

[2022] PBRA 170

Application for Reconsideration by Lee

Application

1. This is an application by Lee (the Applicant) for reconsideration of a decision of an oral hearing panel not to direct release. The hearing took place on the 11 October 2022.
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 dossier of 459 pages, the application by the Applicants legal representative dated 4 November 2022, and an email from the Secretary of State received 14 November 2022.

Background

4. The Applicant was sentenced to an indeterminate sentence for public protection in November 2008. The index offence was conspiracy to commit robbery and burglary. A firearm was involved. The Applicant was involved in a series of professional robberies and burglaries. The Applicant had been recalled having been released on licence.

Request for Reconsideration

5. The application for reconsideration is dated 4 of November 2022.
6. There are various grounds for seeking reconsideration however I have considered only one.
7. The Applicant's legal representative indicated that at the conclusion of the oral hearing it had been agreed that closing submissions by the legal representative would be submitted in writing. Those closing submissions were submitted in writing. The complaint within the application was that there was no reference to the closing submissions having been considered by the oral hearing panel. It was therefore argued that there had been a procedural irregularity in that the panel did not consider all the evidence and submissions before reaching a conclusion.
8. I asked for further particulars relating to this ground. I asked that the panel chair be contacted and asked to confirm whether the closing submissions had been received and read following the oral hearing. I also asked the Parole Board



to confirm whether the closing submissions had been received by the Board and whether they had been forwarded to the panel chair and co-panellists.

Current parole review

9. The hearing took place on 11 October 2022. The decision letter was incorrectly dated 10 October 2022. I ascertained later that the decision letter had in fact been sent to the Parole Board to be issued on 25 October 2022. The reference from the Secretary of State requested the Parole Board to consider whether the Applicant met the test for release and if not whether a recommendation for open conditions should be made. The panel consisted of an independent member and a judicial member.

The Relevant Law

10. The panel correctly sets out in its decision letter 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.

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 (as amended)

12. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) 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)).

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**.

Illegality

15. An administrative decision is unlawful under the Parole Board's heading of illegality if the panel:

(a) misinterprets a legal instrument relevant to the function being performed;



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- (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.

16. 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.

Irrationality

17. 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."

18. 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.

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

Procedural unfairness

20. 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.

21. 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.



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

The reply on behalf of the Secretary of State

23.The Secretary of State offered no representations.

Discussion

24.As indicated above on the basis of the application by the Applicant’s legal representative, I requested further information concerning the receipt of closing remarks. I was able to ascertain that closing remarks had in fact been received by the Parole Board by email sent by the Applicant’s legal representative. However, those closing remarks had not been received by the oral hearing panel members. I was informed that due to an administrative error the closing remarks had been accidentally mis-addressed in an email. In fact, the documents had remained in the inbox of the Parole Board Case manager.

25.The result of this accidental administrative error was that the panel members did not have an opportunity to consider the closing remarks. I have no doubt therefore that this was a procedural irregularity and that I should direct reconsideration.

Decision

26.Accordingly, I do determine there to have been a procedural irregularity, I consider, applying the test as defined in case law, the decision to be 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.

HH S Dawson
02 December 2022

