

[2023] PBRA 40

Application for Reconsideration by Halstead

Application

1. This is an application by Halstead (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board dated the 27 January 2023. The decision of the panel was not to direct release. The application was made on behalf of the Applicant by his legal representatives.
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 and the dossier available to the panel on the day. I have also listened to a significant amount of the recording of the hearing.

Background

4. The Applicant is serving an extended determinate sentence for the offence of wounding with intent to do grievous bodily harm under s.18 Offences Against the Person Act 1861. The sentence is for 9 years imprisonment with 3 years extended on licence. The Parole Eligibility Date was on 3 April 2021, the Conditional Release Date is 2 April 2024 and the sentence will expire on 3 April 2027. He has not yet been released on licence. The panel therefore were considering release prior the Conditional Release Date.

Request for Reconsideration

5. The application for reconsideration is dated 20 February 2023. However, I sought clarification of what were some inaccuracies in the application, and received a response shortly after, and I agreed to extend the time limit for the purposes of this clarification.
6. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.



7. The grounds for seeking a reconsideration are as follows:

(a) Procedurally unfair

- i. The Applicant states that he was never given a copy of his dossier. This means that he went into the parole hearing blind. He did not know what the dossier contained and states had he known he would've pointed out the numerous inaccuracies in the dossier but he wasn't given the chance to address these inaccuracies during the hearing.

(b) Irrationality

- ii. The Applicant states that the panel did not take into consideration a number of factors in their assessment of risk and risk management rendering the decision irrational.

Current parole review

8. The Secretary of State referred the case to the Parole Board to consider release on licence. The date of the referral is July 2020. A single member panel of the Parole Board considered the dossier at that time and directed the case to be heard at an oral hearing. It was listed for a video hearing on 14 July 2021, however prior to the hearing the panel chair deferred the hearing following an application for deferral from the Applicant's legal representatives. The reason for the application was so that an independent psychologist could be instructed to provide a psychological assessment of risk.

9. The case was re-listed for 26 January 2022. On that day a panel of three members, including a psychologist member discussed a number of preliminary issues with the Applicant's legal representatives, the Applicant and all the witnesses. It became apparent that the risk management plan available at that time needed a great deal of further work, as agreed by the Applicant's legal representatives and in fairness to the Applicant, this work needed to be undertaken before the panel took full evidence. Furthermore, the Applicant was encouraged to engage in a Programme Needs Assessment which he had refused to do earlier, and it appears that during that initial hearing it was agreed that some work could be undertaken with him to assist him to be motivated to engage with this assessment. The hearing was therefore adjourned for further information.

10. On 31 October 2022 the same panel convened to hear the Applicant's case. The dossier consisted of 812 pages and evidence was taken from the Applicant's Community Offender Manager (COM) and his Prison Offender Manager (POM). The Applicant also gave evidence. The independent psychologist report was not disclosed (if it had been completed, this is not clear). The Applicant had refused to engage with a prison psychologist for an addendum to a previous assessment that had been earlier directed by the panel chair, so that professional did not give evidence as they did not know the Applicant. The Applicant had also refused to engage with a Programme Needs Assessment.

11. I noted that there was a delay before the decision letter was issued. However, the panel chair ensured that Adjournment directions were provided in a timely manner regarding the delay and no point is taken on this delay from the Applicant.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 27 January 2022 the test for release. 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)

13. 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. 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. 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)).

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.

Other

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

22. PPCS, on behalf of the Secretary of State replied to the Application on Friday 10 March 2023. The reply focuses only on the ground of procedural unfairness which was that the Applicant had not seen his dossier. In the reply, it is stated that the Prison Offender Manager had informed them that they had attended the Applicant's wing with the dossier before the oral hearing. Because on this day cell doors could not be opened, the dossier was left with prison staff on the wing with a note and verbal instructions explaining this was for the Applicant and for his oral hearing. The POM also spoke to the Applicant through the cell door telling him that the office staff had his dossier and he should retrieve it from them at the earliest opportunity. No information was provided as to the date when this discussion took place, just that it was before the hearing.

Discussion



3rd Floor, 10 South Colonnade, London E14 4PU



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info@paroleboard.gov.uk



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23. I will consider each ground separately.

24. Procedural Unfairness: In summary, the application states that the Applicant had never been given his dossier and therefore was unable to challenge any potential inaccuracies in the dossier, rendering the hearing process unfair.

25. I accept that it is established law and a matter of natural justice that a person should know the case against them so that they can respond to that case.

