

[2021] PBRA 88

Application for Reconsideration by Bushby

Application

1. This is an application by Bushby (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 24 May 2021 following an oral hearing on 20 May 2021. The hearing was conducted remotely by telephone link due to current Covid-19 restrictions on face-to-face hearings.
2. The Panel made no direction for release. As it was an extended sentence, they could not consider the question of open conditions.
3. 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.
4. I have considered the application on the papers. These are the dossier of 203 pages (that includes the decision letter) and the application for reconsideration.

Background

5. The Applicant was aged 46 at the time of sentence and is now aged 50 years old. He was sentenced to an extended sentence of 7 years and 8 months (consisting of a 2 years and 8 months custodial element and a 5 year extended licence period) on 18 August 2017 for an offence of threats to kill.
6. He was unsuccessful in his application to the Parole Board for release in May 2020 during the custodial part of his sentence. He was then released automatically on 20 July 2020.
7. He was recalled the next month due to his behaviour at the designated accommodation and towards staff who were supervising him.

Request for Reconsideration

8. The application for reconsideration is dated 8 June 2021. Although the Applicant was represented at the hearing, these grounds were drafted by himself.
9. The grounds for seeking a reconsideration fall under both the headings of irrationality and procedural impropriety. I have summarised these below.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

10. In relation to irrationality the Applicant states that as he had not drunk alcohol for 8 years, it cannot be said that alcohol use is any longer a risk for him. He also says that the evidence shows that the substance misuse and mental health teams do not have concerns about him.
11. In relation to procedural impropriety, the Applicant states that some documents from him were served so late that they could not be considered. However, he complains, further material was provided by his community probation officer.
12. He also states that '*blatant lies*' were told about him and his mother and invites the Parole Board to call his mother on the telephone to rebut evidence that was given at the hearing.
13. Further, the Applicant complains that the Parole Board did not take account of the '*50 pages of submissions*' that he had written, and asked him '*in a mocking tone*' as to why he had done so.
14. Lastly, the Applicant states that insufficient weight was placed on the fact that he was able to secure employment very quickly on release, despite the coronavirus pandemic.

Current parole review

15. The Applicant's case was referred to the Parole Board after he was recalled. An oral hearing was directed in December 2020.
16. The oral hearing was conducted remotely on 20 May 2021. The Panel heard evidence from the Applicant, as well as from the prison probation officer and the community probation officer.

The Relevant Law

17. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

18. 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)).
19. 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

20. 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."

21. 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.

22. 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

23. 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.

24. 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.

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

26. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which

said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide “*objectively verifiable evidence*” of what is asserted to be the true picture.

27. 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

28. The Secretary of State has stated that he does not wish to make any representations.

Discussion

29. Starting with the allegation of irrationality, it is well known that people who suffer from difficulties with alcohol often continue to do so long after they have become abstinent. I do not consider that the Panel’s conclusion as to the Applicant’s risks can be said to be irrational.

30. In relation to the other matters raised by the Applicant, this appears to be simply an attempt to reargue the case that was before the Panel. That is not something that I can do under the reconsideration mechanism.

31. The Decision Letter records that at the start of the hearing there was a discussion as to what material should be in the dossier. The Applicant’s solicitor and the Applicant “*both confirmed that [they] were content for the material to remain out of the dossier. [Both] indicated that the hearing was fair.*”

32. It seems to me that this is a complete answer to the complaint of the Applicant in relation to the service of material and the submissions that he made in writing. He had the opportunity to object to the procedure at the hearing, and specifically state that there was no issue. It is not open to him now to complain about this.

33. The purpose of the reconsideration mechanism is to review the Panel’s decision. There is no power to receive fresh evidence. In any event, it would be highly inappropriate for the Parole Board to contact a witness in order to obtain evidence.

34. Finally, it was a matter for the Panel as to what weight to place on each piece of evidence. It is not clear what weight the Applicant states should have been placed on his ability to secure employment.

35. In any event, I cannot see how this would have had any impact on to the decision of the Panel.

Conclusion

36.As always, it is necessary to step back and consider the above matters taken together.

37.Having done so, I do not consider that there is anything to indicate that the hearing was irrational or in any way unfair.

Decision

38.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.

Daniel Bunting
30 June 2021