

[2020] PBRA 119

Application for Reconsideration by Gomez

Application

1. This is an application by Gomez (the Applicant) for reconsideration of a decision of an oral hearing dated the 29 June 2020 not to direct release and to recommend open conditions.
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 dossier, an undated application from July 2020 and a response from the Secretary of State dated 6 August 2020.

Background

4. The Applicant is serving an indeterminate sentence for public protection for an offence of section 18 Wounding. He was convicted on the same occasion of two offences of sexual assault on a female. At the time of the offences, he was subject to a suspended sentence for a racially aggravated public order offence. He was aged 35 at the time of the offence and is now 49. His minimum tariff of one year and 233 days expired on 12 February 2009.

Request for Reconsideration

5. The application for reconsideration is undated, with the front page stating, "*compiled and submitted in July 2020*". The application was received by the Parole Board via email on 30 July 2020. I am satisfied that it was received within the required timeframe of 21 days of the decision being issued.
6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and, reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.
7. The grounds for seeking a reconsideration are as follows:



- (a) That the decision not to release the Applicant was irrational in that the panel concluded that his release would have been directed but that his risk management plan could not be implemented due to the restrictions imposed on services by the COVID-19 pandemic.
- (b) That the decision not to direct an adjournment was procedurally unfair.

Current parole review

- 8. The case was referred to the Parole Board in June 2019. An amended referral was submitted to the Parole Board in October 2019. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence.
- 9. If the Board decided not to direct the Applicant's release, the referral invited the Board to advise the Secretary of State: (a) on the Applicant's continued suitability for open conditions, if relevant; (b) whether the Applicant, if in closed conditions, should be transferred to open conditions. If the Board decided to make such a recommendation, the referral then invited the Board to comment on the degree of risk involved, and (c) on the continuing areas of risk that need to be addressed.
- 10. The referral was considered by a Member Case Assessment panel on 11 February 2020 which referred it to oral hearing.
- 11. The oral hearing was heard remotely by a three member panel, which included a Psychologist member. It was not possible to hold the scheduled oral hearing face to face at the prison due to restrictions imposed by the COVID-19 pandemic. Oral evidence was heard from the Offender Manager (OM), Offender Supervisor (OS), Prison Psychologist and the Applicant. The Applicant was legally represented throughout and representations were made on his behalf.

The Relevant Law

- 12. The panel correctly sets out in its decision letter dated 29 June 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

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)).

Irrationality



14. 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."

15. 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.

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

17. 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."*

Procedural unfairness

18. 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.

19. 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.

The reply on behalf of the Secretary of State



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20. The Secretary of State has replied to the application by an email dated 6 August 2020, offering no representations.

Discussion

21. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage too of hearing the Applicant as well as the Offender Manager, Offender Supervisor and the Prison Psychologist who authored the psychological risk assessment dated May 2020. The Applicant was also legally represented throughout.

22. Panels of the Parole Board have a 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.

23. 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.

24. 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.

Irrationality

25. The panel concluded that the risks posed by the Applicant were manageable in the community and that they lacked imminence, with a key proviso that an effective risk management plan needed to be put in place. The risk management plan proposed was assessed as being robust and providing intervention, controls and supports that are relevant to the Applicant's case. The panel also considered that the Applicant was motivated and able to comply with his risk management plan and with his licence conditions. However, they went on to conclude that due to the COVID-19 restrictions the risk management plan and proposed licence conditions could not be fully implemented, meaning that a safe return to the community would not be ensured. For that reason, his release was not directed.

26. The panel went on to recommend a transfer to open conditions and recommended a shorter review period for his next parole review.

27. The restrictions placed upon the professionals supporting those on licence by the COVID-19 pandemic are temporary, with these being gradually relaxed from those imposed in the early days of 'lockdown'. The risk management plan put forward by



the Offender Manager was acknowledged as being one which was incapable of being delivered due to the COVID-19 restrictions. The inability to deliver a risk management plan which is adequate to cater for the Applicant's known risk factors in the community led to the panel's conclusion that the Applicant could not be safely released. This conclusion accorded with the consensus of professional opinion from the Offender Manager and Offender Supervisor. Where the support agencies do not have the ability to deliver an adequate risk management plan which is necessary to manage the risks of the Applicant, the panel was quite justified in concluding that the Applicant did not meet the test for release. Accordingly, there is nothing in this ground.

Procedural unfairness

28. The application states that, *"If the sole reason as to why a prisoner cannot be released is a non-workable risk management plan, the case should be adjourned, not concluded with a negative decision."* Determining whether or not to adjourn a case is an exercise of judicial discretion. The panel must consider factors such as the effect upon the Applicant, other prisoners whose cases remain to be heard and the public interest in having a timely conclusion of each review.
29. The COVID-19 pandemic has created restrictions upon daily life across England and Wales, which includes the functioning of those agencies and individuals who support those on licence in the community. There were no estimates of how long the restrictions will be in force which were provided to the panel. There was not therefore evidence to enable the panel to identify a date within a reasonable period for any adjourned hearing to resume.
30. The panel recommended to the Secretary of State that an early referral be considered for the Applicant, demonstrating their appreciation of his position and the progress he has made so far and the restrictions in place by the COVID-19 pandemic which may be lifted in the not too distant future. In all these circumstances the decision not to delay concluding the Applicant's parole review was fair and rational, and I find there was no procedural impropriety or unfairness in this decision.

Decision

31. 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.

Angharad Davies
7 September 2020

