

[2022] PBRA 17

Application for Reconsideration by Birchwood

Application

1. This is an application by Birchwood (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 3 January 2022 not to direct his release.
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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant is serving sentence of imprisonment for public protection (IPP) imposed on 11 January 2008, following conviction for four counts of sexual activity with a male child under 16 (with penetration). On the same date he also received concurrent extended sentences in respect of conviction on two counts of possessing an indecent photograph or pseudo-photograph of a child (now served) and no separate penalty following conviction for indecent assault on a male under 16. The IPP tariff was set at five years less time spent on remand and expired on 20 November 2010. This is his sixth parole review.
5. The Applicant was aged 37 at the time of sentencing. He is now 51 years old.

Request for Reconsideration

6. The application for reconsideration is dated 11 January 2022 and has been submitted via solicitors acting on behalf of the Applicant. The application has been handwritten by the Applicant himself, and his solicitors have sent it on to the Parole Board without any further representations from them on his behalf.
7. It submits that the panel's decision was irrational for a number of reasons:
 - a) The Applicant has completed many offending behaviour courses.
 - b) The panel ignored the evidence of the consultant psychiatrist.
 - c) The decision said the Applicant needs to develop an outside support network, but this is very difficult to do while in closed conditions.



- d) The Applicant is being penalised for not doing something which is voluntary (specifically going to a regime designed to help people recognise and deal with particular problems).
 - e) It was irrational for the panel to place so much weight on the evidence of the current Community Offender Manager (COM) when she had had minimal contact with the Applicant.
8. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No matters of procedural unfairness were raised.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in August 2020 to consider whether to direct his release or, if release was not directed, to consider whether he should be transferred to open prison conditions.
10. The case proceeded to an oral hearing on 28 June 2021. It adjourned for specialist reports and a psychological risk assessment.
11. The reconvened hearing took place on 6 December 2021 before an independent member, a psychiatrist member and a psychologist member. It was held by video conference. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), two COMs, a Community Support Worker, a prison psychologist, and a consultant psychiatrist. The Applicant was legally represented throughout.
12. The Applicant was seeking a direction for release.
13. The POM, the COMs and the prison psychologist did not support the Applicant's release. The consultant psychiatrist did not make a recommendation. The Community Support Worker attended only in a personal capacity.
14. The panel did not direct the Applicant's release nor make a recommendation for open prison conditions.

The Relevant Law

15. The panel correctly sets out the test for release in its decision letter dated 23 November 2021.

Parole Board Rules 2019

16. 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)).

17. 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**.

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.

The reply on behalf of the Secretary of State

21. The Secretary of State has submitted no representations in response to this application.

Discussion

22. Irrationality, in the context of an application for reconsideration, applies to the overall decision not to direct release and not the decisions made along the way (unless, of course, any such decisions taint the overall rationality of a panel's conclusion).

23. I appreciate that the Applicant is not a lawyer and, as such, have carefully considered the points that he has made to determine whether any could potentially give rise to a finding that the panel's decision not to grant release was irrational in law.

24. I accept, as the Applicant says, that he has undergone treatment, that it is more difficult to develop a support network from closed conditions, and that transfer to certain therapeutic regimes is voluntary. These points in themselves, however, are not reasons in law on which I could find that the panel's overall decision was irrational.

25. The Applicant's current COM has held his case for a limited amount of time and did not recommend his release. The COM followed her predecessor's assessment of risk and recommendation. The previous COM held his case from December 2019, and it cannot be said that the current COM's decision to follow the recommendation of their predecessor (who had known the Applicant for longer) was anything other than sensible given her limited involvement in the case to date. The overall view of the probation service was not inconsistent; neither was the current COM's recommendation irrational.

26. The consultant psychiatrist noted that the Applicant's risks could be safely and effectively managed in the community with intense supervision once his depression is treated. This is conditionally supportive of release but requires the Applicant's mental health to be stable and intense mechanisms of support and supervision to be in place. Regardless of the Applicant's mental health, the panel's decision notes that the intense level of support needed to satisfy the consultant psychiatrist that risks were manageable is not in place. This rationally supports its conclusion that the risk management plan would not protect the public from serious harm.
27. The legal test for irrationality essentially requires (in the context of parole) that the decision was so outrageously wrong that no sensible parole panel could have arrived at it. While I accept, as the panel did, that the Applicant's continued imprisonment is causing him manifest frustration and distress, this does not mean the panel can ignore or disapply the public protection test. The Applicant is assessed as presenting a very high risk of serious harm to children and there was no unqualified professional support for release. The panel presents clear and coherent reasons for its decision and those reasons cannot be said to be so outrageously defiant of logic that every other sensible panel of the Parole Board would have concluded that the Applicant could be safely released. The legal test of irrationality sets a high bar, and this case does not meet it.

Decision

28. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
07 February 2022