

[2023] PBRA 63

Application for Reconsideration by Zouaoui

Application

1. This is an application by Zouaoui (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated the 6 March 2023, following a video-link oral hearing, on 16 December 2022. The decision of the Panel was not to direct release. The case was formally adjourned at the conclusion of evidence, for additional information and for written submissions from the Applicant's Legal Representative.
2. There had been an earlier adjournment of the case due to unavailability of a witness and a suggested development of an alleged assault, in custody, by the Applicant.
3. 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. This is an eligible case.
4. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier consisting of 505 pages (including the decision).

Background

5. The Applicant was sentenced in January 2015 to an Extended Sentence of imprisonment totalling 13 years and consisting of a custodial element of 10 years and an extension period of 3 years. The Parole Eligibility Date was 27 April 2021, Conditional Release Date 26 August 2024 and the Sentence Expiry Date 13 May 2027. The offences, all committed on 13 May 2014, were possession of a firearm and ammunition with intent to endanger life, possession of a firearm without certificate and possession of a Class B Drug (cannabis) with intent to supply. He had pleaded guilty to the last 2 offences and was convicted by a Jury after denying possession of a firearm and of ammunition with intent.

Request for Reconsideration

6. The application for reconsideration is undated but submitted by the Applicant's Legal Representative on 16 March 2023. It seeks reconsideration on the grounds that the decision is procedurally unfair, producing "a manifestly unfair, flawed and unjust result."



7. The grounds for seeking a reconsideration, were prepared by the Applicant personally, or on his behalf albeit submitted, without comment, by his Legal Representative. The grounds are set out in considerable detail in 3 pages of closely argued, small font typed, submissions. It is not necessary to reproduce the application in full, but all sections have been considered. The Panel takes the view that the thrust and detail of the submissions, in effect, also challenge the basis of the decision and, arguably, go to the issue of irrationality. It has, therefore, in fairness to an effectively unrepresented Applicant, considered that aspect also. Aspects relevant to procedural unfairness and irrationality are dealt with below.

8. The Applicant submitted:

Procedural Unfairness (and/or Irrationality).

9. In applying the test for release the Panel, having failed to consider available evidence which had not been provided to the Board, placed undue weight on false allegations and came to its conclusion notwithstanding "*all other positive features.*"

10. Following a cell search in May 2022, there had been "*a very serious and intricate cover up*" by the prison authorities to hide the facts and that false information had been provided to the Prison Offender Manager (POM).

11. That the Applicant had been falsely accused of violent behaviour and that an alleged enquiry by the Prison Security Department and Police failed to provide "*any logical or reasonable*" justification as to why the case had been dropped. Accordingly the weight placed by the Board on this alleged offence was procedurally unfair.

12. That there was a "*failure to properly inform*" the Applicant of "*a case against him regarding [Ms AT], that the factual basis was incorrect and, in the absence of no other accusations or reports of intimate or domestic abuse*" the Panel having "*based their decision heavily on there being a history of this*", there was procedural unfairness resulting in the proceedings being fundamentally flawed and producing "*a manifestly unfair, flawed and unjust result.*"

13. That the Panel reached an "*unfair and flawed*" conclusion that the Applicant had not internalised learning from completed interventions, again resulting in procedural unfairness. Matters of evidence were referred to by the Applicant and "*we would further argue that their conclusion may even be deemed irrational based on these facts.*"

14. The Panel had relied on an inaccuracy as to gang affiliation and accordingly here was a further flaw in the proceedings and "*failure in the ability to conduct a fair hearing.*"

15. The Panel failed fairly to give appropriate credit for the Applicant's efforts to establish a "*rapport*" with a newly appointed Community Offender Manager (COM).



16. The Panel failed to give proper weight to agreed evidence from the 2 psychology witnesses that the Applicant did not pose an imminent risk of causing serious harm.
17. That in referring to the Panel's "*inevitable concern*" as to the Applicant's "*entrenched offending history and his repetition of acts likely to cause serious harm or fear of serious harm to others in the past*", the Panel relied "*exclusively*" on matters of rule breaking ending in 2021 and which, whilst regretted by the Applicant, were unlikely to suggest risk of serious harm or fear of serious harm.
18. In conclusion, the Applicant repeated that the proceedings were "*fundamentally flawed*", producing a "*manifestly unfair, flawed and unjust result based on very serious but completely false*" accusations against him, with undue weight being placed on falsehoods. There was a failure to "*follow established procedures*" with necessary information not presented to the Panel and false accusations presented as factual.

Response from Secretary of State

19. The Secretary of State (SoS), by e-mail dated 22 March 2023, indicated that no representations were made in response to the Application.

