

[2022] PBRA 176

Application for Reconsideration by Smith

Application:

1. This is an application by Smith (the Applicant) for reconsideration of a decision of the Parole Board dated 24 October 2022 following an oral hearing refusing his application for release and declining to recommend to the Secretary of State that he should be transferred to open conditions.
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)) 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. They are the application, the decision letter issued by the Parole Board, and the dossier.

Background:

4. On 18 September 2009 the Applicant was sentenced to Imprisonment for Public Protection with a minimum period to serve of 2 years for sexual offences relating to school children. He served nearly 10 years until he was first released on licence on 7 May 2019. He was recalled on 19 August 2019 when the police discovered that he was accessing pornography on a computer relating to children.

Request for Reconsideration:

5. The application is made on the basis that the decision is irrational, and the hearing was procedurally unfair because *'the panel favoured the evidence of the Community Offender Manager over the case advanced by the 'Applicant' and other professional witnesses in particular the prison instructed psychologist.'*

Current parole review:

6. This was the third parole review since the Applicant's recall to prison.

The Relevant Law:



7. The panel correctly sets out in its decision letter dated 24 October 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)

8. 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.
9. 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

10. 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."

11. 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.

Procedural unfairness

12. 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.
13. 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.



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

The Reply on behalf of the Secretary of State

15. The Secretary of State has made no representations.

Discussion:

16. It is clear from a detailed reading of the decision letter that the panel considered the evidence with great care.

17. It heard different evidence from different witnesses and it is clear that the witnesses did not agree on whether the test for release was met. The COM considered that there was more core work to do before the Applicant could be released. He gave his reasons for that.

18. The psychologist took a different view and considered that all core work which needed to be done in custody had been done so that the Applicant could be safely released. The Applicant also took that view.

19. The panel formed their own view on the totality of the evidence and that was that the test for release was not met nor the test for a recommendation for transfer to open conditions. They took that view after they had heard the evidence tested not only by them but by the legal representative of the Applicant. They gave clear and sufficient reasons as to why they had reached their decisions.

20. The panel had in mind that the Applicant had breached his licence relatively soon after his previous release and that his behaviour in accessing pornography relating to young girls heightened his risk of committing sexual offences against school children significantly. The panel were clearly concerned that on the present evidence they could not be satisfied that if released he would do the same again.

21. The panel gave detailed reasons why they had reached their conclusions and, whether one agrees with them or not, they are evidence based and were conclusions that they were entitled to reach.

22. Panels are entitled to disagree with views put forward by witnesses as to the safety of releasing a prisoner. It is the job of the panel to critically assess the evidence that is given and consider the reasons for it. They are entitled to prefer the evidence of one witness as opposed to the evidence of a number of witnesses provided, they have reasons for doing so which they set out.

23. In this case the panel had perfectly cogent reasons for coming to the conclusion that they did and it has set them out in the decision letter.

24. It is unarguable that the decision is irrational. None of the tests set out in para 13 above is met.



25.The unfairness which can found a ground for reconsideration is procedural unfairness. No procedural unfairness has been alleged in this case. The fact that an Applicant thinks a decision is unfair does not found a case for reconsideration on the basis of procedural unfairness.

26.The decision not to recommend the transfer of the Applicant to open conditions cannot be the subject of an application for reconsideration.

Decision:

27.For all those reasons the application for reconsideration is refused.

John Saunders
14 December 2022