

[2021] PBRA 140

Application for Reconsideration by Willson

Application

1. This is an application by Willson (the Applicant) for reconsideration of a decision made by a Member Case Assessment (MCA) panel dated 24 June 2021 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 the decision letter, the dossier and the application for reconsideration. I have also seen a decision of the Duty Member dated 6 August 2021 refusing an application for an oral hearing.

Background

4. The Applicant is serving sentence of imprisonment for public protection imposed on 3 March 2010 following conviction for committing arson recklessly to which he pleaded guilty. A tariff of 30 months (less time spent on remand) was set, and this expired on 12 November 2011. The Applicant was released on licence on 3 October 2018 but recalled on 29 May 2018. He received a further 14-week determinate sentence (now served) following conviction for sending malicious communications. This is his second parole review since recall.
5. The Applicant was aged 40 at the time of sentencing. He is now 51 years old.

Request for Reconsideration

6. The application for reconsideration is dated 30 August 2021 and has been submitted by solicitors acting for the Applicant.
7. It advances four grounds for reconsideration:
 - a) The MCA panel failed to consider the recommendation from the Prison Offender Manager (POM) or a previous psychological report and this amounted to procedural unfairness;
 - b) It was irrational for the MCA panel not to direct release or direct an oral hearing;



- c) The decision not to direct an oral hearing by the Duty Member was procedurally unfair; and/or
 - d) It was irrational for the Duty Member to refuse the application for an oral hearing.
8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in December 2020 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.
10. The case was considered on the papers by the MCA panel on 24 June 2021. The MCA panel had a dossier of 339 pages which contained no legal or personal representations.
11. The POM report (dated 11 March 2021) did not recommend release. It noted that *"there is still outstanding core risk reduction work that [the Applicant] is needing to complete in custody"*. It acknowledged that there had been a significant delay in the Applicant's ability to access the identified intervention and that, if there are further delays *"alternative options may need to be considered"* including a move to open conditions or release if a suitable risk management plan was in place. It noted that this would *"need to be discussed with all professionals involved in [the Applicant's case]"*. It noted that the identified intervention *"usually takes between 6-7 months to complete"*.
12. The COM report (dated 16 April 2021) did not recommend release, noting that the Applicant *"remains a risk to the public and it remains necessary for the protection of the public that the offender be confined"*. It noted the Applicant's limited acceptance of responsibility for all his offending behaviour and his propensity to place blame on others. It considered that the identified intervention was necessary and noted that *"even the most robust risk management plan will be rendered ineffective should [the Applicant] not present with the ability to manage his own behaviour internally"*.
13. The MCA panel did not direct the Applicant's release, agreeing with professionals that core risk reduction work remained outstanding and that the current risk management plan would not manage his risks in the community. It noted that there was an indication that programmes would be delivered imminently and that the Applicant would be a priority.
14. The MCA panel also did not recommend open conditions, concluding that the benefits of such a move did not outweigh the risks.
15. An MCA decision is provisional for 28 days to permit an application to be made for an oral hearing in the interests of fairness. An application was made and considered

by a Duty Member. The application was refused. The Duty Member decision (dated 6 August 2021) noted that the Applicant had begun the required intervention. The Duty Member decision notes that “*This decision remains provisional for a further 21 days from the date it is issued to the parties. Within this time, either party may apply for the decision **not to release you from prison** (my emphasis added) to be reconsidered...*”.

The Relevant Law

16. The panel correctly sets out the test for release in its decision letter dated 10 June 2021.

Parole Board Rules 2019

17. 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)).

18. 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

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.

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

Irrationality

22. 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."

23. 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.

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

The reply on behalf of the Secretary of State

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

Discussion

26. Two separate and distinct decisions were made in the course of this parole review.

27. The first decision was made by the MCA panel: the Applicant was unsuitable for release. This decision was made under rule 19(1)(b). This decision was provisional for 28 days to allow an application to be made for a panel at an oral hearing to determine the case under rule 20(2).

28. An application was made for the case to be directed to an oral hearing. In this situation, rule 20(5) provides that the application for an oral hearing must be determined by a Duty Member (who was not part of the original MCA panel).

