

[2023] PBRA 137

Application for Reconsideration by Unwin

Application

1. This is an application by Unwin (the Applicant) for reconsideration of a paper decision of a Panel of the Parole Board, dated 6 April 2023. The decision of the Panel was not to direct release nor to recommend the Applicant be transferred to open conditions.
2. The Applicant's case was referred to the Parole Board, by the Secretary of State (SoS), on 16 September 2022. Prior to the provisional paper decision, two requests (26 January 2023 and 4 April 2023) were received from the Applicant's Legal Representatives, in which they sought a deferral for an Independent Psychological Report and up-dated reports from the Prison Offender Manager (POM) and Community Offender Manager (COM). A Member's Case Assessment (MCA) dated 23 March 2023 directed an adjournment for additional reports, including a 2019 Prison Psychology Report and a Psychology Sentence Planning and Review Report (SPR E) dated 30 July 2021 which did not constitute an up-dated Psychology assessment but considered whether recommendations in earlier assessments remained appropriate.
3. In making its decision on the papers, the Panel indicated that it had considered the legal representative representations and had considered the principles in **Osborn, Booth and Reilly [2013] UKSC 61** in respect of whether the case should be directed to an oral hearing.
4. On 8 May 2023, the Legal Representatives submitted a request for oral hearing. The application was worded requesting that it be taken into account if no time extension had been granted for the Independent Psychology Report. It emphasised:
 - i. Factual disagreements with regard to undertaking risk reduction work advised in earlier psychological reports and in relation to the Applicant's prison conduct.
 - ii. The only way to resolve risk was through oral evidence without which the Panel could not safely dismiss the possibility of risk reduction.
5. This was refused by the Duty member on 8 June 2023 and the provisional paper decision confirmed. The Duty Member indicated that the legal representations did not raise any issues to put the paper decision "*into serious question*", that important facts were not in dispute, that the Panel had been able to



make an independent assessment of risk and that the written submissions satisfied the Applicant's legitimate interest to participate in his review.

6. 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. Such an application is eligible whether the decision 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).
7. 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**.
8. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier (consisting of 260 pages).

Background

9. The Applicant was sentenced on 16 July 1993, to a term of life imprisonment having pleaded guilty to manslaughter on the grounds of diminished responsibility. A minimum term of 20 years and 1 day was specified with a tariff expiry date of 27 October 2012.
10. The index offending, committed in the early hours of 29 September 1992, involved assault and shooting of the victim (DC) followed by 94 stabs, the decapitation of the body and the head being placed in a bin bag. The Applicant handed himself in to the Police the following day. The Sentencing Judge described the killing as "*grave as it was possible to imagine, a killing without proper motive accompanied by appalling acts of perversion and violence*". [Redacted].
11. There had been a number of previous reviews, none of which had led to progression. Most had been by way of paper decisions but on, 7 January 2020, an oral hearing, with evidence, took place. The most recent previous decision was on 22 October 2021 when, in the absence of any representation from the Applicant or by his Legal Representatives, again on paper, no progress was directed.

Request for Reconsideration

12. The application for reconsideration is dated 28 June 2023 and submitted by the Applicant's legal representative. It seeks reconsideration on the grounds that the decision is illegal by way of error of law, irrational and procedurally unfair.



13. The grounds for seeking a reconsideration, are set out in three pages of submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to illegality by way of error of law, irrationality and procedural unfairness, are dealt with below.

14. The application was made under two headings:

(a) Refusal of extension of time under rule 9 of the Parole Board Rules

Error of Law/procedural unfairness. A test of exceptionality was incorrectly applied to a time extension under Rule 9 whereas Rule 9 was expressed very widely to enable extension in the interests of justice. A correct application of Rule 9 would "inevitably" have resulted in the granting of a time extension.

- i. The last Psychological Assessment was on 16 May 2019 and the SPR E was "not fit for purpose". The Applicant had commissioned an independent report and "[t]here was no question of him having failed to comply with any direction or rule."
- ii. Without a report there could be no proper risk assessment and, therefore, no prospect of release.
- iii. The Human Rights Act 1998 (HRA) requires a prisoner to be given a fair opportunity to take part in a review of detention, especially when many years over tariff.
- iv. A report was reasonably required as to what further reduction work, if any, was required, an issue relevant to a release decision.

(b) Refusal of an oral hearing

- i. *Error of Law.* The review should be conducted in compliance with section 6 of HRA and Article 5(4) of the European Convention of Human Rights (ECHR). Fairness required an oral hearing and its denial was a breach of the law.
- ii. *Procedurally unfair.* As submitted by the Legal Representative on 8 May 2023, there was an overwhelming case for an oral hearing.
- iii. *Irrationality and Procedurally unfair.* To "deprive itself of evidence in the form of a psychological report "which would go directly to (the Applicant's) risk and whether he should be released".

15. The Applicant's submissions concluded that: "In summary, (the Applicant) argues that the decision was wrong in law and reached in a procedurally unfair way."

