

[2022] PBRA 145

Application for Reconsideration by Bamber

Application

1. This is an application by Bamber (the Applicant) for reconsideration of a decision dated 5 August 2022, following an oral hearing which took place on 3 August 2022, 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.
3. I have considered the application on the papers. These are the 266-page dossier provided by the Secretary of State which includes the Panel's written decision; the handwritten application for reconsideration written by the Applicant and submitted by the Solicitor representing the Applicant; and an email from PPCS on behalf of the Secretary of State dated 5 September 2022. I have also listened to the audio recording of the oral hearing, although there were difficulties in obtaining a copy of the audio recording which has regrettably caused a delay to this reconsideration review.

Background

4. The Applicant was sentenced in October 2012 to imprisonment for public protection, with a minimum term of 1 year, 254 days for offences of causing a child to engage in sexual activity and four counts of sexual assault on a female child under 13. He was also sentenced to one-year determinate sentence for 23 counts of offences of taking indecent photographs of child under 13, to run concurrently.
5. The Applicant was 43 at the time of sentence and was 53 years of age at the date of the oral hearing.



6. The Applicant became eligible for Parole on 6 July 2014. He was released on licence on 11 May 2018 following a review by the Parole Board but was recalled to custody on 14 July 2021. The current review by the Parole Board is his first review following his recall.

Request for Reconsideration

7. The handwritten letter from the Applicant making an application for reconsideration was received by the Parole Board attached to a forwarding e-mail from his legal representative on 26 August 2022.
8. It is not easy to follow what the Applicant is saying was irrational and/or procedurally unfair. Doing the best that I can, the grounds for seeking a reconsideration seem to be as follows:

Ground 1: The Applicant submits that the process was procedurally unfair because the panel were not impartial, and the panel had pre-judged the Applicant. He implies the hearing was not conducted fairly as the panel's questioning terminology was over-complicated and convoluted and suggested a pre-determined decision. The Applicant states the questions were formed around past offences and not the index offence, for which he was sentenced for in 2012 and that he was subject to an interrogation indicative of a pre-determined decision.

Ground 2: The decision was irrational as the Board has an inaccurate definition of past offences; that both his Probation Officers recommended his re-release; that the panel had not taken into account his behavioural programmes he has previously completed; and that the Board did not take into account that he was recalled without committing a further offence that caused another person to be a victim.

Current parole review

9. On 13 August 2021, the case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct the Applicant's release or if that was not appropriate to recommend a transfer to open conditions. The case was directed to an oral hearing after consideration by a Parole Board Member as part of the member case assessment process on 18 January 2022.
10. The oral hearing took place before a three-member panel of the Parole Board on 3 August 2022 with all parties attending by way of video link; in addition to hearing from the Applicant, who applied for release, the panel heard from the Prison Offender Manager (POM) and the Community Offender Manager (COM). The panel also considered the contents of the dossier which ran to 247 pages. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented. Written closing submissions were received after the oral hearing by the Applicant's legal representative and are contained within the dossier.



The Relevant Law

11. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.
12. The panel correctly sets out in its decision letter dated 5 August 2022 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 (as amended)

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.
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 has a similar meaning as procedural irregularity does in Judicial Review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

19. Procedural unfairness means a procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

20. 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; and/or
- b) The Applicant was not given a fair hearing; and/or
- c) The Applicant was not properly informed of the case against him/her; and/or
- d) The Applicant was prevented from putting his/her case properly; and/or
- e) the panel was not impartial.

21. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

22. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

23. 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)



24. The Respondent confirmed by way of email dated 5 September 2022 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

Ground 1:

25. The Applicant submits that the panel was not impartial, was biased and had pre-judged the Applicant. He implies the hearing was not conducted fairly as the panel's *"questioning terminology was over-complicated and convoluted and suggested a pre-determined decision"*. The Applicant states the questions were formed around past offences and not the index offence, for which he was sentenced for in 2012 and that he *"was subject to an interrogation indicative of a pre-determined decision."* I have carefully listened to the audio recording of the oral hearing.

26. The Applicant indicates that during the course of the oral hearing panel members included comments such as a) *"There is nothing normal about you"* b) *"what would a 20-year-old woman even see in a man like you?"* and c) *"Repeatedly told [the Applicant] that he was lying which was not the case."*

27. I have listened to the audio recording and did not hear a comment regarding (a).

28. The POM was asked by the panel whether she had at any time had a conversation with the Applicant about *"what on earth did an 18-year-old girl see in you?"* I have concerns as to how this question was put to the witness and how this may have been perceived by the Applicant to inappropriate and/or be lacking in impartiality.

