

[2021] PBRA 35

Application for Reconsideration by Brown

Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision of a three-member panel, dated 28 January 2021, not to direct his release following an oral hearing.
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 consisted of the dossier running to 936 pages (including the decision letter) and the various representations for reconsideration.
4. The Applicant submitted his own representations dated 1 February 2021, which triggered the Reconsideration Mechanism. Subsequent to that, the Applicant's solicitor provided the Reconsideration Panel with an email containing further information and submissions and the Applicant submitted a further letter containing representations.
5. The Rules are silent as to what format the application should be, and whether the reasons for the application are separate to the application itself. In this case, after receiving the extra information, I issued a direction setting a short deadline for receipt of any further submissions.
6. In addition, I considered it necessary in the interests of justice to apply Rule 9 to change the time for the Secretary of State to respond under Rule 28(4) to seven days from that deadline.
7. In the event, it was confirmed that there were no further representations from either party.

Background

8. The Applicant was sentenced to imprisonment for public protection (with a tariff of 3½ years) on 15 September 2008 for sexual offences committed against children.



The Tariff Expiry Date was 3 December 2011. He was 48 years old at the time of sentencing and is now 61.

9. He was released in 2015 and recalled for alleged further offending in February 2018. This is his second review since the recall.

Current parole review

10. The Secretary of State originally referred the Applicant's case to the Parole Board in February 2019.
11. An oral hearing was directed in November 2019, to be heard at a face to face hearing, and was listed on 30 March 2020. This was adjourned on the day in light of the Covid-19 pandemic until 27 July 2020, being listed for a video hearing.
12. However, on that day the case had to be adjourned again due to technical difficulties.
13. The hearing proceeded on 23 November 2020 by video link.
14. The Panel heard oral evidence from the Applicant, as well as his Offender Supervisor (the official supervising his case in custody), Offender Manager (community probation officer) and a psychologist instructed on the direction of the Parole Board.
15. At the hearing both the prison and community probation officers, and the prison psychologist, were recommending that the Applicant remain in custody. All recommended a treatment pathway that involved transfer to a specialist unit dealing with prisoners who have difficult personality traits.
16. The Panel noted the recommendations and concluded that there was still core risk reduction work outstanding that needed to be completed before the Applicant could be safely released.

Request for Reconsideration

17. The application for reconsideration is contained in the documents as set out above.
18. There are said to be nine different points, under both the headings of irrationality and procedural unfairness.
19. In short, the Applicant challenges the viability of the pathway put forward by the professionals. This is because as a vulnerable prisoner he would not be able to move to the proposed unit and therefore the Panel proceeded under an error.
20. Further, reasons are put forward as to why his risk is manageable in the community.
21. The Applicant also raises an issue in relation to the psychological risk assessment which, he states, was only prepared because of an unspecified procedural error.

The Relevant Law

22. The Panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

23. 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. This is such a case.

24. Such a decision is eligible for reconsideration on the basis that (a) the decision is irrational and/or (b) that the decision is procedurally unfair.

Procedural unfairness

25. 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.

26. 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 properly informed of the case against them;
- (c) they were prevented from putting their case properly; and/or
- (d) the panel was not impartial.

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

Irrationality

27. 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."

28. 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.

29. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28 (see **Preston [2019] PBRA 1** and others).

The reply on behalf of the Secretary of State

30. The Secretary of State has not made any representations in response to the application.

Discussion

31. At the start, there are two points to make about the reconsideration mechanism.

32. Firstly, it is important to remember that my role is not to make my own assessment of risk or the viability of the release plan. I am conducting a review of the Panel's decision.

33. In considering this, I remind myself that the Panel had the benefit of hearing the oral evidence from the witnesses to better inform their decision.

34. Secondly, it is not part of the Parole Board's remit to lay out a treatment pathway, or to stipulate that a particular piece of offence related work should be undertaken. The sole question is whether the risk of an Applicant can be managed in the community or not.

35. That is sufficient to dispose of most of the application. Whether the Applicant could access the suggested Unit or not can have no bearing on the decision as to whether to direct release or not.

36. Although it may feel unfair to the Applicant, the question of release is decided by looking forward at what, hypothetically, would happen in the community. In assessing that the fact (if it is the case) that he cannot access programme work in custody to reduce his risk is not a relevant factor.

37. Further, in relation to the submissions that the Applicant makes as to why his risk is manageable in the community, this is not for me to consider on a reconsideration unless the Panel's decision is irrational. In this case, it is clearly not given the Applicant's history and the recommendation of the professionals.

38. It is not entirely clear what the Applicant means in relation to the psychological risk assessment, but it appears that he considers that he was disadvantaged by the recent psychological assessment and the reasons it came to be prepared.

39. I do not consider that this ground is made out. Any concerns he had about the assessment could have been explained and explored at the hearing. Further, it was open to him to have obtained and served his own expert report to challenge any part of the prison psychologist's report.

40. In a case such as the Applicant's it would be routine for the Parole Board to have directed a psychological risk assessment. The fact that one was directed is unsurprising (and, in many ways, inevitable) given the history of the case.

41. In those circumstances there was no unfairness.

Conclusion

42. My role when considering an application for reconsideration is not to make an assessment of risk myself, or determine whether I would have directed release when presented with the case, but to assess the decision to see if there are any errors on the grounds set out above.

43. I consider that it is clear that the decision that the Panel made was one that was open to it, and there is nothing to suggest that it was conducted in an unfair manner.

44. In those circumstances, I do not consider that there can be said to be a legal error in the decision.

Decision

45. For the reasons I have given, I do not consider that the decision was irrational, or was reached in a procedurally unfair manner.

46. Accordingly, the application for reconsideration is refused.

Daniel Bunting
18 March 2021