

[2023] PBRA 105

Application for Reconsideration by Donachie**Application**

1. This is an application by Donachie (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 24 April 2023 not to direct his release.
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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection on 21 May 2007 following conviction for wounding with intent to do grievous bodily harm to which he pleaded guilty. The tariff was set at 2 years, 6 months and expired in August 2009.
5. He was released on licence by the Parole Board after a hearing in November 2012. He was recalled to custody in September 2021. It appears that he used drugs, predominantly heroin, during his time on licence, and, despite warnings, did not comply or be honest with those responsible for his supervision. He was recalled following concerns that his behaviour was paralleling his lifestyle prior to the index offence. He was re-released in June 2022 after a further hearing.
6. He was recalled for a second time in August 2022 following continued concerns about substance misuse.
7. The Applicant was 25 years old at the time of sentencing and is now 41 years old. This is his first parole review since his second recall.

Request for Reconsideration

8. The application for reconsideration is dated 9 May 2023 and has been drafted by solicitors acting for the Applicant.

9. It argues that the decision was irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding procedural unfairness or error of law.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in September 2022 to consider whether to direct his immediate release.
11. The matter proceeded to an oral hearing on 21 April 2023 before a two-member panel. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, a stand-in Prison Offender Manager (**POM**), and his Community Offender Manager (**COM**).
12. The panel did not direct the Applicant's release.

The Relevant Law

13. 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)

14. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
15. 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)).
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.
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.

The reply on behalf of the Respondent

20. The Respondent has submitted no representations in response to this application.

Discussion

21. The first part of the application refers to a panel chair having been on the panel of the Applicant's 2022 hearing and that he "*may have looked at things without a fresh perspective*". Other parts of the application also refer to matters that were discussed at the earlier hearing. There is no persuasive evidence put forward in the application to suggest that the panel chair was predisposed against the Applicant. Panels of the Parole Board treat each review as a stand-alone exercise and must not allow any prior involvement by panel members to influence their decision. Of course, if the Applicant was unhappy at the prospect of having a previous panel member chairing his parole review, it was open to him to make an application for recusal. In any event, this would be a potential matter of procedural unfairness which is not pleaded within the application and I therefore have no need to consider it further.
22. The bulk of the application resubmits a significant number of points in favour of the Applicant's re-release: that he is addressing his substance misuse, that he has not used violence in the community for a significant time despite his entrenched drug addiction, and that the panel has put too much weight on past behaviours. Moreover, it is said that the professional witnesses considered that further risk reduction work was necessary and, ultimately, the panel's decision not to release the Applicant was "*unreasonable*".
23. For an application for reconsideration to be successful, it is not enough for a decision to be unreasonable. To meet the legal test, it must be so unreasonable that no other sensible panel would have made the same decision on the evidence before it. This sets a particularly high bar.
24. The panel disagreed with the professional opinions of the POM and COM. It was entitled to do so. To say otherwise would undermine the panel's position as an independent risk assessor. Moreover, it gave extensive and clear reasons for departing from those opinions and why it concluded that the proposed risk management plan would not be sufficient to manage the Applicant's risk of serious harm if released. It noted prolific substance misuse in the community over an eight week period before recall to the extent that there were no viable options other than recall and that substance misuse was a key risk factor in the Applicant's offending.

It noted a lack of a defined relapse prevention strategy and considered that professionals put too much emphasis on his not having reoffended.

25.The panel’s reasoning is detailed and comprehensive. While the Applicant may well disagree with it, the decision is not sufficiently outrageously defiant of logic to amount to irrationality in the legal sense.

26.The panel explained in its detailed reasons how it had weighed and balanced the competing views and facts. It was correctly focused on risk throughout. It was reasonably entitled to reach the conclusions it did on the evidence before it. The legal test of irrationality is a very strict one. This case does not meet it.

Decision

27.The complaint of irrationality is not made out on the papers before me. Accordingly, this application is dismissed.

Stefan Fafinski
8 June 2023