

[2022] PBRA 160

Application for Reconsideration by Austin

Application

1. This is an application by Austin (the Applicant) for reconsideration of a decision of an oral hearing panel made on and dated the 22 September 2022. The decision was not to direct the release of the Applicant.
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 and by way of considering the taped recording of the hearing. The papers were a dossier consisting of 894 pages, the application for reconsideration drafted by the Applicant's solicitor and dated 13 October 2022 and an email from the Secretary of State confirming that no representations were to be made on behalf of the Secretary of State.

Background

4. The Applicant is serving a discretionary sentence of life imprisonment. The index offence was committed in 2003. The minimum tariff imposed by the judge was 3.5 years. The tariff expired in July 2007. The index offence was kidnapping. The facts of the offence were that the Applicant followed a 20 year old female who was on her way home from work. The offence occurred at approximately 11pm. The Applicant grabbed the victim from behind and forced her off a road and into a darker path area on an industrial estate. The Applicant threatened the victim with violence if she did not do what she was asked. A metal object was pressed against her neck and side. The incident lasted for one hour and was described by the judge as "*a terrifying ordeal*". The Applicant had been released from prison in relation to an earlier offence two weeks before committing the index offence. The Applicant was 49 years old at the time of committing the index offence. The Applicant was 67 years old at the time of the oral hearing. The oral hearing was the eighth review by the Parole Board.

Request for Reconsideration



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



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



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885

5. I have dealt below with the representations made on behalf of the Applicant and commented by way of discussion upon those representations.
6. I have listened to a taped recording of the oral hearing which was provided by the Parole Board.

Current parole review

7. The initial referral in relation to this matter was made in May 2018 by the Secretary of State. Since that initial referral there have been several adjournments and delays. The delays related to various matters including securing further reports, giving time for temporary release to be undertaken and giving time for psychological work to be completed.
8. The oral hearing was considered by a panel consisting of an independent member, a psychologist member, and a judicial member of the Parole Board. The panel heard evidence from the Applicant's Prison Offender Manager, his Community Offender Manager, and a prison psychologist. The Applicant was legally represented.

The Relevant Law

9. The panel correctly sets out in its decision letter the test for release.
10. 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 (as amended)

11. Pursuant to rule 28(1) of the Parole Board Rules 2019 a decision as to whether the prisoner is or is not suitable for release on licence is eligible for reconsideration when that decision has been made by an oral hearing panel after an oral hearing (Rule 25(1)).
12. Rule 28(2) of the Parole Board Rules provides that decisions relating to those serving indeterminate sentences are eligible for reconsideration (rule 28(2)(a)).
13. 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 a number of decisions including the decision on a previous reconsideration application in the case of **Barclay [2019] PBRA 6**.

Illegality

14. An administrative decision is unlawful under the broad heading of illegality if the panel:
 - (a) misinterprets a legal instrument relevant to the function being performed;
 - (b) has no legal authority to make the decision;
 - (c) fails to fulfil a legal duty;
 - (d) exercises discretionary power for an extraneous purpose;

- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

15. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

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."

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.

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.

22. 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."*

General

23. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
24. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.
25. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
26. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

The reply on behalf of the Secretary of State.

27. The Secretary of State indicated that no representations were to be made in this case.

Applicant's representations and Discussion

28. I have dealt below with the representations made on behalf of the Applicant and commented by way of discussion upon those representations.
29. **Ground 1** - Procedural unfairness - The Applicants solicitor argues that the decision letter, contrary to the terms of the referral letter by the Secretary of State, makes no reference as to whether it was considered appropriate for the Applicant to remain within the open estate and further that the decision letter did not indicate any continuing areas of risk that might be needed to be addressed nor any *"indicated steps"* that should be taken which would assist a future oral hearing panel. The argument being

that the referral by the Secretary of State related both to release and to advice concerning remaining within an open prison.