29. The second decision was made by the Duty Member: the case should not be directed to an oral hearing. The effect of this second decision (not to direct an oral hearing) on the first decision (not to direct release) in this instance is set out in rule 20(6)(b). This provides that the provisional decision (not to direct release) remains provisional and becomes final if no application for reconsideration is made within 28 days.

30. Rule 28 is clear that the only decisions subject to reconsideration are those made under rule 19(1)(a) or (b), 21(7) or 25(1). Therefore, the decision of the Duty Member not to direct an oral hearing, which was made under rule 20(6)(b), is not covered by the reconsideration mechanism. It follows that any submissions made seeking reconsideration of the decision of the Duty Member must fail.

31. Although the application submits that the guidance as to whether both decisions can be "appealed" is "contradictory", a careful reading of the Parole Board Rules 2019 themselves and the text in both decisions, makes it perfectly clear that only the decision of the MCA panel not to release is amenable to reconsideration.

32.The remaining submissions falling within the reconsideration mechanism are, essentially, that the decision not to direct release was procedurally unfair and/or irrational.

33.It is submitted that it was procedurally unfair that:

- a) the MCA panel failed fully to consider the recommendation of the POM who noted that alternative options could be considered if the Applicant could not complete the intervention in a reasonable time frame; and
- b) the MCA panel failed to consider a previous psychological report that supported release and stated that an intervention may not be required.

34.The POM's comment regarding alternative routes for progression was, in fact, qualified by a statement that a robust risk management plan would be required if release were to be countenanced. It was made prior to the COM's report which was clear that "*even the most robust risk management plan will be rendered ineffective*" if the Applicant did not have sufficient internal controls to manage his own behaviour. Therefore, I do not find the MCA panel's disinclination to explore the POM's speculation further to be procedurally unfair, given the clearly stated view of the COM.

35.Turning next to the psychological report, I presume that the submissions (which are vague) refer to an independent report from March 2019 which supported release. First, it is a generally accepted principle that psychological reports remain current for 12 months and therefore the age of this report diminishes the amount of evidential weight it carries. Second, this psychological report predates the August 2020 decision of the Parole Board which did not direct the Applicant's release and concluded that the Applicant had core risk reduction work outstanding in custody. In coming to that conclusion, that earlier panel also had the benefit of hearing from the Applicant at an oral hearing. The independent report would have been available to the earlier panel: a panel which was self-evidently not persuaded by it. It is not procedurally unfair for the current MCA panel to remain similarly unpersuaded by it.

36.Therefore, I do not find the decision not to direct release to be procedurally unfair.

37.Turning finally to irrationality, it is submitted that it was irrational for the MCA panel not to direct release given that "*the POM, along with an independent psychologist, had previously felt that risk would be manageable in the community with a full risk management plan*".

38.I have already dealt with the matter of the independent psychological report and find it was not irrational for the MCA panel to give it (at best) limited weight for the reasons of currency and the dismissal of its recommendations by a previous panel of the Parole Board.

39.The POM's report is also not as unequivocal as the application suggests. It also posits open conditions as an alternative to release and that alternatives to the identified intervention "*may need to be considered*" and discussed with all professionals. The POM was not recommending release and it is not irrational of the MCA panel to concur with that recommendation.

40. It is also submitted that the POM was deprived of the opportunity to express a view on the adequacy of the proposed risk management plan as they had not seen it at the time of submitting their report. Although this is true, the primary recommendation of the POM was for the Applicant to remain in closed conditions and only to consider alternatives if the identified intervention was unreasonably further delayed, and even then, subject to the views of other professionals and the adequacy of the risk management plan.

41. The view of the COM was that no risk management plan would be effective without the Applicant being able to control his own behaviour. It is therefore difficult to see how the POM would have changed their recommendation given that any such change was predicated on the success of the risk management plan and that, at present, the COM's view was that no risk management plan would be effective without the Applicant first being able to evidence change in himself. It is not irrational for the MCA panel to reach the decision it did without making further enquiry of the POM.

42. The legal test for irrationality sets a high bar, which this case does not meet.

Decision

43. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused. The decision of the Duty Member not to direct an oral hearing is not justiciable under rule 28 and any submissions regarding it must automatically fail.

Stefan Fafinski
4 October 2021