

[2022] PBRA 5

Application for Reconsideration by White

Application

1. This is an application by White (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 23 November 2021 not to direct his release.
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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving a discretionary life sentence imposed on 12 February 2002 following conviction for wounding with intent to do grievous bodily harm to which he pleaded guilty. A further offence of assault occasioning actual bodily harm was taken into consideration. His tariff expired on 14 April 2005. This is his fifth parole review.
5. The Applicant was aged 21 at the time of sentencing. He is now 41 years old.

Request for Reconsideration

6. The application for reconsideration is dated 14 December 2021 and has been submitted by solicitors acting on behalf of the Applicant.
7. It advances three grounds for reconsideration:
 - a) The decision was procedurally unfair as it incorrectly recorded the Applicant's oral evidence in relation to a key issue;
 - b) The decision was factually incorrect and irrational in stating that the Applicant had been managed in intensive therapeutic communities until his transfer to his current establishment; and/or
 - c) The decision was irrational as it was at odds with the recommendations of report writers.
8. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section 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

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2020 to consider whether to direct his release or, if release was not directed, to consider whether he should be transferred to open prison conditions.
10. The case proceeded to an oral hearing before two independent members and a psychologist member on 23 November 2021. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), an independent psychologist (commissioned by the Applicant's solicitor), and a recovery worker. The Applicant was legally represented throughout. The Applicant's legal representative invited the panel to recommend a move to open conditions.
11. Witnesses supported a move to open conditions. The panel did not direct the Applicant's release nor make a recommendation for open prison conditions.

The Relevant Law

12. The panel correctly sets out the test for release in its decision letter dated 23 November 2021.

Parole Board Rules 2019

13. 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)).
14. 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**.

Procedural unfairness

15. 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.
16. 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.

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

Irrationality

17. 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."

18. 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.

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

The reply on behalf of the Secretary of State

20. The Secretary of State has submitted representations in response to this application. These relate to the length of the time the Applicant spent in closed conditions prior to his transfer to open conditions.

Discussion

21. This is an unusual case which warrants a careful analysis. Rule 28 can only be applied to the decision not to direct the Applicant's release. The Applicant was not seeking release and told the panel he did not feel ready for release. The Applicant was seeking a recommendation for open conditions which was not granted; the decision not to make any such recommendation cannot be subject to reconsideration.

22. The panel nonetheless had a duty arising from the terms of the Secretary of State's referral to consider the test for release regardless of the Applicant's wishes. It could only consider the question of open conditions after deciding that the Applicant did not meet the test for release.

23. The decision not to direct release must be procedurally fair and rational even if the Applicant is not seeking release.

24. It is not clear whether the grounds raised in the application for reconsideration are pleaded in relation to the decision not to direct release or the decision not to recommend open conditions. I can only consider them in relation to the panel's decision not to direct release.

25.Regarding the matter of procedural unfairness raised in ground (a), **R(Grinham) v Parole Board [2020] EWHC 2140 (Admin)** provides that if procedural unfairness is found, it also has to be shown that the decision not to direct release might have been different. Even if I found procedural unfairness on ground (a), I cannot see that the decision not to direct release would have been any different. There was no support for release, no developed risk management plan and the Applicant was not seeking release. Ground (a) has no prospect of success and must fail.

26.Moving on to the matters of irrationality pleaded in grounds (b) and (c), the panel's overall decision not to direct release cannot be said to be irrational in any way for the reasons set out above. I cannot conceive that any other panel (let alone all other sensible panels) would have concluded otherwise. Grounds (b) and (c) must also fail.

Decision

27.For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
10 January 2022