29. The Applicant submits that *"most of the lines of questioning were focussed on past crimes where he was being ridiculed and derided for not remembering past offences dating back nearly 30 years."*

30. I did not hear any panel members directly accuse the Applicant of lying during his evidence in the hearing, however contradictions and omissions in his accounts of his conduct during the course of the hearing were highlighted and he was given opportunities to address these. These were not limited to previous offences, in which memory could have faded, but included his more recent conduct whilst in the community.

31. It was not irrational for the panel to query the level of honesty of the Applicant with professionals and the panel themselves with caution and to challenge the evidence of all witnesses regarding this, given the evidence of the Applicant's lack of honesty when in the community leading to his recall.



32. Over the course of the three and a half hours of evidence, the lines of questioning did include past offending and the index offences. The panel was entitled to take into account the gravity of all of his past offences when assessing risk.
33. However, the questioning also covered a breadth of areas linked to risk, including progress during his sentence including previous offending behaviour work, his time in the community, his relationships, the circumstances leading to recall, his custodial conduct, plans for the future and the risk management plan.
34. I did not hear evidence of the Applicant being ridiculed and derided, subject to the possible perception following the comment at discussed at paragraph 28.
35. The panel did have to ask him to wait to hear the full question before responding on occasion. The panel members attempted to clarify matters due to confusion, omissions or contradictory evidence or where the Applicant and a panel member talked over each other. At times, the Applicant was interrupted when giving his evidence.
36. There were some occasions where questions asked by panel members to both the Applicant and witnesses were unclear.
37. A panel is required to consider all of the evidence placed before it, both written and oral evidence. Prior to the oral hearing, the panel would have considered the parole dossier and it is entirely reasonable that this will have shaped the areas of concern and indicated where further exploration in oral evidence is required by the panel.
38. I did not consider that the Applicant was subjected to a *"ruthless barrage of tactical predefined questioning that can be summarised best as an unbearable interrogation which is indicative of a pre-determined decision"* as submitted by the Applicant.
39. The written decision was issued two days following the oral hearing, this time frame is not unusual and does not indicate a predetermined decision as submitted by the Applicant.
40. Whilst I do not believe that the majority of submissions of the Applicant are founded, or amount to procedural unfairness, I do have concerns that some questions put to witnesses, including the Applicant, were unclear or convoluted and may have caused confusion and impacted upon the Applicants responses, potentially causing contradictions, when his level of openness and honesty was in question. This, combined with interruptions during his responses may have led to omissions and the panel not benefitting from best evidence. Further, comments



made during the course of the hearing that may have been reasonably perceived by the Applicant to indicate that the panel was not wholly impartial, such as the comment discussed at paragraph 28.

41. Taking into account the concerns, when in combination, the Applicant has satisfied that the perception of fairness was compromised, and I consider that the procedure adopted was unfair to the Applicant.

Ground 2:

42. It is submitted by the Applicant that the decision was irrational as the Board has an inaccurate definition of past offences; that the panel had not taken into account his behavioural programmes he has previously completed; that the Board did not take into account that he was recalled without committing a further offence that caused another person to be a victim; and that both his Probation Officers recommended his re-release.

43. The Applicant does not specify what is inaccurate about the Board's definition of his past offences.

44. The Panel had expressly taken into account the behavioural programmes the Applicant had previously completed at paragraph 1.5. of the written decision.

45. The Applicant had not committed any violent or sexual offences whilst on licence, but did receive a further conviction for breach of sex offender registration, receiving a further sentence of 12 months' imprisonment, a matter the panel was obviously aware.

46. Simply disagreeing with professional recommendations is not sufficient to establish irrationality. If it were, there would be no need for a panel to exercise any judgement in cases where professional witnesses were all in agreement. This would extinguish the panel's purpose as an independent risk assessor and decision-making body.

47. That said, if a panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**.

48. The panel gives clear and cogent reasons for its disagreement with the recommendations of the professional witnesses. It cannot be said in view of the



panel's stated reasons that its decision is outrageously illogical in the sense expressed above. There is no irrationality on this point.

Decision

49. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, that the decision of the oral hearing panel was procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Directions

50. I have given careful consideration as to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

51. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

Katy Barrow
17 October 2022