Discussion

30. This matter can be dealt with shortly. As explained above a decision to recommend or not to recommend a move to or from open conditions is not eligible for reconsideration under the Parole Board Rules. By extension therefore the question of whether the Applicant should or should not remain in open conditions and the question of any continuing areas of risk or any further steps which could be taken are not susceptible to the reconsideration process. The only matters which can be considered within a decision relating to reconsideration, following an oral hearing, relate to whether or not a direction for release has been made. I therefore determine that this ground is not a matter eligible for a reconsideration decision.
31. **Ground 2** -irrationality - The Applicant's solicitor notes that evidence given by the Prison Offender Manager and by the Community Offender Manager supported a direction for release of the Applicant. Additionally, evidence given by the prison psychologist cautiously supported release. The Applicant's solicitor argues that the decision was irrational, in the sense set out above, because the panel failed to take account of the professional views of the witnesses.

Discussion

32. As appropriately set out by the Applicant's solicitor, in the appeal representations, an oral hearing panel is not obliged to accept the opinions of professional witnesses. The panel must make its own risk assessments and evaluate the effectiveness of any risk management plan. Again, entirely appropriately, the Applicant's solicitor indicates that in a number of decisions the courts have indicated that in cases where the opinions or recommendations of professional witnesses are not followed, it is important that the panel should explain clearly its reasons for so doing and its reasons should justify its conclusions.
33. In this case the panel gave clear and convincing reasons for its own conclusions and gave reasons for departing from the views of the professional witnesses. The panel also, in its decision, faithfully included the positive as well as negative points within the decision.
34. The panel acknowledged that the Applicant had completed a recent positive day of temporary leave. The panel also acknowledged that the Applicant had a much improved relationship with professionals. Historically the Applicant had had a poor relationship with professionals, and the panel accepted that this aspect of potential risk had improved. The panel also acknowledged that the Applicant had an enhanced status within the prison merit scheme. He had maintained employment within the prison. He had expressed his regret concerning the offences he had committed in the past and he had indicated that he would not drink alcohol except in controlled circumstances for example a meal with friends.
35. Having acknowledged that there were positive factors to consider in the Applicant's case the panel set out clearly the reasons why it had come to the conclusion that the Applicant did not meet the threshold for release.

36. The panel took the view that the Applicant remained lacking in insight regarding his risk factors. Although the Applicant had completed recent one-to-one psychological work the panel took the view that they had been minimal improvement in his insight. An example of the minimal improvement was the fact that during the oral hearing itself the Applicant told the panel that "motivation is not an act". The panel's view was that the Applicant demonstrated a lack of understanding of risky thoughts and risk factors generally and how to deal with them.
37. The panel also noted that the Applicant had admitted that his offending, since 1984, had a background of sexual motivation, despite having said otherwise to professionals in earlier exchanges. The panel took the view that this inferred that the Applicant had not been honest about his motivation for offending in the past and therefore lacked insight into that offending.
38. The panel also noted that the Applicant, having been questioned about his understanding of consent in sexual circumstances, appeared to suggest that victims who were not in a position to escape and who may be detained might still be in a position to consent to sexual activity. In general terms, the panel took the view that the evidence received from the Applicant indicated a continuing absence of understanding of the fundamental basis of consent in the sexual context. This concern was directly associated with the facts of serious offences, committed in the past, by the Applicant.
39. The panel also indicated their concern relating to alcohol. Alcohol was a significant risk factor in relation to further offending in connection with this Applicant. The Applicant had taken alcohol, against the conditions of his temporary release on two occasions in 2021. He had also failed to disclose the fact, to professionals, that he had lapsed and that he had taken the alcohol. The panel took the view that in the circumstances of the Applicant being released on temporary licence, impulsive decisions to take alcohol were evidence of a lack of internal controls and of impulsive behaviour. Both being risk factors in relation to this Applicant.
40. Finally, the panel noted that the risk management plan involved the Applicant living in probation premises, a substantial distance from an area where he would have some level of support in the community. The Applicant's risk factors were identified as boredom and social isolation. The panel took the view that a release to an area unknown to him and a substantial distance from the limited support network which the Applicant had in the community was a further consideration.
41. The panel therefore demonstrated within the decision that it had carefully considered the views of the professional witnesses. It had taken account of the positive factors favouring the release of the Applicant, however the panel explained in some detail the reasons why it had concluded that the statutory test for release had not been met and concluded therefore that it remained necessary for the protection of the public that the Applicant be confined.
42. **Ground 3** – procedural unfairness -the Applicant felt that he was being "bullied and provoked" as a result of the questioning by a panel member.

