

[2022] PBRA 38

Application for Reconsideration by Groves

Application

1. This is an application by Groves (the Applicant) for reconsideration of a decision of the Parole Board dated the 23 February 2022 made following an oral hearing held on the 22 February 2022 not to direct 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 dossier, the decision letter dated 23 February 2022 and the application for reconsideration 1 March 2022 from solicitors for the Applicant.

Background

4. The Applicant is serving an IPP sentence for an offence of wounding with intent to cause grievous bodily harm. The offence saw him assault a doorman outside a nightclub in June 2009, hitting him in the face and neck with a glass bottle which broke, causing his artery to be severed. He was aged 20 at the time of the index offence and is now 33.
5. His minimum tariff of 2 years and 202 days expired on 16 June 2012.
6. Following his index conviction in October 2012 he received a 15-month sentence for harassment of his former female partner, an offence committed whilst in custody for the index offence. The Applicant progressed to open conditions in 2018 but absconded in December 2018, being unlawfully at large for almost a week. He received a further 6-month sentence in January 2019 for being unlawfully at large.
7. In July 2021 he received a further 8-week sentence for assaulting a prison officer in June 2020.

Request for Reconsideration

8. The application for reconsideration is dated 1 March 2022.
9. The grounds for seeking a reconsideration are as follows:

The decision was irrational on the basis that:



- (a) The conclusion did not follow from the evidence, with 2 errors or 'leaps' in reasoning (i) that the entirety of the evidence around the August 2021 IEP warning was seemingly ignored and that the decision was missing the details of this key evidence and (ii) that his legal representative making representations that certain licence conditions were not necessary and proportionate led to a negative inference that he was reluctant to accept certain restrictions on him

The decision was procedurally unfair on the basis that:

- (b) The Applicant did not receive a fair hearing as a consequence of the matters relied upon in support of the irrationality ground, on the basis that it was unfair of the panel not to include some of the evidence from the psychologist within the decision because it went against the finding they wanted to make.

10. There is also reference to the panel's observation that they considered the Applicant to display grandiose and narcissistic traits and failed to give weight to evidence from the psychologist and to take into account that he was struggling with the video format and the remoteness of the hearing. This is included in the irrationality representations but is really a claim of procedural unfairness – I have dealt with this as ground (c).

Current parole review

11. The case was referred to the Parole Board in May 2021. The referral was for the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release. If after considering the case, the Board decided to direct the Applicant's release on licence, the referral invited the Board to make a recommendation in relation to any condition which it considered should be included in the licence.
12. If the Board did not decide to direct release on licence, the referral invited the Board to make a recommendation whether the Applicant was ready to be moved to open conditions, commenting on the degree of risk involved if this recommendation were to be followed.
13. The referral was considered by a Member Case Assessment (MCA) panel on 22 September 2021 and directed to oral hearing. The oral hearing was heard by a video link on 22 February 2022 by a two member panel, which included a specialist psychologist member. Oral evidence was heard from the Community Offender Manager (COM), Prison Offender Manager (POM), a prison psychologist and the Applicant. The Applicant was legally represented during this hearing.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 23 February 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

15. 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



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



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info@paroleboard.gov.uk



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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)).

16. 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

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.

Procedural unfairness

19. 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.

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;
- (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.

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

The reply on behalf of the Secretary of State

21. The Secretary of State has indicated in an email dated 4 March 2022 that he does not wish to make representations in response to this application for reconsideration.

Discussion

Ground (a)

22. The first ground raised is that the conclusion of the panel did not follow from the evidence before it. There are said to have been 2 errors, described as '*leaps*' in reasoning, (i) that the entirety of the evidence around the August 2021 IEP warning was seemingly ignored and that the decision was missing the details of this key evidence and (ii) that the Applicant's legal representative's representations that certain licence conditions were not necessary and proportionate led to a negative inference that he was reluctant to accept certain restrictions on him.

