

[2023] PBRA 2

Application for Reconsideration by Hills-Francis

Application

1. This is an application by Hills-Francis (the Applicant) for reconsideration of a decision of a panel dated 14 November 2022 not to direct release following an oral hearing.
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.
3. I have considered the application on the papers. These are the application for reconsideration, the decision letter and the dossier. As it is relevant to the application, I have listened to a recording of a discussion between the panel and the Applicant's legal representative which took place before the substantive hearing. The fact that this discussion took place is recorded in the decision letter.

Background

4. On 11 September 2009 when the Applicant was 21, he was sentenced to Imprisonment for Public Protection with a minimum period to serve of 2 years 9 months for an offence of robbery and an offence of assault with intent to rob. He has served 11 years over his tariff. The Applicant was transferred to open conditions in August 2019 following a recommendation by the Parole Board. He was returned to closed conditions in July 2020 following the making of threats to staff. During his sentence the Applicant has been diagnosed [with mental health conditions] and has spent time in hospital on transfer from prison.

Request for Reconsideration

5. The application for reconsideration was received on 5 December 2022.
6. The grounds for seeking a reconsideration are as follows:
 - (i) The panel had already made a decision that they were not going to release the Applicant before hearing the evidence at the oral hearing and accordingly the hearing was procedurally unfair.
 - (ii) The decision was irrational as it was against the weight of the evidence.



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Current parole review

7. The Applicant's case was referred to the Parole Board to decide whether it would be appropriate to direct the Applicant's release on 25 May 2022.
8. The panel which consisted of two psychiatrists and an independent member considered the Applicant's case on 1 November 2022.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 14 November 2022 the correct test for release and applied it to their decision.

Parole Board Rules 2019 (as amended)

10. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence.
11. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences.

Irrationality

12. 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."

13. 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.
14. 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

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.

The reply on behalf of the Secretary of State (the Respondent)

18. The Respondent has not made any representations. It would have been helpful if he had as the case raises issues of importance.

Discussion

19. It is necessary for me to set out in some detail what happened when the panel spoke with the legal representative on her own before beginning the substantive hearing. I am able to do this because I have listened to the recording and all my findings are based on that. I have transcribed as best I can the most significant parts of the recording which I will put in quotation marks. There may be slight but unimportant mistakes in transcription.
20. The hearing was virtual and started with introductions. The Chairman indicated at the beginning that the panel was going to speak to the Applicant's legal representative on her own before the evidential hearing commenced. At the end of the introductions the Chairman explained that the panel had a discussion before the hearing during which they went through the Applicant's case and she then said to the Applicant: *'We feel that it would be helpful for us to speak to your legal representative before the hearing and then allow the legal representative to spend time talking to you.'* The Chairman then asked the legal representative whether she was OK to speak to the panel on her own and then talk to the Applicant. Without hesitation and without taking instructions, which surprises me, the legal representative agreed to this course of action.
21. While there may be exceptional circumstances where a panel could properly hold a meeting with a legal representative without the prisoner being present, in my judgment, those occasions should be rare. They could include, for example, where the panel wanted to say something about material which had been withheld from the prisoner but had been seen by the legal representative. If a discussion with the legal representative in private does happen a reason for the privacy should be given and it needs to be in my view a compelling one. At a late stage in the discussion with the legal representative the Chairman said: *'I didn't think it was a good idea to have this discussion in front of him. I thought best to speak to you. Leave it to you to speak to him. He may insist on going ahead. If he does we are where we*

are. It could go ahead but the outcome may not be what he wants. If he goes ahead and fails if he fails in his application he could spend another 12 to 18 months locked up. If things go according to plan we could be in a better state in 6 months.' I do not think there is anything in that explanation to justify a private conversation.

