

[2022] PBRA 80

## Application for Reconsideration by Nagafi

### Application

1. This is an application by Nagafi (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 6 June 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:
  - a) The Decision Letter dated 6 June 2022;
  - b) A request for reconsideration in the form of written representations dated the 15 June 2022; and
  - c) The dossier, numbered to page 324, of which the last document is the Decision Letter. The panel considered a dossier which ran to 314 pages.
4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made, and I am satisfied that the written representations provide reasonable explanation as to the proposed grounds for reconsideration.

### Background

5. The Applicant is now 47 years old. On 11 September 2015, he received an extended determinate sentence comprising of 6 years in custody and a 3-year extended licence period. The sentence was imposed following his conviction for offences of arson with intent to endanger life, possession of cannabis (a class B drug) and two offences of possessing class C drugs.
6. The offences were committed at the Applicant's home address which he shared with others. The Applicant had turned on the gas supply to the kitchen hob and had created a 'rope' from clothing which had run from the kitchen to the dining room. The end of



the 'rope' had been set alight and it was suggested that it had acted as a fuse which would eventually ignite the gas.

7. The Applicant was released automatically on 13 November 2020, although he was then held at an immigration detention centre prior to his eventual release to designated accommodation on 19 July 2021. The Applicant was recalled to custody on 12 August 2021 due to concerns about his behaviour which led to his accommodation placement being withdrawn.
8. Following his recall, the Applicant's case was referred to the Parole Board to determine whether he should be re-released. The Applicant's legal representative submitted representations to the Parole Board (08 October 2021) and the Applicant also produced his own written representations which were added to the dossier. On the 20 October 2021, the Applicant's case was considered on the papers by the Parole Board and an oral hearing was directed.
9. The oral hearing was heard on 25 May 2022, and it is the panel's decision following that hearing not to direct the Applicant's release that is now the subject of the reconsideration application. At the time of the oral hearing, the Applicant was in the extended term of his sentence

### **Request for Reconsideration**

10. The Applicant's grounds for reconsideration are that the panel's decision was irrational and/or procedurally unfair, in that:

- a) The decision is irrational and/or procedurally unfair for failing to consider that English is not the Applicant's first language.
- b) The decision is procedurally unfair after the panel failed to adjourn to obtain further information regarding the Applicant's mental health.
- c) The decision is irrational and/or procedurally unfair as the panel failed to provide sufficient reasons for its rejection of the COM's recommendation for release. The stand-in prison offender manager and the consulting psychiatrist did not provide a recommendation.
- d) The decision is procedurally unfair as the panel have wrongly stated the test for release.

### **The Relevant Law**

11. The panel correctly sets out the test for release in its decision letter dated the 6 June 2022.
12. 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)).

13. In **R (on the application of 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."*

14. 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.

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

16. 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."*

17. 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.

18. 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.

19. 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.

20. 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. On 21 June 2022, the Secretary of State confirmed that he would not be making any representations about the application.

### **Discussion**


*The decision is irrational for failing to consider that English is not the Applicant's first language.*

22. It is submitted that at various points in the Decision Letter, reference is made to the Applicant's evidence being contradictory or difficult to follow without any mention of English not being his first language or any reference to the panel taking this into consideration.
23. The Applicant's legal representations within the dossier (08 October 2021) are detailed and were clearly produced following discussion with the Applicant and on his instructions. At no point within those written representations does the Applicant express difficulty in his understanding of English. The Applicant also produced his own written representations (in English), and these are detailed and outline his dispute about being recalled to prison and his wish to be re-released.
24. It is reasonable to note that within the dossier of evidence there is an indication that the Applicant's preferred language is Farsi (Persian). However, he has engaged with professionals during his sentence and on licence and there is nothing to suggest that he has struggled to understand or communicate in English.
25. Parole reviews sometimes deal with cases where English is not the prisoner's first language. Provision can be made for an interpreter to be present to assist the prisoner in giving evidence and understanding proceedings. There is nothing before me to suggest that any such request was made in this case.
26. The panel asked questions of the Applicant at the oral hearing and his responses led to the panel's concerns now being challenged in the reconsideration application. However, the Applicant was legally represented at the oral hearing and his legal representative would have had opportunity to ask questions of the Applicant and, more importantly, would have had opportunity to raise concerns if it was felt that the Applicant was in difficulty or disadvantaged at the oral hearing.
27. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other

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party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

28. I am not persuaded that there was anything to demonstrate that the Applicant's language skills led to an irrational and/or procedurally unfair decision. The evidence would suggest that he was able to engage with the oral hearing process and was able to instruct his legal representative. Prior to the reconsideration application there had been no suggestion that the process was unfair or that an interpreter should be provided.