Discussion

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

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

 info@paroleboard.gov.uk

 Parole_Board

 0203 880 0885

43. I have listened with care to the recording of this oral hearing. The Applicant elected to provide evidence to the panel. The role of the panel is to interrogate and test the evidence presented within the dossier and by the witnesses in order to reach a conclusion as to risk. In this case the Applicant had a long history of offences involving rape, violence, and detention (the victims of these offences being lone women some known to the Applicant some not known). The evidence from professionals was of a degree of minimisation by the Applicant of his offending. The professional evidence also indicated a lack of insight by the Applicant of the triggers and motivations relating to these offences. In this case there was clear evidence of a pattern of offending. The crucial factors in relation to assessing risk related to the pattern of offending and the background to that offending. The oral hearing panel would have been failing in its duty were it to ignore the historical pattern of offending despite the fact that the offences had been committed some years before the hearing. Having listened to the recording of the hearing I am fully satisfied that the panel member conducted the questioning in a measured, clear and forensic manner. The Applicant was given appropriate time to consider replies and to explain his responses. The Applicant himself replied in a measured and thoughtful manner to the matters which were being raised with him. The Applicant no doubt suffered discomfort because of the nature of the enquiries, and the fact that serious offences were being analysed and discussed. I am fully satisfied however that the questioning of the Applicant was relevant, balanced and proportionate. The evidence being assessed was extremely important and relevant to reaching a decision relating to the Applicant's risk. I therefore determine that this ground of appeal is lacking in merit and is rejected.

44. I am reinforced in this conclusion by the fact that the Applicant was represented by an experienced solicitor. No comment or complaint was made either at the time of the questioning or at the conclusion of the hearing relating to this aspect of the oral hearing.

45. **Ground 4** Irrational / procedural irregularity - Bias - The Applicant's appeal document indicates the following *"the Panel was entirely focussed on finding reasons as to why the Applicant should not be directed for release and indeed the Applicant forms the view, rightly or wrongly, that as the Panel were aware that this was a reconsideration hearing that the Panel were overly keen to ensure they did not direct release unless they had no choice whatsoever."*

Discussion

46. This ground is not developed further by the Applicant in the Appeal representations. The position in this case was that the hearing was a rehearing following an earlier Reconsideration decision. The panel were told that there had been a reconsideration decision and that this was a rehearing. The panel were specifically not told of the content of the original (Oral Hearing Panel) facts or of the decision. The findings and details of the reconsideration decision were also withheld from the panel. The panel therefore conducted the hearing on the basis that they were aware that this was a reconsideration but had no information about the basis of the reconsideration. The panel therefore had no information as to whether the original Oral Hearing Panel decision had been to release or to continue the Applicant's detention. In the circumstances I am not satisfied that there can be any basis for arguing that the panel, on the basis of this hearing being a reconsideration, were biased against the Applicant, or had an unfair view of the Applicant. No evidence of the suggested bias is indicated

in the Appeal document, save a general view that the panels' decision was not to recommend release.

47. In my determination the panel provided clear and detailed reasons for reaching its conclusion. The panel took account of all relevant factors. The panel took full account of the fact that professionals were recommending release. The panel explained its reasons for rejecting the views of the professionals. The panel's duty was to reach its own independent opinion having taken careful note of the views and representations of the witnesses and of the Applicant. The decision letter demonstrates that the panel explained, with care, the basis of its decision and reached its conclusion having taken account of all relevant factors. For these reasons therefore the application must be refused.

Decision

48. 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.

HH S Dawson
07 November 2022