

[2021] PBRA 62

Application for Reconsideration by Maguire

Application

1. This is an application by Maguire (the Applicant) for reconsideration of a decision of an oral hearing dated 29 March 2021 not to direct release but to recommend 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 the dossier of 416 pages (including the closing submissions and the decision letter) and the application for reconsideration.

Background

4. On 1 March 2007, when aged 21, the Applicant was sentenced to life imprisonment following her plea of guilty to murder. She was ordered to serve a minimum period of 14 years, less time spent in custody on remand, before she could apply for parole.
5. The minimum period expired on 7 August 2020.

Request for Reconsideration

6. The application for reconsideration is dated 16 April 2021.
7. The application is based first on procedural irregularity, and, secondly, irrationality.
8. The grounds for seeking a reconsideration on the basis of procedural irregularity are as follows:
 - (a) The panel asked relatively few questions of the substance misuse team representative and then stood her down.
 - (b) The Applicant's legal representative did not appreciate that substance misuse was the panel's main area of interest and did not object to that course of action.



(c) The burden of the panel's questions was directed at the Community Offender Manager and the psychologist, who were not as well placed as the substance misuse team representative to answer the panel's questions

9. The grounds for seeking a reconsideration on the basis of irrationality are as follows:

(a) In the conclusion of the decision letter, the panel stated, "*Witnesses to the hearing appeared to be confident that the proposed plan to remove the Methadone reliance by using a prescribed blocker was, in principle, a sound idea but the Panel was unable to comprehend why this process could not have been started sooner...*"

(b) As a matter of record, prison regulations prohibited the process starting sooner.

(c) The panel placed undue weight on its finding that the Applicant was not yet free of drugs. She was free of illicit drugs and drug addiction had not formed part of the index offence nor did the professional witnesses associate it with her risk of serious harm.

(d) The panel, by implication, required the Applicant to be completely free of drugs before release, which was inconsistent with the professional plans for her release.

Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board on 9 October 2019.

11. The oral hearing, which took place remotely by video link (and later by telephone) due to the Covid-19 restrictions on 16 March 2021, was conducted by a judicial member, a psychologist member and an independent member of the Parole Board. The panel heard from the substance misuse team representative, the Prison Offender Manager, a psychologist and the Community Offender Manager.

12. At the time of the hearing, the Applicant was aged 35. The professional witnesses supported her release.

The Relevant Law

13. The panel correctly sets out in its decision letter 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.

Irrationality

14. 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,



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"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."

15. 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.
16. 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

17. 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.
18. 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.
19. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Secretary of State

20. The Secretary of State was not represented and did not lodge any submissions.

Discussion

21. Dealing first with the allegation of procedural irregularity, at its centre, the Applicant's complaint is that the panel did not disclose its main focus of interest in the case at an early stage of the hearing.



22. This is an unusual complaint. One of its necessary components must be the suggestion that a panel has a duty to reveal its main focus of interest. This cannot be right. Although there are many cases when it is mutually helpful for the panel to indicate the areas of evidence it wishes to concentrate on, there must be very many cases where the panel is unsure at the beginning of a hearing as to what the main focus will be. Frequently these things emerge during the evidence.
23. In most cases (and this is one) the Applicant is protected from a panel investing one matter with importance and then capriciously changing its mind, by the presence of a legal representative.
24. The legal representative exercises judgement as to what he or she thinks should be the main focus of the case and asks questions accordingly.
25. If a legal representative is either inadvertently misled by the panel or fails to appreciate what is worrying it, the legal representative should raise the problem with the panel.
26. As I understand the position, the legal representative did not object to the witness being stood down and later, either orally or in the written submissions, did not complain of the panel's approach to the evidence. It was open to the legal representative during the later stages of the oral hearing to apply for the substance misuse team representative to be recalled. That might have created logistical difficulties but if the application had merit, the panel would have been obliged to arrange for the witness to be recalled.
27. The reconsideration panel, as far as is practical, follows the procedure of Judicial Review; in this case, the Applicant's lawyers had a remedy at first instance which they chose not to exercise and cannot now raise it on review.
28. Turning to the allegation of irrationality, it may be helpful to try to reduce this case to its essentials.
29. In prison, the Applicant became addicted to prescription drugs.
30. The panel identified substance misuse as the main issue in the case.
31. For some time, the prison authorities had been attempting to wean the Applicant off drugs by prescribing methadone.
32. Shortly before the hearing, the authorities reduced her dosage of methadone in order to return her to the prescribed drug.
33. Apparently, prison regulations prohibit the administration of prescribed drugs to prisoners until they are within two weeks of release.
34. The composition of prescribed drugs is significantly different to the drugs used illicitly in prisons.



35. The panel noted that, although there was no information to suggest the Applicant had been taking illicit drugs in the recent past, security/intelligence information contradicted the suggestion that she had been free of drugs for five or six years.
36. The panel concluded that, although the Applicant might understand her trigger situations, the possibility of an as yet unaddressed and underlying drug dependency existed.
37. In those circumstances, the panel considered it to be too risky to direct the release of the Applicant but concluded that it was sufficiently safe to recommend progression to open conditions where she would be tested and monitored before final release.
38. The question for me is not whether I might have come to that conclusion or whether a different panel might have come to a different conclusion. It is an insufficient basis for a challenge to a panel's decision simply to put forward a reasonable, alternative conclusion consistent with the evidence, because as Lord Hailsham remarked in **Re W (An Infant) [1971] AC 682** "*Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right to be regarded as reasonable.*"
39. Dealing with the individual points raised on behalf of the Applicant, the panel did understand why the drug is not prescribed until shortly before release, because the panel itself referred to the prison regulations. What the panel was saying, was it could not understand how the advantages of the regulation outweighed the disadvantages
40. The panel was entitled to find that the Applicant was not free of drugs; it is inaccurate to say someone taking only prescribed substitutes is free of drugs because if they were not taking the substitute, there would be a grave risk that they would take illicit drugs. The panel was also entitled to conclude that an unaddressed dependency on drugs, whether prescribed or illicit, raised serious doubts about whether the Applicant could be released safely into the community.
41. The decision letter is comprehensive, balanced and extremely clear; it is also analytical and evidence-based. There was sufficient evidence upon which this panel could reach the conclusion it did. Bearing in mind **R (ex parte Wells) v Parole Board 2019 EWHR 2710**, the reasoning given by the panel for coming to the conclusion that the risk posed by the Applicant could not be managed in the community easily reached an acceptable standard in public law.
42. This ground also fails because, in essence, it submits that the Panel should have preferred an alternative, arguable case and come to a different decision. The correct approach of the reconsideration process is not to ask whether the panel might have come to a different decision; the correct approach is confined to asking whether the Applicant has established that the panel's finding was irrational within Lord Diplock's definition. In this instance, the Applicant has failed to do that.



Decision

43. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

James Orrell
18 May 2021



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