

[2023] PBRA 175

Application for Reconsideration by Merron

Application

1. This is an application by Merron (the Applicant) for reconsideration of a decision dated 15 September 2023 made by a panel on the papers 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 consisting of 742 pages, and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection on 1 December 2006 following conviction for a number of offences: robbery x 2, attempted robbery and burglary (after trial); robbery x 3 and criminal damage x 3 (to which he pleaded guilty). The tariff was set at seven years less time spent on remand. This was reduced on appeal to five years and six months less time spent on remand. It expired in April 2011. He is therefore now more than 12 years post- tariff.
5. The Applicant was 36 years old at the time of sentencing and is now 52 years old. This is his fifth parole review.

Request for Reconsideration

6. The application for reconsideration is dated 21 September 2023 and has been drafted by solicitors acting for the Applicant.
7. It argues that the decision was procedurally unfair and/or irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in June 2019 to consider whether to direct his release. If immediate release was not directed, the Board was asked to consider whether the Applicant should be transferred to open prison conditions.
9. After a series of adjournments, the case was listed for an oral hearing on 19 October 2023.
10. On 4 August 2023, the Applicant's Prison Offender Manager (**POM**) notified the Parole Board that the Applicant was alleged to have assaulted staff on 9 July 2023. It is reported that he lifted a chair, punched two officers in the face, bit an officer, and placed his hands and arm around an officer's neck. He gained possession of a staff radio and attempted to grab keys. He is said to have been non-compliant throughout. Serious injuries were sustained, including a broken arm. All staff members attended outside hospital. The Applicant was recategorised to Category B status and transferred establishments. The incident was referred to the police.
11. On 9 August 2023, the panel chair issued further directions. These note the alleged incident and the legal representations indicated that the Applicant was acting in self-defence. The directions further note as follows:

"Current guidance is that all prisoners are entitled to a prompt review and that, unless pending matters can be resolved promptly it may be appropriate to conclude a review on the papers. The Panel Chair notes that [the Applicant's] case was referred to the Parole Board in June 2019, more than 4 years ago. In all the circumstances, the Panel Chair considers that, unless confirmation is received that the Police investigation has been concluded or will be concluded within a prompt timescale, it appears to be appropriate to conclude this review on the papers under the provisions of Rule 21."

12. An update from the police was directed, along with representations on behalf of the parties.
13. A police update was received on 16 August 2023 which stated *"The investigation is currently ongoing. There is no approx. timescale of length due to enquiries taking place"*.
14. The Respondent did not object to the review being concluded on the papers, agreeing with the Panel Chair that the alleged violent incident would undermine an effective hearing while under police investigation.
15. The Applicant did object to the review being concluded on the papers. Submissions note that the Applicant maintains he was acting in lawful self-defence and asserts the investigation would conclude without charge.
16. Attention was also drawn to the words of Stanley J in **Broadbent v The Parole Board [2005] EWHC 1207 (Admin) [26]**:

"Nonetheless I am clear that the fact of a charge and a pending prosecution alone cannot without more justify a conclusion that there is a risk of reoffending. If it were, the Parole Board would be delegating to the prosecution authority the

assessment of the conduct of a prisoner and the evidence or facts said to give rise to a risk of reoffending. Moreover, if the fact of a charge and a prosecution for the offence was sufficient, it is difficult to see how the Board could give to the prisoner the fair hearing to which he is entitled, as envisaged by the House of Lords in R (Smith and West) v The Parole Board [2005] UKHL 1."

17. Although it was acknowledged that the Applicant has an Article 5 Convention Right to a speedy review of this detention, he also has a right for his detention to be properly scrutinised, especially given his status as a post-tariff indeterminate sentenced prisoner.
18. The panel concluded that it was appropriate to conclude the review on the papers because:

"Whilst a police investigation into further violent offending is pending, risk cannot be assessed and therefore an effective hearing cannot take place [and, there] is no timescale for the conclusion of the Police investigation and therefore no timescale in which any future Oral Hearing could be listed."
19. The panel did not direct the Applicant's release.

