

[2023] PBRA 184

Application for Reconsideration by Parton

Application

1. This is an application by Parton (the Applicant) for reconsideration of a decision of a Parole Board Panel dated 20 September 2023 not to direct the release of the Applicant but recommending that he remained in open conditions following an oral hearing dated 7 August 2023.
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 application for reconsideration, the decision letter and the dossier consisting of 387 pages.

Background

4. The Applicant was convicted of murder and sentenced on 20 June 2005 to life imprisonment with a minimum term of 18 years to serve before he can be considered for release on parole. His tariff expired on 11 November 2022. A previous panel who considered the Applicant's case recommended on 26 November 2020 that he be transferred to open conditions. That recommendation was accepted by the Secretary of State (the Respondent) and the Applicant was transferred to an open prison on 24 December 2020. The Applicant has generally done well while in an open prison and has completed many temporary leaves when he has stayed with his mother.

Request for Reconsideration

5. The application for reconsideration is dated 9 October 2023.
6. The grounds for seeking a reconsideration are that the review was procedurally unfair and that the decision of the panel was irrational.

Current parole review

7. The oral hearing took place on 7 August 2023, but the decision was adjourned to obtain further information about the accommodation suggested in the risk management plan as the place where the Applicant would be released to if parole



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was granted. The suggested address was the home address of the Applicant's mother and partner and its suitability had to be assessed by the local Probation Service who would have to supervise the licence. The adjournment directions provided that written submissions should be submitted after the information had been supplied and after the legal representative had had an opportunity to take instructions from the Applicant. The Panel intended that the decision would then be provided in writing but reserved the right to hold a further oral hearing if that was necessary.

The Relevant Law

8. The Panel correctly sets out in its decision letter dated 20 September 2023 the test for release and applied it in reaching its conclusions.

Parole Board Rules 2019 (as amended)

9. The decision of the Panel in this case is eligible for reconsideration.

Irrationality

10. 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."

11. 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.

Procedural unfairness

12. 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.

13. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

15. The Respondent has made no submissions in response to this application.

Discussion

16. During the hearing the Panel heard evidence from the Prison Offender Manager; a Prison Psychologist; the stand in Community Offender Manager (COM) and the Applicant. The professional witnesses all supported release but the Panel attached less weight to the evidence of the COM as she had had very little to do with the case prior to the hearing.

17. It was apparent that the matter could not be concluded immediately after the hearing as there were outstanding matters that the COM had to complete which included a suitability for release assessment to be undertaken at the address of the Applicant's mother. This needed to be done to complete the risk management plan. Reading the decision letter, it is clear that the Panel were concerned about the suitability of the mother's home as the Applicant's residence immediately after release, in the light of the seriousness of the index offence and the difficulty there may be to supervise the Applicant in the initial stages of parole if he was to be living there.

18. The COM reported back on those inquiries on 14 August 2023. The report included this information "[the proposed release] *address has been deemed a suitable release address by the [relevant] Probation Office. The assessor concluded that the 'address in my assessment is suitable, it is isolated which is both a protective factor and a risk however I believe that the risk can be managed'*". However, the report contained two pieces of information which concerned the panel. First, the report said at the end of para 1 "*During the visit there were some concerns that [the Applicant's] mother minimised and colluded with [the Applicant's] offending behaviour. For instance, she voiced that aspects of the case were 'unfair' and in her words 'lies'*".

19. Secondly the report said at para 2 "*During discussions with [the Applicant's] mother, she indicated that [the Applicant] is experiencing a level of paranoia and fear, that she may come to some form of harm as a result of the index offence. She indicated that [the Applicant] continues to be very worried about her and whether any harm would come to her as a result of the murder. In spite of this there is no evidence of any threats to [the Applicant's] mother. [The Applicant's] mother described that during one of [the Applicant's] overnight RoTL's [periods of temporary leave from open prison] to her address he was paranoid and worried. Believing that someone was trying to gain access to the property. [The Applicant's] mother suggested that if [the Applicant] had his way, he would have erected a large gate and installed some form of fencing around the property. The assessor added 'I am aware that [the Applicant] was fearful for his mother's safety when the index offence took place and in my assessment this does appear to be a risk that will need to be monitored,*



based on my brief conversation with Mum that if [the Applicant] believes that Mum is at risk or is being threatened this could increase risk, however again I believe this can be managed as based on the limited time I have had to read his case there will be signs and evidence of increased paranoia and a worsening of his mental health".

