

[2023] PBRA 164

Application for Reconsideration by Kirkhouse

Application

1. This is an application by Kirkhouse (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 4 September 2023. The decision of the panel was 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)) either on the basis (a) that the decision contains an error of law, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier consisting of 524 pages; the application for reconsideration submitted by the Applicant; and the response by the Secretary of State (the Respondent).

Background

4. On the 23 March 2007 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection in relation to an offence of false imprisonment. The minimum term fixed by the judge was two years, and fifteen days.
5. The details of the index offences are that the Applicant had targeted two young females, one of whom was known to him. The first offence was perpetrated against a 17-year-old victim. The Applicant was reported to have grabbed her and pulled her to the ground. He put a knife to her neck, then ran away when she screamed.
6. The Applicant subsequently moved to a different area. However, nine days after the first offence was committed, a second offence was committed. The Applicant grabbed a woman, around the neck, from behind and insisted that she went with him. The victim struggled for some time before she attracted the attention of a passing police car.

Request for Reconsideration

7. The application for reconsideration is dated the 7 September 2023.
8. The grounds for seeking reconsideration are set out below.



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Current parole review

9. This was the seventh review of the Applicant's case. The Applicant is now aged 39. He was aged 23 when sentenced.

Oral Hearing

10. The review was conducted by a Chair of the Parole Board who was also a psychology member of the Board. The co-panellists consisted of a second psychology member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, and a Community Offender Manager (COM). The Applicant was represented by a solicitor and gave evidence.
11. A dossier consisting of 513 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 4 September 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)

13. Pursuant to 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)).
14. 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

15. 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."

16. 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.

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

Procedural unfairness

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.]
21. 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 Secretary of State (the Respondent)

22. The Respondent has made no representations in response to this application.

Reconsideration grounds and discussion

Ground 1

23. The Applicant's solicitor argues that the panel failed to take account of the fact that the Applicant suffered from a neurodiverse disorder which could have explained the limitations in his memory and ability to understand and imagine risk scenarios.

Discussion

24. I have considered this ground, and the written decision of the panel. I note that the panel consisted of a psychology member as the Chair as well as a second psychology

member in a specialist capacity on the panel. I am also aware that Parole Board members receive guidance and training in connection with neurodiverse issues.

25. The panel was certainly aware of the fact that the Applicant had been assessed as meeting the criteria for a neurodiverse complaint. At 2.12 of the decision the panel specifically indicate that an assessment had been made. The panel noted also at paragraph 2.16 of the decision that within a psychological assessment, concerns had been expressed about cognitive inflexibility and the Applicant's limited insight into high-risk situations. The panel were therefore aware of the issues and also noted the potential areas of risk associated with these cognitive difficulties.
26. Also of note is that at paragraph 2.26 of the decision letter the panel carefully questioned the Applicant about issues of concern. The panel noted the Applicant's replies. It is apparent from the notes of the replies that the Applicant was able to respond to questions and understood the nature of the enquiries being made of him.
27. Parole Board panels are aware of the need to make adjustments to take account of cognitive and other challenges. A failure to take account of such challenges could amount to a procedural irregularity in that a prisoner might not have had sufficient opportunity to present his case fairly before the panel. In this case, however, there is no evidence that the Applicant was unable to present his case in the way that he chose. On the face of the written decision, the notes indicate that he was able to respond to the questions which were put to him by the panel. Those replies were noted in the decision. The Applicant was also legally represented, and thus had additional support in connection with presenting his case.
28. I am not therefore persuaded that there exists evidence to indicate that the Applicant was prevented from presenting his case to the panel. As indicated above, two members, although possibly not specialist neuro psychologists, possessed a specialist general and professional knowledge of psychological issues and in my view were capable of ensuring that the Applicant was treated fairly in terms of his ability to present his case.

Ground 2

29. The Applicant's solicitor argues that testimony presented by the Applicant within the hearing, particularly evidence indicating a poor memory of the background to the index offences and the difficulty in understanding risk scenarios, was likely to be associated with the Applicant's neuro diverse condition.

Discussion

30. At paragraph 4.2 of the decision the panel set out a number of reasons why it had concluded that the Applicant's risk was such that it remained necessary, in order to protect the public, that he be detained. The panel acknowledged that public protection and risk to the public took precedence over any benefits that might accrue to the Applicant from being in the community, and also took precedence over the fact that the Applicant may have exhausted possible rehabilitative interventions within the custodial estate.

31. The panel were particularly concerned about the fact that the risk factors in this case and in particular the motivation behind the index offending was not fully understood despite the passage of time. The panel noted that without a better understanding of the background to the offending, the panel were constrained in assessing whether the Applicant's risks had been appropriately addressed. The panel were also concerned about the Applicant's inability to fully understand the function of alcohol in relation to offending. The panel further noted the fact that the Applicant was inconsistent in his engagement with professionals and appeared to be reluctant to engage in interventions or behavioural work which he deemed not to be relevant.
32. Finally, the panel were concerned about the absence of stable plans for the longer term. The panel were obliged to consider risk indefinitely and had a duty to ensure that there were realistic plans for managing risk over the longer term.
33. This was a case where the professionals took differing views as to progression and the management of risk. The panel took account of those differing views and fully explained the basis upon which they had reached their decision. As explained in the decision of **Wells v Parole Board (2019)** the panel were not obliged to follow the recommendation of any particular professional, however, where a panel took a differing view, it was incumbent upon the panel to explain clearly the reasons for its decision, and those reasons should be sufficient to justify its conclusions.

Decision

34. In this case, I am satisfied that the decision of the panel was fully explained and justified upon the evidence and did not therefore amount to irrationality in the sense set out above, and I therefore dismiss the application for reconsideration.

HH S Dawson
18 September 2023