

[2023] PBRA 128

Application for Reconsideration by Levy

Application

1. This is an application by Levy (the Applicant) for reconsideration of a decision of a panel following an oral hearing dated 22 May 2023 not to direct 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)) on the basis (a) that the decision contains an error of law, (b) that it is irrational or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the application for reconsideration, the dossier, the decision letter, the email dated 21 June 2023 from the Public Protection Casework Section (PPCS) of the HM Prison & Probation Service on behalf of the Secretary of State (the Respondent) and the Parole Board guidance for oral hearings.

Background

4. The Applicant was sentenced on 8 April 2009 to an indeterminate sentence of imprisonment for public protection for an offence of aggravated burglary and two offences of robbery. The minimum period he had to serve before he was eligible for parole was four years and 200 days. His tariff expired on 25 October 2013. One of the robberies involved the use of a knife. The Applicant was heavily dependent on illegal drugs at the time he committed the offences. He was released on licence on 1 March 2017 on the direction of the Parole Board and recalled on 8 June 2021 as a result of breaching his licence conditions.

Request for Reconsideration

5. The application for reconsideration is dated 16 June 2023.
6. The grounds for seeking a reconsideration are as follows:
 - (i) It was procedurally unfair for the panel to refuse to allow the Applicant's wife to give evidence at the oral hearing.
 - (ii) Alternatively, it was irrational of the panel to refuse to allow the Applicant's wife to give evidence.



- (iii) The panel failed to make rulings on allegations made against him which were denied.
- (iv) The panel failed to give sufficient reasons for not recommending that the Applicant be transferred to open conditions.

7. The principal grounds are (i) and (ii). I have not considered ground (iv) as it relates to a decision relating to open conditions which is not eligible under the Parole Board Rules 2019 for reconsideration.

Current parole review

- 8. The Secretary of State referred the Applicant's case to the Board on 8 July 2021. There were a series of adjournments and deferrals, and the hearing did not take place until 15 May 2023.
- 9. The panel heard evidence from the Prison Offender Manager (POM); the Community Offender Manager (COM) and a prison psychologist. The panel considered a dossier consisting of 643 pages.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 22 May 2023 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)

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

13. 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."

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.

Procedural unfairness

15. 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.
16. 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.
17. The overriding objective is to ensure that the Applicant's case was dealt with justly.
18. 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.*"

The reply on behalf of the Respondent

19. The Respondent did not make any representations in response to the application which is unfortunate as the case raises a question of principle.

Discussion

20. I shall deal first with (i) and (ii) of the grounds for the application for reconsideration.
21. The factual background is as follows: during the period that the Applicant was released on licence he married in March 2019. There were problems in the marriage caused by the Applicant's drug use and in January 2020 the Applicant moved out and in February 2020 his wife obtained a non-molestation order. Despite this it was apparent that contact between the two continued. On 26 May 2021 probation became aware of an incident which was said to have occurred on 12 May 2021 when the Applicant's wife alleged that the Applicant had threatened her with a knife to obtain money to buy drugs and had slashed the tyres of her car and damaged the



bodywork. The Applicant's wife had dialled 999 and had made a statement to the police setting out what had happened, and the police had taken photos of the damage.

