

[2021] PBRA 10

Application for Reconsideration by Storey

Application

1. This is an application by Storey (the Applicant) for reconsideration of a decision of a Parole Board panel at an oral hearing dated the 7 January 2021 not to direct 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 the dossier of 418 pages including the decision now under review, and the application for reconsideration.

Background

4. The Applicant is serving a life sentence for murder, imposed in December 1989. The tariff was set at 13 years less time on remand. This expired in April 2002. He was released on licence in August 2015 but recalled in January 2016. He was 22 years old at the time of the index offence and is now aged 53.

Request for Reconsideration

5. The application for reconsideration is dated 27 January 2021.
6. The grounds for seeking a reconsideration are as follows:
 - A. The panel failed to give appropriate weight to the evidence of witnesses; The dossier and oral evidence provided by witnesses supported progression. The panel failed to provide adequate justification as to why it disregarded the evidence that was in favour of the Applicant's progression as well as disregarding the Applicant's assertion that he was nervous during his oral evidence.
 - B. The panel raised concern regarding the Applicant's lack of insight based purely upon his oral evidence. The Applicant's representatives explained in closing submissions that the Applicant was extremely nervous, however this was dismissed by the panel.



- C. The decision letter fails to explain clearly the panels reasons for doing so to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.
- D. 'The panel set unachievable targets having already received oral evidence that 'The Applicant had been assessed as unsuitable for a regime designed and supported by psychologists to help people recognise and deal with their problems ('PIPE').

Within the decision letter the panel states the following:

"The panel noted that a previous consideration for PIPE [a regime designed and supported by psychologists to help people recognise and deal with their problems] had been short lived. The panel considered that sentence planning would be assisted by a reconsideration of this target, and by a more intensive assessment of personality, whether by IPDE [a type of personality assessment], PCL-R [also a type of personality assessment], or other appropriate tool. The next panel reviewing the matter is likely to consider it important to see further insight into the recall incident."

This statement has been made despite in oral evidence from both the Applicant and the Offender supervisor confirming that following his transfer to prison A he was assessed as unsuitable for a regime designed and supported by psychologists to help people recognise and deal with their problems.

We seek to remind the Parole Board that it is not the duty or within the powers of the Parole Board to 'set targets' for a prisoner to achieve. Indeed, in any referral, it is expressly forbidden for the Parole Board to indicate what specific work should be undertaken and when.'

Current parole review

7. The Applicant had been released on licence in August 2015 and recalled following a breach of that licence in January 2016. In March 2018 a previous panel declined to direct release or recommend a transfer to open conditions.
8. In April 2019 the Applicant's case was directed to an oral hearing. The ambit of the hearing was widened to include consideration of the Applicant's suitability for transfer to open conditions in June 2019, following a change in the Secretary of State's policy concerning such transfers. The hearing took place on 9 December 2020 and was conducted remotely via video-link, due to the Covid-19 restrictions on face-to-face hearings in place at the time. The panel was composed of four members, two of whom were psychologists. Oral evidence was heard from the applicant's Prison and Community Offender Managers, from two psychologists, and from the Applicant himself.

The Relevant Law



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9. The panel correctly set out in its decision letter dated 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

10. 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)).
11. A decision to recommend or not to recommend a move to open conditions is therefore not eligible for reconsideration under Rule 28.

Irrationality

12. 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."

13. 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.
14. 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

15. 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.
16. 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

17. 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

18. No representations were received on behalf of the Secretary of State.

Discussion

19. Since none of the professionals were recommending release such that it would be illogical to suggest that the a decision not to direct release was irrational I have assumed that the application is based on the unwillingness of the panel to recommend progression to open conditions and the grounds submitted refer only – see 7A above – to "progression" rather than "release". As set out at paragraph 12 above that decision is not amenable to the reconsideration mechanism as currently contained in the Parole Board Rules. That is of course sufficient to dispose of this application. However in a previous application, **Barclay [2019] PRBA 6** in which the same circumstances were present, the reviewer did deal shortly with the grounds submitted. I shall do the same.

Grounds A & B

20. The grounds point out – as did the DL – that of the four professionals to give evidence to the tribunal three supported a recommendation for open conditions and the fourth recommended that the Applicant should remain in closed conditions. The panel was concerned to explore the events surrounding the Applicant's recall and found the Applicant's evidence about them, both as recounted to the professionals before the hearing and in his evidence to the panel to be unsatisfactory. Nothing is put forward to justify the assertion that the panel ignored the nervousness of the Applicant at the hearing and while giving his evidence. It is a 'given' that a parole hearing will be stressful for the prisoner as it will for any person facing possible adverse consequences as the result of a hearing be it a parole hearing, criminal trial or other hearing of this kind. The panel set out in some detail its recollection of his evidence in the DL, and for all that the Applicant may have been nervous it is clear that he was able to put forward his account, both of the incident which had led to his recall and other matters such as his relationship with his family. A further understandable difficulty for the Applicant was that he was clearly hoping to



persuade the panel to direct his release – see the last 3 sub-paragraphs of paragraph 7 of the DL – against all the recommendations of the professionals.

21. The principal function of an oral hearing is for the panel to assess and test with (if he/she consents) the assistance of the prisoner and of course the prisoner's representative, the recommendations made to the Board concerning the prisoner's future whereabouts. The panel is independent and free to follow or reject the recommendations of professionals. The DL summarised the opinions of the four professionals and the reasons for their conclusions. It explained that its concern was that the events which had led to the recall and other findings raised a concern that any adverse reaction to a turn of events in the future was likely to be immediate and thus not amenable to the kind of control which even a strong Risk Management Plan. The fact that another panel may have reached a different conclusion does not make the decision 'irrational'. And insofar as a failure to make sufficient allowance for the applicant's nervousness might constitute a procedural irregularity I would reject that too.

Ground C

22. There is nothing in this ground. The passages at the end of Paragraph 8 of the DL clearly explain why the panel decided not to direct release and then why it decided not to recommend transfer to open conditions.

Ground D

23. There is nothing in this ground. A paragraph which suggests ways in which the problems which prompted the decision might be resolved in future is a commonplace in DLs. The suggestions are not and cannot be directions and a failure to indicate what might be useful in future would be justifiably criticised by a prisoner at a later hearing.

Decision

24. Refusal – For the reasons I have given,
a. The decision is not amenable to the reconsideration procedure for the reasons set out above.
b. I have however considered the grounds submitted as if they had been submitted following a direction for no release. I do not consider that the decision was either irrational or procedurally unfair and would accordingly have refused the application even if it had been within my power to grant it.

Sir David Calvert-Smith
11 February 2021



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