The August 2021 incident

23. In August 2021 a negative behaviour entry was recorded against the Applicant. He was recorded to be '*very abusive and threatening towards staff, getting in their personal space and then trying to assault them*'. Attempts were made to de-escalate the situation and he was escorted back to his cell under restraint. Following the incident he was placed onto the basic regime for 2 days, was removed from his job and from his participation with a literacy charity. He was reported to have apologised after the incident to all staff involved.
24. The evidence of the psychologist in relation to this incident, which it is said in representations was that staff placing their hands on the Applicant "*effectively amounted to an assault*", and that the incident was not clear cut is said to have been excluded from the decision because it did not support the panel's view. The panel are said to have drawn a complete adverse inference against the Applicant for this incident, instead of considering how it could be used to show his insight and understanding of risk by not responding violently.
25. The panel set out the evidence of the POM within the decision letter, recording that the Applicant had told her he had been backed into a corner by staff and that he denied being threatening. They noted that the POM was unable to offer any further information about the incident than that within the dossier.
26. The panel also set out the evidence of the Applicant about this incident, as well as his responses to questioning about incidents of violence in custody. Their analysis was that he struggled to accept responsibility for his role in incidents, which they found was concerning.

27. The evidence given by the prison psychologist was explicitly recorded, with it being noted that she could not confirm having spoken to the Applicant about the August 2021 incident. The panel set out her expressed opinion that recent violence had arisen when the Applicant had been restrained and concluded that this was not supported by the evidence they had.

28. I consider that the panel clearly set out in their decision letter their analysis of this incident, their conclusions and the impact this had upon the parole decision. They considered that the incident was aggressive and violent and was evidence of continued poor thinking. The decision letter detailed their concerns that the Applicant continues to find it difficult to manage his emotions and arousal when challenged by authority and that he had potentially caused an escalation in the situation in an attempt to prove a point. These conclusions were supported by the evidence available to the panel and I find nothing irrational in this ground.

The representations re licence conditions

29. The panel carefully recorded in the decision letter the proposed licence conditions and the approach of the Applicant, in particular that if he felt they were not necessary and proportionate that he would challenge them. The Applicant told the panel that he considered that reporting developing relationships was an unfair condition as his index offence had not been for '*domestic violence*'. It recorded his evidence that he would comply with all licence conditions to avoid being returned to prison, and the view held by all professionals that although he might verbally challenge and seek to discuss licence conditions that he would ultimately comply.

30. The closing submissions by the Applicant's legal representative as to whether certain recommended conditions were necessary and proportionate, and specifically whether it was necessary they should mirror prohibitions in a restraining order, were also recorded.

31. In their decision the panel considered that one of the factors leading them to conclude that his risks could not be managed in the community was "*his apparent reluctance to accept certain restrictions on him as necessary, specifically in relation to managing his risk within intimate relationships*". No link was made, nor negative inference drawn from the legal representations in the decision letter. The panel's concern is expressed to arise from the Applicant's difficulty in accepting that he posed a risk to others and his belief that all his responses are subject to his decision making, which the panel doubted.

32. This ground is not made out. The two errors or '*leaps*' in reasoning are not established. The panel carried out its own assessment of risk, as it is required to do and its decision was considered and well-reasoned, flowing from the evidence it had. I do not consider it is appropriate to interfere with it.

Ground (b)

33. The second ground is a general claim described as procedural unfairness, that the Applicant did not receive a fair hearing as a consequence of the matters relied upon in support of the irrationality ground. This is on the basis that it was unfair of the panel not to include some of the evidence from the psychologist within the decision letter because it went against the finding they wanted to make.

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34.The Applicant has not set out in the application how there is said to have been any procedural impropriety in the proceedings. The application merely repeats those matters set out in support of ground (a) which relate to the decision itself, not how the decision was made. I am not therefore satisfied that any potential procedural impropriety has been identified, nor that any has been established. Accordingly, there is nothing in this ground.

Ground (c)

35.There is also reference in the application for reconsideration to the panel's observation that they considered the Applicant to display grandiose and narcissistic traits and a complaint that they failed to give weight to evidence from the psychologist and to take into account that he was struggling with the video format and the remoteness of the hearing. This is included in the irrationality representations but I consider this is really a claim of procedural unfairness.

36.The panel records in the decision letter their view that the Applicant displayed grandiose and narcissistic traits within the hearing and within his description of his attitudes towards others. The display of these traits had also been identified by the 2019 panel of the Parole Board and the psychological risk assessment from 2014. The panel was aware of the personality disorder traits of the Applicant, considering that his attitude was a facet of those traits.

37.There were no representations during the hearing by the Applicant or his legal representative that he was struggling with the video format and the remoteness of the hearing.

38.I am not satisfied that the application has identified any potential procedural impropriety. The observations of the panel on how the Applicant presented to them are not in themselves demonstrative of an unfairness. No contention is put forward as to how the procedure was defective nor how it should have been conducted differently. I find that this ground is not made out.

Decision

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

Angharad Davies
23 March 2022