

[2022] PBRA 129

Application for Reconsideration by Davis

Application

1. This is an application by Davis (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 4 August 2022 not to direct release 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.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 4 August 2022;
 - b) A request for reconsideration from the Applicant in the form of representations from his legal representative;
 - c) The dossier, numbered to page 306, of which the last document is the Decision Letter. The panel had a dossier numbered to page 292, together with written closing submissions.

Background

4. The Applicant is now 50 years old and was 49 years old at the time his case was considered by the panel. On the 24 January 2008, when he was 35 years old, he received an extended determinate sentence following his conviction for seventeen offences of rape committed between 2002 and 2007. The extended sentence for these offences (the Index Offences) was set with a custodial element of fourteen years and an extended licence period of ten years.
5. The Applicant was released automatically, as is required by law, on the 16 February 2017 but was recalled to custody on the 10 July 2020 following the discovery of computer devices in his home and an allegation that he was in possession of indecent images of children. He was later charged with these matters, although the allegation of possessing indecent images was not pursued and he was convicted on two counts of breaching his Sexual Harm Prevention Order (SHPO) by being in possession of two devices that those supervising him had been unaware of. The Applicant had admitted the SHPO breaches.



6. The case was referred to the Parole Board by the Secretary of State to consider whether his release should be directed. If not released following that referral, the Applicant would otherwise be released in October 2031 unless he were to be released at a future review. At the time of his recall, the Applicant was still in the custodial term of his sentence. By the time the panel concluded its review, the Applicant was in the extended term of his sentence, however, having been recalled to custody, he can only serve that extended term in the community if his release is directed.
7. The case was initially considered on the papers by a panel of the Parole Board in September 2020. That panel did not direct his release. The Applicant then applied for his case to be considered at an oral hearing which is allowed for under the Parole Board Rules. That application was granted on the 20 October 2020.
8. The panel first convened an oral hearing on the 23 February 2021 but a charging decision was still awaited by the Crown Prosecution Service and so the case was adjourned. Further delay emerged before matters were resolved and the panel then considered the case at an oral hearing on the 26 July 2022. The panel heard evidence from the Applicant, from the official supervising his case in custody, his Probation Officer based in the community and from a psychologist instructed by the Applicant's legal representative. The Applicant asked that his re-release be directed and this view was supported by the psychologist witness. The Probation Officer based in the community did not support release. The panel, in its Decision Letter, declined to direct the Applicant's release.

Request for Reconsideration

9. The Applicant's grounds for reconsideration are that the panel's decision was procedurally unfair, in that:
 - a) The Applicant's closing written submissions were not taken into account in the Decision Letter;
 - b) The psychologist's recommendation for release was not accurately recorded in the decision letter and it was not clear which professional did not support release;
 - c) The Applicant's reasons for committing the Index Offences were only partially recorded by the panel in the Decision Letter and this inaccuracy translated into a conclusion that the Applicant did not show insight into why he offended;
 - d) The Applicant argues that the panel did not give weight to the extended time he spent in the community, evidencing compliance, following his arrest for the matters that led to his recall;
 - e) The Applicant argues that the panel perhaps did not apply the '*balance of probabilities*' test when making a finding of fact in respect of the allegation leading to his recall; and
 - f) The Applicant argues that there are conflicting and confusing statements in the Decision Letter.

The Relevant Law



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

10. The panel correctly sets out in its decision letter dated the 4 August 2022 the test for release.
11. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"When consideration is being given to release on licence of a prisoner serving the custodial term of a determinate sentence, the issue for the Board is whether it is no longer necessary for the protection of the public that the prisoner be kept in custody. To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration of that exercise ignores the fact that the statutory test has no temporal element. It is, therefore, wrong to say that the Board is not empowered to consider risk after the expiry of the appropriate custodial term. If a prisoner will pose a danger after the expiry of that term, that is bound to be relevant to the issue of the safety of the prisoner's release prior to that point.

The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). 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)).

Procedural unfairness



14. 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.
15. 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.
16. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

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."*
18. 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 uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for 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.



The reply on behalf of the Secretary of State

19. In an email of the 13 September 2022, the Secretary of State confirmed that he would not be making any representations.

Discussion

20. The Applicant argues that the closing written submissions were not taken into account in the Decision Letter, although he accepts that page two of the Decision Letter records that *'Solicitors' representations as agreed'* were received after the hearing. The Applicant's complaint appears to centre on the fact that the submissions were not referenced in the *'body'* of the document. However, the panel was not required to rehearse all aspects of the case or to record the detail of the submissions. It properly referenced that it had received the written submissions and it produced its Decision Letter following their receipt. I am satisfied that the panel considered the written submissions in its consideration of the case.

21. The Applicant's suggestion that the psychologist's recommendation for release was not accurately recorded is not a correct analysis when reading the Decision Letter in its entirety. In paragraph 3.3 of its Decision Letter, the panel had this to say:

'In evidence, [the psychologist] considered further work on risk to be useful and beneficial. She did not consider it necessary, as she believed that risk could be managed by external controls, subject to compliance issues ...'

22. It is reasonable to conclude, in reading the Decision Letter, that the psychologist was satisfied that the Applicant did not need to remain in custody to complete offence focussed work and that he could be released. The psychologist's report, which was before the panel, recommended the Applicant's release and it cannot be said that the panel was not clear on what the recommendation of this witness was.