22. While this incident did not lead immediately to the Applicant's recall, it set in motion a series of events which did lead to recall on 8 June 2021.
23. As part of the directions for the hearing the panel obtained a copy of the police report including the Applicant's wife's statement and the photos of the damage and a note of a no comment interview with the Applicant on 10 June 2021. A decision was taken to take no further action by the police.
24. The Applicant's wife wrote two letters to the Parole Board for consideration as part of the hearing supporting his application for parole. The Applicant's wife indicated that she and her husband were now together and that the complaint she had made to the police was a false complaint. The Applicant's wife set out in one of her letters why she had made this false complaint. The Applicant denied in evidence that he had threatened his wife or damaged her car. On 21 April 2023 the Applicant applied to the Parole Board to allow his wife to be called as a witness at the hearing.
25. PPCS indicated that they had no objection to the application.
26. The panel refused the application. In refusing the application, the panel relied on a number of matters. It relied on the Parole Board guidelines for oral hearings. The Board also said that a reason for refusal was that the oral hearing was going to be by video link and the Applicant's wife had hearing difficulties and the *"panel cannot assess whether she would be disadvantaged by having to attend the hearing remotely"*.
27. The panel said it had a duty to safeguard the proposed witness from possible emotional and psychological harm caused by giving evidence. The panel said it believed that all parties would be professionally compromised if the Applicant's wife was present as a witness or an observer. It noted that she had already put in two statements to the Board and could put in further representations in advance of the hearing if she wished. Finally, in its reasons for refusal, the panel said that the Applicant's wife could not provide a professional opinion to the panel on risk.
28. At the hearing the panel considered the written evidence about this alleged incident; the oral evidence of the Applicant; the professional opinions expressed by the COM and the psychologist as to which of the two versions put forward by the Applicant's wife was likely to be correct and concluded on the balance of probabilities that her complaint to the police was correct. This was an important finding as it was this alleged incident that led to the recall and the panel also found that it was offence paralleling behaviour.
29. The guidance on which the panel relied reads as follows and is to be found at para 2.42 of the Oral Hearing Guidance issued by the Parole Board: *"It will almost always be inappropriate to direct the attendance of a victim or alleged victim. Any information the panel needs can be obtained from other sources and the merit of the proposed direction must be balanced against the need to protect the victim. A direction for a victim to attend a hearing must only be considered in very exceptional*



circumstances and must be discussed with the Parole Board's Practice Advisor in the first instance".

30. The Applicant does not argue with the Guidance but does submit that these were exceptional circumstances. He also submits that some of the reasons for not allowing this witness to be called as set out by the panel should have had no weight.
31. I agree that the possibility of hearing difficulties which may have been a practical difficulty should not have been a reason for refusal. That problem could have been investigated and I have no doubt that a solution would have been found. Further I agree that it is difficult to see without further explanation why *"all parties would be professionally compromised if [the Applicant's wife] is present as a witness or as an observer"*. Whilst it is true that the Applicant's wife could not give a professional opinion on risk to the panel it does not follow that her evidence was not relevant.
32. I am also somewhat troubled by the panel questioning the COM and the psychologist for their view of which of the two accounts given by the Applicant's wife was likely to have been accurate.
33. Following the guidance, the panel had to balance the merit of allowing the witness to give evidence and the need to protect the witness. The decision as to whether the Applicant's wife told the truth in her first account or in her retraction was an important part of the panel's decision. Clearly her evidence would be very relevant to that decision so the Applicant was applying to call relevant and arguably important evidence which the Applicant wished to be heard. While in many cases for a victim to have to give evidence of a traumatic experience could be damaging, in this case the alleged victim wanted to give evidence that nothing happened. Of course there was a possibility that she had been put under pressure either directly or indirectly to give this evidence and there would clearly be difficult questions for her to answer but it doesn't seem to me that the panel have asked themselves the proper questions in reaching their decision.
34. I agree that there were some practical difficulties in the Applicant's wife giving evidence but not the ones on which the panel relied. It may be that she needed to be warned before giving evidence that she didn't need to answer questions as it may be on her second account she committed the offence of attempting to pervert the course of justice. Careful control would need to be kept on the questioning but those were not considerations that the panel took into account.
35. In my view the way that the panel reached their decision on calling the witness was irrational and may have compromised the fairness of the hearing.
36. I do not consider that ground (iii) is made out. A panel does not need to make a finding on every allegation that is considered in the hearing. The panel were aware that the Applicant denied the allegations and the panel did not rely on them in making their decision. The reasons for the decision are detailed and had the panel relied on those allegations the decision letter would have made that clear.
37. I have already indicated why I did not consider ground (iv).

Decision



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38. Having found that the reasons given for the decision not to allow the witness to be called were irrational I grant the application for reconsideration.

John Saunders
14 July 2023