Current parole review

20. The Panel considered a Dossier, then, of 463 pages.
21. The case was referred to the Board by SoS on 28 September 2020 as an EDS Sentence Case and the Board asked to consider whether it would be appropriate to direct release. At the oral hearing, the Panel heard evidence from the Prison Offender Manager (POM), the COM, a Prison Psychologist and Independent Psychologist both of whom had submitted reports (including a jointly agreed document) contained in the dossier and from the Applicant.
22. In its 13-page decision, the Panel dealt in detail with evidence as to the index offences and with the Applicant's substantial offending history which including robberies and supply of Class A drugs and substantial custodial sentences. It gave him credit for completing offending behaviour courses "*a range of interventions*" and in-cell work with custodial substance misuse services. It expressed concern as many instances of poor custodial behaviour and "*multiple proven adjudications*", his periods in the Segregation Unit and what were described as security transfer between prisons as a result of his behaviour. His poor behaviour was said to have continued in 2021, although a psychology assessment commissioned by his Solicitors, advised, contrary to the view of the Prison Psychologist, that the Applicant could be supported. It further noted that the alleged assault on another prisoner had not led to a prosecution.



23. The Panel reported that, following transfer of prisons in May 2022, the Applicant had showed a period of stable conduct and achieving Enhanced status. The joint psychological assessment agreed that there was no evidence that the Applicant posed an imminent risk of serious harm, that no further core risk reduction work remained outstanding and that the likelihood of further serious violence lay between low and medium. It noted that, again, the Independent Psychologist considered that he could be safely managed in the community.
24. The decision set out in detail evidence given by the POM, the Psychologists and COM with almost one and half pages devoted to the Applicant's own evidence. It recorded that the Prison Psychologist considered the proposed Risk Management Plan (RMP) to be "*relatively limited*", that the Applicant might not be honest with professionals managing him and that, although risk of violence was not considered imminent, that risk was "*more than minimal*." It further recorded that although, the Independent Psychologist continued to advise that the Applicant's risks could be managed in the community, she did so "*with some hesitation*." It further recorded that the COM supported release but that he had known the Applicant only for 2 weeks but was "*hopeful*" of establishing a good relationship.
25. The Panel set out additional information received after the oral hearing which had been obtained in accordance with Directions requiring a more detailed RMP. No objection had been received from the Applicant or his Legal Representative as to the specific requirements, nor were any concerns raised in the written representation which specifically said that the Applicant was aware of the Licence Conditions and "*is happy to abide by them*." Those conditions include reference to persons who "*currently or formerly associated with named gangs*."
26. In coming to its conclusion, the Panel found, in the Applicant's favour, that he had sustained family support and was said to be highly motivated to engage and comply if he were released from custody. It emphasised, however, its concerns as to the Applicant's offending history and that, although there was evidence of positive change, this was of relatively short duration when weighed against enduring rule breaking, emotional instability, aggression and substance misuse all of which raised concerns that the Applicant could easily be destabilised if he returned to the community currently. The Panel accepted that the Applicant might not currently present as posing an imminent risk of serious harm but was not satisfied that such risk was only minimal indefinitely.

The Relevant Law

27. The panel correctly sets out in its decision letter the test for release.
28. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.



Irrationality

29. 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."

30. 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.

32. 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

33. 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.

34. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy this Reconsideration Assessment Panel (RAP) 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.

35. 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*



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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.

36. 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.*"
37. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.
38. The Panel is subject to the '*duty of enquiry*', a duty which has been explained in various decisions of the courts and of reconsideration panels including, for example, **Samuel [2021] PBRA 100**: 'One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary), for that purpose.'

Discussion

39. I have carefully considered this application and am satisfied that there has been neither procedural error nor irrationality in the decision. The Applicant was represented by an experienced Legal Representative who, following the hearing, in a 6-page written submission, fully outlined her client's case and made no application for further oral evidence in relation to the additional information provided in response to the Directions.

Procedural Unfairness:

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40. In effect, the Applicant's application centres not around procedural issues but around matters of evidence, much of which, he claims, was unavailable due to false information and alleged concealment of information by the prison authorities and the Police. These were not matters suggested by the Legal Representative as germane to the case and I am satisfied that procedures were properly followed and that the Applicant had full opportunity to present his case on all matters which formed the basis of the Panel's conclusion.

Irrationality

41. It is difficult specifically to distinguish the grounds of Application from each other and my conclusions as to procedural error are also relevant to irrationality. On the sole ground which the Applicant concludes "*we would further argue that their conclusion may even be deemed irrational based on these facts*", the Applicant raises concerns as to evidence given by the Prison Psychologist and the Applicant's disagreement as to a finding in relation to his internalisation of learning from interventions undertaken by him. I find that the issues were dealt with entirely fairly – if, in fact, a Panel differs from the clear advice of professionals, it should give the basis for its findings. In this case it is not always easy to find precise advice from the professional witnesses particularly as they had been labouring under the difficulties of the "*no recommendations*" constraints and, also, from the limited knowledge of the stand-in COM. It is clear to me, however, that such views as were expressed were carefully explored during evidence and that the Panel gives evidence-based reasons for its decisions.

Decision

42. 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.

**E.
Slinger
4 April 2023**