*The decision is procedurally unfair after the panel failed to adjourn to obtain further information regarding the Applicant's mental health.*

29. At paragraph 1.8 of the Decision Letter the panel stated, "*The panel were left with unresolved concerns about [the Applicant's] mental health. The dossier contained descriptions of psychotic symptoms that persisted or recurred over several years; apparently in the context of substance misuse. [the Applicant] told the panel that he had fabricated all symptoms of mental illness – deceiving health and other professionals - to avoid deportation to Iran. The cause of [the Applicant's] symptoms therefore remain obscure. The Panel also read and heard evidence to suggest that [the Applicant] has abnormal personality traits. The Panel concluded that poor mental health is an additional and important risk factor for future harm to others.*"

30. It is submitted that if the panel had unresolved concerns then it should have adjourned to obtain further information. However, the Applicant fails to take account of the entire Decision Letter and the evidence of a psychiatrist witness at the oral hearing. The panel rehearsed the evidence of the psychiatrist witness in its Decision Letter and in its Conclusion it had this to say:

31. "*Whilst [the Applicant] maintained he faked mental health symptoms, the panel concluded that did not account for the presence of symptoms over a considerable period. The panel found the view of [the psychiatrist witness] - that he likely experienced real symptoms related to drug-induced psychosis alongside fabrication – persuasive.*"

32. It was a matter for the panel to determine, having considered all available evidence, whether there remained unresolved issues that might necessitate an adjournment. The panel, with a psychiatrist member in its number, was well placed to make that decision.

33. There is nothing in the panel's approach to demonstrate that this was procedurally unfair.

*The decision is irrational and/or procedurally unfair as the panel failed to provide sufficient reasons for its rejection of the COM's recommendation for release. The stand-in prison offender manager and the consulting psychiatrist did not provide a recommendation.*

34. The Applicant submits that the sole recommendation from the professional witnesses was made by his Probation Officer in the community. There were two other witnesses at the oral hearing, these being an officer responsible for the Applicant's case in custody and a psychiatrist.
35. The formal recommendation in terms of whether the Applicant should be released was properly made by the Probation Officer based in the community. The other witnesses provided factual evidence to assist the panel in its determination.
36. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
37. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)**, both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.
38. It is suggested in **Wells** that rather than ask "*was the decision being considered irrational?*" the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.
39. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. It follows that I must decide whether on a reading of the panel's decision, I am satisfied that the conclusions it reached are justified by the evidence it considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.
40. Parole Board assessments are not confined to the risk to the public in the United Kingdom. In this case, the panel needed to consider the risk that might emerge in the United Kingdom and also overseas should the Applicant be deported.

41. In its Decision Letter, the panel identified the concerns it had about monitoring the Applicant's level of risk on release, and it gave reasons for this. The panel established that there would be unlikely to be any form of risk management if the Applicant was returned to his home country and it detailed its concerns about the likely effectiveness of the risk management plan should the Applicant be released in the United Kingdom.
42. The panel took note of the Probation Officer's recommendation but, as previously stated, it was not obliged to agree with it. In its Decision Letter, the panel set out areas of risk it considered to be untreated, with particular reference to the lack of any work to address the Applicant's risk of arson. It then went on to provide reasons as to why the Applicant did not, in the panel's assessment, meet the test for release, and within its determination identified what were reasonable concerns about events that might lead to a rapid escalation in risk.
43. Any reading of the Decision Letter demonstrates that the panel completed its task with great care. It gave detailed reasons for its decision not to direct the Applicant's release. There were no evidential gaps or leaps in its reasoning. There was nothing procedurally unfair or irrational in the panel's approach.

*The decision is procedurally unfair as the panel have wrongly stated the test for release.*

44. There is nothing to this ground. As I noted at paragraph 11, the panel correctly sets out the test for release. The Applicant's complaint is that because he was in the extended term of his sentence there should be a presumption (see **R [Sim] v Parole Board [2004] QB 1288**) that he would be released unless the Parole Board determined that it was likely that he would go on to commit a further serious offence.
45. The Applicant submits that there is some ambiguity in the Decision Letter, however, he appears to have missed the point that his legal representative's closing submissions reminded the panel of the case of **Sim**, that the panel then referenced the case in its determination and went on to establish why the Applicant did not meet the test for release.

## Decision

46. 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.

**Robert McKeon**  
**29 June 2022**