

[2024] PBRA 14

Application for Reconsideration by Smith AKA Derber**Application**

1. This is an application by Smith AKA Derber (the Applicant) for reconsideration of the decision of an oral hearing panel dated 20 December 2023 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier (consisting of 482 pages), and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) on 12 March 2009 following conviction for rape to which he pleaded guilty. His tariff was set at three years and four months less time spent on remand. He received a second concurrent IPP with the same tariff for robbery to which he also pleaded guilty. The IPP tariffs expired in September 2011. He was also made subject to an order under section 45A of the Mental Health Act 1983 and initially detained in a medium secure hospital unit.
5. The Applicant was 44 years old at the time of sentencing and is now 59 years old.

Request for Reconsideration

6. The application for reconsideration is dated 2 January 2024 and has been drafted by the Applicant.
7. It argues that the decision contained an error of law as well as being irrational and procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. This case was referred to the Parole Board by the Respondent in March 2023 to consider whether or not it would be appropriate to direct the Applicant's release. If



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release was not directed, the Board was asked to advise the Respondent whether the Applicant should be transferred to open prison conditions.

9. The review progressed to an oral hearing on 11 December 2023 before a three-member panel, including both psychiatrist and psychologist specialist members. Oral evidence was taken from the Applicant together with his Prisoner Offender Manager (**POM**), his Community Offender Manager (**COM**) and a HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. None of the professional witnesses supported release. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the decision not to release the Applicant that is open for reconsideration.

The Relevant Law

11. 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

12. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
13. 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)).
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.

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

Irrationality

18. 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."

19. 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.

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

Error of law

21. 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.

22. 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.

The reply on behalf of the Respondent

23. The Respondent has submitted no representations in response to this application.

Discussion

Error of law

24. It is first argued that the panel made an error of law following *R (Guittard) v Secretary of State for Justice* [2009] EWHC 2951 (Admin) which, it is said, establishes that a prisoner must be released if he shows normality in jail for at least seven months. This is incorrect (and, in any event, *Guittard* does not deal with the Parole Board's statutory test for release).

25. It is also argued that the Applicant cannot be detailed for longer than seven weeks as he is an "overstay prisoner". This is also incorrect.

26. It is also noted that there is "no current law on IPP" since the sentence has been abolished. While IPP sentences can no longer be imposed, there is undoubtedly a statutory release test which applies to IPP prisoners. This is the test set out in section 28(6)(b) of the Crime (Sentences) Act 1997 and which has been correctly stated (and applied) by the panel.

27. The panel has made no error of law, and this ground fails.

Procedural unfairness

28. Next, it is argued that the process was procedurally unfair because:

- a) The panel did not ask the correct questions;
- b) The panel did not pay attention to the Applicant or what he said;
- c) The panel believed that witnesses had qualifications;
- d) His POM "lied sporadically and proficiently"; and
- e) According to law, a prisoner can ask to leave prison as long as they "talk normally to people".

29. There is no evidence before me which suggests that any of the above is true, and this ground also fails.

Irrationality

30. Finally, it is argued that the decision was irrational, because "the women" (which I take to mean the female witnesses) acted irrationally toward the Applicant. The Applicant contends that they were careless in their evidence and "didn't give a shit about what [he] had to say". As such, their evidence was erroneous conjecture based on supposition and violated his human rights.

31. Again, there is no evidence whatsoever before me upon which it can sustainably be argued that the panel's decision was irrational in law.

Decision

32. The panel notes that the Applicant has a problematic interaction style with professionals (which included the panel itself) and acts in a combative or dismissive manner as a means of defending himself. His application for reconsideration may be

viewed in exactly the same way. He is clearly and demonstrably aggrieved, but the panel's decision is logical, thorough, rational, clear, and focussed on evidence throughout. It applies the correct legal test. The Applicant's vehement disagreement with the decision, the way in which it was reached, and the participants in his oral hearing does not change that.

33. For the reasons set out above, the panel's decision was not unlawful, procedurally unfair or irrational, and the application for reconsideration is refused.

Stefan Fafinski
18 January 2024