22. It is of course inevitable and desirable that a panel will form an initial view on pre reading and in discussion. It may well be a good idea to mention those matters so as to focus the evidence and so that the prisoner knows the difficulties he or she needs to overcome in evidence. It may also be that the panel thinks that there are other things which may need to be done and other evidence obtained. There is no reason why that shouldn't be mentioned before the hearing and discussions can take place as to whether an adjournment is necessary. A prisoner is entitled to hear what is said in the course of his hearing except in exceptional circumstances. The Parole Board should follow the principles of open justice as far as is possible and consistent with other legal principles. Normally I would take the view that having this private discussion was procedurally unfair in itself. In this case I am not going to reach that conclusion as the legal representative expressly agreed to a private hearing and it is not a complaint that she makes in her application for reconsideration.
23. The complaint in this application is that the content of the private discussion showed that the panel had made up their minds before the hearing to refuse the application and essentially the oral hearing was a waste of time. I think it is generally accepted that forming a concluded view as to the result of an oral hearing before hearing the evidence would not be procedurally fair.
24. The evidence relating to this aspect of the application is as follows: At the beginning of the private hearing the Chairman said: *'We wanted to speak to you because we are quite concerned about the position we find ourselves in with [the Applicant]. We are struggling to see how we can progress this hearing without a proper risk management plan which has been tested properly. One of the problems we have is that [the Applicant] doesn't even have s. 17 leave to the community. It has not yet been approved by the [Ministry of Justice] MOJ. We are not in a position where he could go out and be tested. We wondered what your position was about that.'*
25. The legal representative responded that the Applicant had been discharged by the Mental Health Tribunal. The Chairman continued: *'it is a notional conditional discharge if he were not detained because of his prison sentence he would not be able to leave hospital. It is really unfortunate that the tribunal has exceeded its responsibility. It is not a matter for the Mental Health Tribunal. They should not have said that he didn't need testing in the community. That is not a matter for them it is for us. The basis that we assess release is very different. The Mental Health Tribunal has said that he is compliant with treatment and therefore doesn't need to be detained for treatment within the Mental Health Act. Even that is questionable because he did stop taking his medicine. Normally when we do these cases we come to a situation when the prisoner has been going on extensive leave we have reports by people from the leave placement. Properly tested.'*
26. The Legal Representative asked what the panel was proposing. The Chairman said: *'We appreciate that the COM thinks she has a risk management plan but we think*

it is unrealistic. He needs a proper assessment from the local authority about accommodation and community support. He needs somewhere to go and he needs to be able to go on leave to that placement and come back before the panel with a well worked up release plan.'

27. Another panel member then contributed to the discussion by saying what had happened in another case that he had dealt with from the same hospital when there had been extensive testing. It was then stated that the contents of the dossier did not support release but pointed to a knock back. By adjourning, it was hoped the Applicant could come back with a stronger case in the new year. The Chairman went on to point out that if the Applicant were knocked back, he might be sent back to prison and would end up back in hospital after a few months and the whole process would start again. There was then a discussion about how long it would take to get the necessary permission and testing in the community to satisfy the panel.
28. During this part of the discussion the Chairman said: *'He has hardly had any escorted leaves. Visit to [a family member] and then visit to the hospital when he tried to abscond. **On that basis no way that we could direct his release today.** (my emphasis) I did the MCA. I sent it to a hearing quickly as I knew this would be an issue'*. It was then said that the earliest date for an adjourned hearing would be the end of March to early April. The mental health tribunal was further criticised by the panel for setting up false expectations and that had resulted in the COM being blindsided.
29. I am afraid that there is no other conclusion that I can draw on what was said other than the panel had made up their mind that they were going to refuse the application before they had heard the evidence. In reaching that conclusion I am not simply relying on the one remark that I have highlighted. It was the strong impression coming from the whole conversation. To make up your mind without allowing for the possibility of the evidence changing it, cannot be a fair hearing. It is inevitable that the panel may in some cases have strong views before they start a hearing but the panel must be in a state of mind where it could change its mind if the evidence leads it to do so however unlikely that may be. By saying that there was *'no way we could direct his release today'* the Chairman has made it clear that their minds were made up whatever they might hear in evidence. Even if this wasn't accurate and they could have changed their minds, the appearance from what was said was that they wouldn't and, as is pointed out in the application, the appearance of justice is important.
30. I have considerable sympathy with the panel. They were trying to do what they thought was in the best interests of the Applicant who is already 11 years over tariff; has mental health problems and shows every sign of being stuck in the system. They saw an adjournment as in his best interests as it would provide the opportunity for him to be tested in the community which was something they considered essential. It probably would have been in his best interests to have had an adjournment. The panel should however, in the perhaps surprising situation when the Applicant decided to carry on despite their indications, have made it clear what their concerns were to everyone but also made it clear that they could be persuaded by the evidence which they hadn't yet heard to change their minds.

31.As is clear from what I have said I am satisfied that the complaint as to procedural unfairness is made out so I do not need to consider in detail the allegation that the decision was irrational as being against the weight of the evidence. I am quite satisfied that it was a perfectly rational decision. While the COM did support release there was a great deal of evidence from treating physicians and nurses from which the panel could properly conclude that it was not safe to release the Applicant until he had been properly tested in the community. The panel set out clearly their reasons for preferring the evidence of the treating physicians and they were entitled to take that view.

Decision

32.While I find that the decision was justified on the evidence and was not irrational, I have concluded that the hearing was procedurally unfair. It is important that justice is seen to be done and accordingly I have no alternative but to direct that the decision should be re-considered.

John Saunders
3 January 2023