The Relevant Law

20. 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)

21. 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)).
22. 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)).
23. 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**.

Procedural unfairness

24. 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.

25. 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.
26. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Irrationality

27. 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."

28. 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.
29. 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

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

Discussion

31. It is argued that the decision not to release the Applicant was procedurally unfair because, in deciding to conclude the review on the papers, the panel was unable to make a full assessment of risk.
32. On first view, this could be read as a submission that the decision to conclude the review on the papers was procedurally unfair. That decision, taken under rule 21, would not be open for reconsideration. However, in all the circumstances of this particular case, a decision to conclude on the papers led to a virtually certain outcome that the Applicant would not be released, so the two decisions are, in my view, inextricably linked.

33. There is also the matter of the risk assessment itself. The decision itself points out the panel's inability to undertake a risk assessment:

"2.25... the Panel considered that the [previously supplied] risk assessments could not be relied upon while [the police investigation] was pending."

"2.26. The Panel was unable to reach a concluded view about [the Applicant's risk] whilst the investigation into the alleged further violent reoffending remained ongoing and therefore made no assessment of the risk of serious harm or reoffending risk which [he] presents."

"4.1. ...the Panel was unable to reach a concluded view about the risk of harm and reoffending risk which [the Applicant] presents or to evaluate the effectiveness of any plan to manage his risk."

"4.2...the Panel concluded that it remained necessary for the protection of the public that [the Applicant] remained confined."

34. The paragraph cited from **Broadbent** appears to say that a charge and pending prosecution cannot justify a conclusion there is a risk of reoffending. However, Stanley J went on to say (at [27]):

"That is not to say that the Parole Board is required in every case to consider all of the evidence on which a prosecution is based, or indeed any of it, or that it must necessarily make a finding as to whether the prisoner did or did not commit the offence charged. There will be cases where the undisputed facts are sufficient for it to conclude that there is a risk of reoffending."

35. The **Broadbent** proposition put forward on the Applicant's behalf is therefore qualified. The Parole Board may conclude that there is a risk of reoffending where the undisputed facts are sufficient.
36. In the Applicant's case, the facts are disputed. Submissions are clear that the Applicant's position is that he was acting in self-defence and was confident that there would be no charge. It is safe to say, then, following **Broadbent**, that the panel should not conclude that there was a risk of reoffending on the basis of the ongoing investigation.
37. The panel did not, however, conclude that there was a risk of reoffending. It was at pains to point out that it could not undertake a risk assessment, nor evaluate the risk management plan.
38. The Parole Board also has detailed guidance on dealing with allegations, following the Supreme Court's decision in **R(Pearce) v Parole Board [2023] UKSC 13**. This includes giving the prisoner a "full and fair opportunity to comment" (at [45], following **R (Director of Public Prosecutions) v Havering Magistrates Court [2002] 1 WLR 805, [41] (Latham LJ)**). Panels must always investigate allegations that are relevant.
39. In this case the panel has not done so. While I accept that the panel is correct in saying that the Applicant has a right to a speedy review of his detention and that the referral has been open for some considerable time, what is 'speedy' must be determined in the light of the circumstances of the individual case (**RMD v**

Switzerland App no. 19800/92 (ECtHR, 26 September 1997)).

40. I find therefore that the decision was procedurally unfair by:
- (a) reaching a conclusion without a risk assessment being undertaken;
 - (b) failing to engage with the guidance on allegations following **Pearce**;
 - (c) depriving the Applicant of a full and fair opportunity to comment; and
 - (d) prioritising a speedy conclusion over a full investigation of the allegations.
41. Moreover, it is illogical to conclude that a prisoner does not meet the test for release without evaluating a risk management plan. In that sense, I also find the decision to have been irrational.

Decision

42. For the reasons set out above, the panel's decision was both procedurally unfair and irrational and the application for reconsideration is granted.

Stefan Fafinski
04 October 2023