

[2022] PBRA 127

Application for Reconsideration by Johnson

Application

1. This is an application by Johnson (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 19 August 2022 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board Rules**) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for reconsideration.

Background

4. The Applicant was sentenced on 12 October 2011 to detention for public protection following conviction on two counts of wounding with intent to do grievous bodily harm to which he pleaded guilty. His tariff expired on 25 November 2016. The Applicant was 18 years old at the time of sentencing and is now 29 years old.
5. He was released on licence on 18 October 2018 but recalled to custody on 20 February 2020. He had been arrested and charged with possession of Class A and Class B drugs with intent to supply. He was convicted and received a sentence of imprisonment for 42 months on 20 July 2020.

Request for Reconsideration

6. The application for reconsideration is undated but was received by the Parole Board on 31 August 2022. It has been drafted and submitted by solicitors acting on the Applicant's behalf.
7. It submits that the decision was irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding procedural unfairness or error of law.

Current Parole Review



8. The Applicant's case was most recently referred to the Parole Board by the Secretary of State in April 2021 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.
9. The case proceeded to an oral hearing on 15 August 2022 before a three-member panel. The Applicant was legally represented throughout. The panel heard oral evidence from the Applicant's Community Offender Manager (**COM**), his Prison Offender Manager (**POM**) and a psychologist from HMPPS..
10. All witnesses supported the Applicant's release.
11. The panel did not direct the Applicant's release, but it did recommend a transfer to open conditions.

The Relevant Law

12. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
14. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).
15. 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

16. 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."



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17. 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.

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

Duty to give reasons

19. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.

20. The duty to give reasons was most recently considered in the context of parole decision in **R(Wells) v Parole Board [2019] EWHC 2710**. Saini J acknowledged (at para. 38) that a panel of the Parole Board is not bound by the expert evidence before it, but that (at para. 40):

"The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting".

The reply on behalf of the Secretary of State

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

Discussion

22. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

23. The application submits that the decision was irrational on three grounds. First, the panel gave too much weight to security intelligence. Second, the panel gave too much weight to its concerns about the Applicant's account of his relationship with his co-defendant in the recall matter. Finally, the panel did not provide sufficient reasons as to why it did not follow the recommendations of the witnesses.

24. Dealing with the first ground, the decision notes, correctly, that a security report (17 January 2022) within the dossier contains 25 high reliability entries accumulated over a 15-month period at the Applicant's current and former



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establishments. These indicate security concerns around involvement with drug supply, bullying and threatening other prisoners, possession of mobile phones.

25. The decision notes the evidence of the Applicant's POM that no formal action had been taken in respect of any of the security reports, the Applicant remained on the enhanced regime of the Incentives and Earned Privileges (**IEP**) scheme, and the Applicant was working in a trusted position.
26. It also notes the evidence of the psychologist who said she had challenged the Applicant about the security report, as well as seeking additional information from the security department. She could not conclude that there was evidence of wrongdoing as no formal action had been taken.
27. It further notes the evidence of the Applicant who said he was unaware of the security information before receiving the report, that he denied the content and could not offer any further explanation.
28. The reasons given by the panel for not directing the Applicant's release (decision, paras. 4.1 – 4.3) do not include any treatment of the security intelligence. It cannot therefore be said that the panel gave them too much weight as part of its decision not to direct release and this first ground must fail.
29. Turning to the second ground, the psychologist noted that the Applicant has maintained that his relationship with his co-defendant had been platonic, but there was evidence of a lack of openness and honesty with professionals (decision, para. 2.7). Probation records, however, note that the Applicant referred to his co-defendant as his 'partner' when arrested and his co-defendant had consistently indicated that she was in a sexual relationship with the Applicant.
30. The panel's reasons note that one of its concerns was the Applicant's account of his relationship with his co-defendant. The application submits that the co-defendant had been involved with the criminal justice system, so it cannot be assumed that she is a credible witness whose account should automatically be believed. Of course, the same could also be said of the Applicant. It is also submitted that the Applicant has provided a consistent account of the relationship to all professionals, although I note the documented reference to 'his partner' as highlighted above.
31. The reference to the Applicant's relationship with his co-defendant forms part of its broader analysis of its concerns about his openness and honesty with professionals (decision, para 4.2). Probation records indicate that the Probation Service was not aware of the relationship between the Applicant and his co-defendant as he had "*always discussed how positive his relationship with his partner was*". Regardless of whether the relationship between the Applicant and his co-defendant was sexual or not, the evidence suggests that the Applicant had not, in fact, been fully open with probation in supervision and it not irrational for the panel to raise its concerns about that, particularly given the Applicant's re-offending with a co-defendant unknown to the Probation Service while on licence. Therefore, the second ground also fails.



32. Finally, it is submitted that the panel did not provide sufficient reasons why it departed from the recommendations of the witnesses. The panel is not bound by the recommendations of the professional witnesses. To say otherwise would undermine the panel's role as an independent assessor of risk.

33. It is submitted that there are insufficient reasons for the panel's decision that the Applicant should spend a further period of time in open conditions when all witnesses agreed it was not necessary. The decision under reconsideration, however, is whether the panel gave sufficient reasons why the Applicant could not be released. Any recommendation for open conditions is outside the scope of the reconsideration mechanism.

34. The application goes on to submit that the Applicant's risk was not imminent.

35. Regarding imminence of risk, **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1281 (Admin)(Johnson)** states (at para. 31):

If an offender poses no risk, the protection of the public will not require his confinement. That does not mean the Board is to ignore anything other than immediate or imminent risk...

36. In other words, the Board must consider risks over the long term as well as the risks that may arise immediately or imminently on a prisoner's release. This requires the Board to consider whether risks might arise in the longer term as well as in the shorter term. For prisoners (like the Applicant) serving an indeterminate sentence, the Board must always consider risk over an indefinite period.

37. The application also sets out that it disagrees with the panel's view that the proposed risk management plan did not cover certain elements of risk. Simply disagreeing with a panel's view does not make that view irrational. I must look at the panel's decision as a whole in the light of the evidence before it and ask whether it was so unreasonable that every other panel would have decided differently and released the Applicant. Following **Wells**, the panel has a clear legal duty to give reasons. The more a panel departs from expert evidence, the more heightened its duty to give reasons for doing so, particularly when the liberty of the prisoner is at stake.

38. The panel sets out clear reasons why it disagreed with the recommendations of professionals. These reasons relate to the evidence in a rational way and are sufficiently adequate, intelligible, and comprehensible for me to follow them. I find the panel has discharged its duty to give reasons and has reached an entirely sustainable conclusion based on the evidence before it. I have no reason to interfere with it. The legal test for irrationality is a very strict one. This case does not meet it.

Decision

39. For the reasons I have given, I do not find the decision was irrational and accordingly the application for reconsideration is refused.



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