations when considering unsubstantiated allegations.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release and if the panel did not consider it appropriate to direct release, it was invited to advise the Secretary of State on whether the Applicant should be transferred to open conditions.
9. A three-member panel convened to hear the case on 30 September 2019. It was unable to conclude the hearing on that day and adjourned to 5 February 2020 when it sat again to finish the evidence. The Panel at the first hearing had available to it a dossier of 390 pages and at the reconvened hearing, a dossier of 428 pages as well as a security report dated 7 January 2020 and a new report from the Offender Supervisor dated 27 January 2020. Over the course of the two hearings, the Panel heard evidence from the Applicant's Offender Supervisor, his former Offender Supervisor, a Prison Psychologist, the Offender Manager and the Applicant.

The Relevant Law

10. The Panel correctly sets out in its decision letter dated 5 February 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

11. 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)).
12. 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



13. 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."

14. 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.
15. 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

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. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
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.

Other

18. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the



factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

19. 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."

The reply on behalf of the Secretary of State

20. The Secretary of State has been invited to submit representations in respect of this application but has not done so.

Discussion

Eligibility

21. The Panel in this case made two decisions. The first not to release the Applicant. The second not to recommend his progression to open conditions. The latter decision is not eligible for review.

22. Whilst the Applicant claims he has a legitimate expectation that a recommendation that he should not be transferred to open conditions would be open to review, such an expectation would be contrary to the clear test set out in rule 28. I also note that the Applicant was legally represented throughout proceedings by a representative who could have explained to him, if there was any doubt, the scope of the reconsideration mechanism.

23. The Applicant does not claim that the decision not to release him was irrational. Indeed, he could not properly do so given that none of the professional witnesses were recommending his release and the Applicant himself told the Panel that he did not want to be released yet because he *"had been in custody a long time and would rather take time to re-learn what society is all about"*.

24. It follows that the part of the application seeking reconsideration of the decision not to recommend that the Applicant move to open conditions is ineligible under rule 28 and must be refused.

Irrationality



25. In any event the test for irrationality has not been met in this case.
26. Having made a decision to refuse the application for release, the Panel clearly and carefully addressed all parts of the four factors to be taken into account when considering a transfer to open conditions. 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.

Procedural Unfairness

27. The Parole Board issued guidance in March 2019 to assist panels considering 'allegations' or 'conduct alleged to have occurred which has not been adjudicated upon'. Panels faced with information regarding an allegation have to assess the relevance and weight of the allegation and either:
- (a) Choose to disregard it; or,
 - (b) Make a finding of fact; or
 - (c) Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review.
28. It follows that the Panel did not have to make findings of fact in respect of all the allegations made against the Applicant in the dossier and in the evidence. It is, however, relevant that much of the alleged custodial behaviour appears to have been admitted by the Applicant and was therefore been treated by the Panel as having taken place. (The assessment the Panel had to make in respect of most of this conduct was not whether it was alleged to have taken place but how others might have perceived it and then how relevant that conduct was to the Applicant's risk of serious harm).
29. The guidance makes clear that panels may need to make an assessment of an allegation when the allegation is capable of being relevant to the parole review, but the panel is not in a position to make a finding of fact either because there is insufficient material available to make such a finding on the balance of probabilities, or because it would not be fair to do so. This is likely to be the case, as here, in relation to security information where relevant first-hand witnesses are not available, or could not practically attend, to give evidence to the Panel.
30. The guidance recommends that the parole decision letter should include reference to an allegation made, explain whether the allegation had been disregarded or taken account of, and if taken account of, an outline of the Panel's analysis and how the allegation has impacted on decision making.



31. It is clear that the Panel explored the relevant entries from the security information in some detail with the witnesses and allowed the Applicant an opportunity to respond to each of them.
32. The witnesses also provided an assessment of how they considered the Applicant's custodial behaviour related to risk for example the current Offender Supervisor gave evidence that, *"Although [the Applicant] has not been placed on report or adjudicated, she would not say that [the Applicant was] fully compliant, noting an ongoing passive-aggressive threats towards staff and coercive behaviour that could be considered as paralleling certain aspects of the index offences"*.
33. The Applicant told the Panel that any negative perceptions of his conduct were based on his mental health and/or lack of sleep. He admitted to having been outspoken and this gives others the (incorrect) perception that he was aggressive. In the second hearing when faced with allegations of how the Applicant had behaved with the chaplaincy, the Applicant *"denied being aggressive towards staff although said it was 'probable' that others would have perceived it as such"*.
34. At the second hearing, the Applicant's Offender Supervisor gave evidence about two recent security entries dated October 2019 which suggested that the Applicant had made derogatory sexual comments about a female officer and had then stared at her continually for 20 minutes.
35. The Panel does not refer to this incident again as part of its conclusion and the Panel made no finding of fact in relation to it. It may be that they disregarded it entirely. Nevertheless, the Panel did not explain whether the allegation had been disregarded or taken account of, and if taken account of, did not provide 'an outline of the panel's analysis and how the allegation has impacted on decision-making'. The guidance requires them to have done so and the relevance of this allegation to the Panel's risk assessment would have been clearer if their analysis about this allegation had been clearly articulated in the decision letter.
36. Despite this omission, I do not consider the way in which the allegations were treated by the Panel to have amounted to procedural unfairness. The Applicant was given full opportunity to dispute the allegations and to give his own evidence as to why he believed the witnesses may have perceived his behaviour to be aggressive. The Panel was careful not to make findings of fact where the evidence was not available to support them doing so. Whilst the Panel could have separated out each and every allegation to make clear what its assessment of each was, overall, the panel were meticulously careful to point out what evidence of the professional witnesses was accepted by the Applicant and what was not. Considering the test for procedural unfairness overall, I do not consider the Applicant to have been treated unjustly.



Decision

37. 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.

Kay Taylor
18 March 2020