Response from Secretary of State (the Respondent)

16. The Respondent, by e-mail dated 13 July 2023, indicated that no representations were made in response to the application.

Current parole review



17. The Panel considered a dossier, then, of 163 pages.
18. The case was referred to the Board by the Respondent on 16 September 2022 as a post tariff indeterminate sentence case and the Board was asked to consider whether to direct release and, if release were not directed, whether the Applicant was ready to be moved to open conditions. The Panel was asked to give full reasons for any decision or recommendation. In accordance with standard requirements, the Board was asked not to comment upon or make any recommendations on issues which included any specific treatment needs or offending behaviour work required.
19. It was the Applicant's seventh review on this sentence. As indicated above, there had, previously, been decisions both on paper and following an oral hearing.
20. In its 9-page decision, the Panel dealt with the Applicant's offending history which including some violence but in relation to which, the index offences constituted a significant escalation in offending behaviour. Adopting earlier reports, it dealt in detail with the index offence and medical assessments at the time of sentence and risk factors, many resulting from childhood and teenage difficulties and mental health issues. It recorded significant offence focused work during the sentence, acknowledging some progress, particularly during a period on a Psychologically Informed Planned Environment (PIPE) Unit. It indicated its intention to focus primarily on events since the last review (22 October 2021).
21. It acknowledged the problems caused to progress by Covid restrictions with which the Applicant was considered to have coped well. It commended positive aspects of his work, use of time and general behaviour although he was downgraded from Enhanced Status following a positive test for heroin. There were, however, indications as to possible reluctance to meet his POM and COM or to engage with psychology or the substance misuse team. The earlier psychological information advised that a further assessment would be of little benefit in the light of no further offending behaviour work. It recorded that, in the Legal Representations, the Applicant challenged factual issues including his reported reluctance to engage and claimed that not having been given an opportunity to do outstanding work, he was at an impasse.
22. The Panel indicated that in the situation where the Applicant had not completed recommended outstanding one to one work which might have assisted in assessing his emotional management and reduction of future risk, it could make its own assessment as to risk and "*saw no reason to disagree with the risk assessments that had been provided*". The Panel rejected the deferral for an independent psychological risk assessment on the basis that it was required to focus on risk and risk management and was not to be involved in sentence planning nor influence the identified work or the manner in which it was delivered.
23. It concluded that, as advised by professionals, the risks relating to the Applicant's personality traits were core areas linked to risks of serious harm and



needed to be addressed. It came to its decisions having considered the tests both for release and, in the alternative, for transfer to open conditions.

The Relevant Law

24. The panel correctly sets out in its decision letter, dated 6 April 2023, the test for release and the issues to be addressed in making a recommendation to the SoS for a progressive move to open conditions.
25. A decision to refuse an application for an oral hearing under Rule 20, following an earlier decision not to direct release under Rule 19, is not eligible for reconsideration under Rule 28. However, the original decision not to direct release under Rule 19 can properly be the subject of an application for reconsideration, and such an application can properly argue that the lack of an oral hearing amounts to a procedural unfairness.
26. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

Error of Law/Illegality

27. An administrative decision is unlawful under the broad heading of illegality if the panel: (a) misinterprets a legal instrument relevant to the function being performed; (b) has no legal authority to make the decision; (c) fails to fulfil a legal duty; (d) exercises discretionary power for an extraneous purpose; (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or (f) improperly delegates decision-making power.
28. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Procedural Error

29. 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 from the issue of irrationality which focusses on the actual decision.
30. 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.



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

Irrationality

32. 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."

33. 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.

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

35. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.

36. 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."*



37. In **R (Wells) v Parole Board [2019] EWHC 2710** it is stated *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."*

Discussion

38. In assessing the application as against the findings of the Panel, I express some sympathy with the Applicant's legal representative in seeking to distinguish between the three separate strands of an application since, basically, all submissions centred around the basic concerns that the Applicant had been unable to obtain professional evidence which he claimed was relevant to risk and was unable himself to present his case and deal with his current and future situation. There was, therefore, a repetition of many of the same factors as applicable to each.

39. I find that every effort was made, and properly made, by the legal representatives to put before the relevant Parole Board members the reasons for their seeking additional evidence, by way of Independent Psychological Review, and the need for an oral hearing to enable the Applicant properly to present his case. I am further satisfied that it was made clear by them that such submissions as they were able to make were comments in support of the application for time to seek that review and were not made specifically in relation to the Applicant's case as a whole or in anticipation of a paper decision.

40. Procedural fairness requires that the Applicant be given a fair hearing and be not prevented from properly putting his case. These requirements mirror those of Articles 6 of HRA and Article 5(4) of the European Convention of Human Rights (ECHR).

41. I am satisfied that a fair overview of the Panel's decision indicates that these vital aspects of procedural fairness were not met and, accordingly, should not stand. A further review should take place.

42. In the light of my finding on procedural fairness it is not necessary to consider further whether, technically, there could be considered to be an error of law or irrationality.

Decision

43. For the reasons I have given, I grant this application.

Edward Slinger
27 July 2023