23. I can understand the Applicant's comment about it not being clear about which professional was not recommending release because the panel referred to this as being the *'previous [Probation Officer]'*. My reading of this is that the panel made a typographical error and it was referring to the fact that although Probation had previously supported release it was no longer doing so because the Applicant had been assessed as meeting the criteria for offence focussed work in custody. Even if I am wrong on that reading, it is not something that can be considered to be procedurally unfair because a) the Applicant was legally represented at the oral hearing, was in a position to ask questions of witnesses



and his Probation Officer was present; b) the Applicant was aware of the professionals' views when he filed his closing written submissions, otherwise he surely would have highlighted the issue; and c) the panel was required to undertake its own assessment of risk and was not obliged to follow any recommendations. In respect of the latter point, panels of the Parole Board are very much aware of the need to make their own assessment of risk because the Secretary of State has, through an amendment to the Parole Board Rules, prevented his witnesses from providing a recommendation in their written reports. Although, whether the Secretary of State has the power to control the evidence received by the Parole Board in this way is currently being litigated in the High Court.

24. The Applicant submits that he was questioned at the oral hearing about the Index Offences but he complains that his reasoning was only partially recorded in the Decision Letter and led to an inaccurate conclusion that he lacked insight into why he offended. Nevertheless, he accepts that the reasons he gave as to why he thought the Index Offences happened were recorded within a summary of the evidence in the Decision Letter in respect of the psychologist's evidence.

25. It is helpful perhaps to record some of the history of this case. The Applicant was convicted of seventeen counts of rape, on a female who was aged between 7 and 11 years of age, and his offending covered a period of several years. Reports before the panel identified a degree of minimisation and rationalisation in the Applicant's account of his behaviour. He told the panel his offending was attributed to emotional factors, rather than a sexual attraction, although the panel noted that he had previously indicated that the offences were '*purely about sex*'. The Applicant told the panel that the offences '*just happened*', even though he was aware that the victim was a child and that his actions were illegal.

26. In its Decision Letter, following its recording of the Applicant's account of his offending, the panel recorded the psychologist's formulation which indicated that the Applicant was socially isolated, lonely, not confident in meeting women or in social situations and that in the lead up to his offending his isolation increased with the breakdown of his relationship. The psychologist noted that the Applicant would use pornography and would masturbate on a daily basis, which indicated sexual preoccupation, and that he used alcohol, offended against the victim and did not have the skills to stop doing so.

27. In its conclusion, the panel found the Index Offences to be serious, with planning and premeditation. It noted that there were '*distinct periods of offending, punctuated by periods of desistance, which indicated that [the Applicant] was able to manage his behaviour*'. However, the panel, in considering the Applicant's evidence, was not persuaded that he showed insight into why he offended and it could not find other evidence of risk reduction. The panel was



aware, through no fault of the Applicant, that he had been unable to complete offence focussed work in custody but that a change in assessments meant that he would now be eligible to undertake a course. In the absence of risk reduction work, the panel assessed the Applicant on the basis that he was an untreated sex offender and that risk management would be likely to rely on external controls rather than the Applicant's ability to manage himself. The panel was alive to periods of compliance on licence but the events leading to recall meant that the panel could not rely on the Applicant's ability to work honestly with professionals which, in its view, would undermine the external controls of the risk management plan.

28. Any reading of the Decision Letter gives a clear understanding of the panel's assessment of the Applicant's offending and there was nothing unfair in its approach. The Applicant's complaint centres more on how the panel recorded the information, for example, by reflecting his account of his behaviour within the evidence presented by the psychologist witness. Panels are not required to rehearse the totality of oral evidence and are simply required to give a clear explanation for the conclusions that they reach. The panel did exactly that and cannot be criticised. As noted in **Oyston [2000] PLR45**, *"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"*. There was nothing procedurally unfair in the panel's approach.
29. The Applicant's argument that the panel did not give weight to the extended time he spent in the community is inaccurate and does not evidence procedural unfairness. In fact, in fairness to the Applicant, the panel did record his compliance on licence. However, its concern was that his commission of further offences meant that it could not rely on him to manage himself safely on release. The Applicant may disagree but that does not make the approach procedurally unfair.
30. The Applicant's submission of the panel making a finding of fact is incorrect. In fact the panel recorded that it was *'unable to say whether the images had been downloaded by [the Applicant] or not, but at the very least found his evidence unconvincing that he was wholly unaware of the images, that he had not used or downloaded Ares or Bit Torrent software, or that the reset of the computer referred to by police was a mere reboot. The panel therefore considered that risk of illicit internet imagery and pornography remained live'*.
31. I am satisfied that the panel did not make any finding of fact, it merely highlighted ongoing concerns about risk in this case and this was a reasonable approach given the evidence available to it.



32. The final submission refers to '*conflicting and confusing statements*' in the Decision Letter. In particular, the Applicant references the panel's analysis that external controls will be insufficient to protect the public from harm but elsewhere, that it stated that the risk management plan would be robust, subject to compliance issues, and that while there were concerns over compliance, it was likely that the external management would be sufficient to manage risk while offence focussed work takes place.

33. However, it is important to take note of the panel's reasons for refusing release in their entirety. The panel found that there had been no evidence of risk reduction through accredited coursework and that the Applicant should complete this work in custody. Although work might be available in the community, the panel could not be sure when that might start or that the Applicant could be managed on licence without the work first taking place. The panel recognised the external control of the risk management plan, but it had concerns about the Applicant's openness and honesty with Probation which might impact on his supervision in the community. The panel was entitled to reach this conclusion, although the decision itself is not a matter of procedural unfairness and the Applicant is not seeking to argue irrationality. In terms of the panel's approach to reaching its decision, I am not persuaded that it was procedurally unfair.

Decision

34. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Robert McKeon
20 September 2022