20. Following service of that report the Applicant's legal representative put in his submissions to the Panel. The representative clearly had taken the Applicant's instructions on the latest report and he deals with the concerns expressed in that report at pp. 367/368 in the dossier where the legal representative says: *"The assessor did raise two concerns within the report but still concludes that the risk is manageable if [the Applicant] is released to the property. There are contingency plans if any issues arise with the accommodation. [The Applicant] understands the concerns raised in the recent report. He is aware that he cannot rely solely on his family as a supportive network and is confident that as he builds on his employment plans he will increase his social network. The report highlights the need for [the Applicant] to remain open with professionals and honest about his anxiety and concerns. [The Applicant] is fully aware of what is expected from him and he has showed good insight in the future challenges in the community and has the skills and support to deal with such challenges in the appropriate way."* It is to be noted that the written submissions do not suggest that the Applicant challenges the contents of the report or that he wishes to give or call further evidence about it. Nor does it suggest that the Applicant or his legal representative would wish to explore the matter further nor suggests that the Panel should.
21. The Applicant complains that the procedure adopted was unfair in that *"the decision letter has relied on hearsay evidence from an un-named Probation Officer who has completed a home suitability check without providing [the Applicant] with the opportunity to question the witness. The Parole Board have failed to make a fair and reasonable finding of fact on the information"*. Further it is said that the procedure was unfair because *the "Parole Board have relied on material and concerns that have not been put to [the Applicant], in particular the allegation that he was paranoid during an ROR [a period of temporary release from open prison] which was raised in a conversation (post hearing) with his mother during the Home Suitability Check."*
22. While it is part of the requirement for a fair hearing that the prisoner is given the opportunity to know the case against him and comment on it, the Applicant did know the content of the further report before his final submissions had been put in. Quite rightly the legal representative had taken instructions on the contents of that document and responded to it in his submission. No suggestion is made in those submissions that the Applicant disputes the correctness of the information or wants to ask further questions of the person who carried out the checks. The Panel had specifically said that they would hold a further oral hearing if they considered it necessary. If the Applicant took the view that further investigation of the matters referred to in that report were necessary, the time to say so was in the submissions; not wait for the decision and then complain. The Panel were perfectly entitled to take the view from the submissions that there was no requirement for any further hearing. The Panel were perfectly entitled to assume that if the Applicant disputed the contents of the report or wanted the matters explored further he would have made that clear. In my judgment, the Applicant had a fair hearing.



23. It is also submitted that it was also procedurally unfair for the Panel not to have adjourned their decision to investigate whether a suitable approved premises could be found as an alternative to the proposed release accommodation.
24. The Panel were concerned about the risk management plan because of the proposed release accommodation and might have reached a different decision if approved premises could be found. They considered adjourning but decided not to because they decided it could take some time and they also wanted the Applicant's reported paranoia to be investigated.
25. What they did do was to recommend that the matter should be referred back to the Board within 9 to 12 months which they considered a reasonable time frame for investigating the matters which they decided needed to be investigated.
26. That also in my judgment was not unfair but was a sensible, realistic and pragmatic approach.
27. I have gone on to consider whether the decision was irrational. When considering irrationality, it is important to remember the high bar which has to be overcome in order to establish irrationality. It is important to take into consideration that the Panel hears the evidence and is in the best position to assess and judge that evidence and make a decision based on it.
28. It was not irrational to be concerned about the risk management plan. The Applicant had committed a terrible crime and to release him without careful consideration of the risk management plan would not have been sensible. While the Applicant had done well in closed and open prison and made considerable progress, the panel were entitled to consider whether releasing him to his mother's address provided enough protection to the public. The Panel acted on the information that they had. The panel were entitled on the evidence that they had to conclude that the mother "*could potentially be a collusive influence*" and that the anxiety and fear for his mother's safety was capable of being offence paralleling behaviour. The consequence of that was that the Panel were not satisfied that the test for release was met.
29. The explanations for the decision given in paragraphs 3 and 4 of the decision letter adequately set out the reasons for the decision.

Decision

30. 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. I do support the recommendation that the Applicant's case should be referred back to the Board within 9 to 12 months.

Sir John Saunders
30 October 2023