26. In the Applicant's case however, I note the long gap between the referral and the actual hearing in October 2022 and the gap between that hearing and the decision letter, and at no point during those gaps, at no point during the hearing and at no point during the delay before the decision was issued, did the Applicant or his legal representative indicate that there was an issue. The dossier would have been reconstituted a number of times with additional reports throughout this period.

27. Having listened to a significant part of the hearing, I note the following:

- i. That the panel chair confirmed the number of pages in the dossier with the legal representative and nothing was raised during the preliminaries that the Applicant needed to read his dossier first.
- ii. That the panel chair explained to the Applicant, as part of the preliminaries, that the manner in which the panel arrive at a decision was by reading everything in the dossier and by taking evidence. Nothing was said about the dossier at this point either.
- iii. That the Applicant was informed that he could have a private discussion with his legal representative at any point during the hearing if he wished.
- iv. That at no stage during taking evidence from any of the witnesses or during the time when the Applicant was giving evidence were any concerns raised by him or the legal representative about the Applicant not knowing the case he was facing.
- v. That the Applicant was told that at the end of the hearing his legal representative would be able to make any submissions on his behalf, and this was accepted without comments.
- vi. That the legal representative made closing submissions on the Applicant's behalf at the end of the hearing without raising any issues regarding the procedure for the review and the hearing.
- vii. That at the end of the hearing the panel chair specifically asked the both the Applicant and the legal representative if they had any concerns about the process and if the hearing had been fair. The reply from both was that it had been a fair hearing.

28. Moreover, there is nothing to prevent a representative or a prisoner making any further submissions in writing following a hearing and prior to the deadline for the decision to be issued (14 days). None were made.

29. I think it unlikely given that the Applicant answered questions put to him without suggesting that he was hearing any issue for the first time that the Applicant had had no sight of the dossier at all. It is more likely that he may not



have had the dossier in front of him at the time of the hearing, relying on his legal representative, who did. This is not unusual, although I concede that it would have been best practice for the panel chair to check at the outset if the Applicant had seen and digested the dossier instead of just checking with the legal representative.

30. I also consider it the responsibility of the legal representative to ensure that their client has the information they need and to make any application or submission about any procedural issue during and not sometime after the decision has been issued. It is rather surprising that the legal representative themselves indicated at the end of the hearing that it had been a fair one in the circumstances.

31. I therefore do not consider that there was any procedural irregularity in the process.

32. Irrationality: I will take points made by the application in turn. Inevitably there may be some repeated comments on each point as many are linked.

33. *'No adjudications for physical violence or aggression 'for some time'*: The panel acknowledges that this is the case, however points out that there are a number of allegations (without an adjudication process) of verbal aggression from the Applicant that continue to be of concern. Secondly and more importantly, while acknowledging that the Applicant likely had the skills to control general physical violence, the panel was clear that it was concerned about the risk of intimate partner violence, something that could not be tested within the custodial setting. The panel noted that this risk remained untreated. I note that there is a pattern of intimate partner violence in the Applicant's offending history.

34. Parole Board panels do not only look at the type of violence displayed in the index offence. A panel has a duty to consider public protection more generally, as indicated in the test for release. A panel therefore is bound to consider all risks of serious harm in a prisoner's case. In this instant, the panel explored risk of serious harm to members of the public, to known individuals and to intimate partners. It noted the lack of insight displayed by the Applicant at the hearing about intimate partner violence.

35. The panel also found that drug misuse is a risk factor for the Applicant and to risk of serious harm. I note the decision letter states that the panel was *'extremely concerned'* that the Applicant had received 10 drug related adjudications over 4 days shortly before the hearing.

36. There were a number of other concerns expressed by the panel in relation to future risk of serious harm, and I do not consider it necessary to go into all the concerns for this part of the reconsideration. I do find that the panel explored the risk of future violent offending very thoroughly indeed, noted the offence



focused work that had been undertaken by the Applicant, noted the difficulties that he had had in completing further work, noted the lack of engagement with an assessment of future risk and treatment need, concerns about insight and ability to self-manage emotions, and came to a reasoned, reasonable and justified conclusion regarding future risk.

37. The further submissions on this ground can be taken together as they largely pertain to the management of risk in the community. The submissions include that the risk (of future violent offending) was not imminent, that there was *'great insight'* into his offending history, that there would be warning signs, that the wider risk management plan was robust and that the Applicant was motivated to comply with licence conditions. The submissions also indicate that the Applicant had built a good relationship with professionals and had evidenced that he was open and honest.

38. In effect, the Application submits that the test for release is met and the panel failed to take into account relevant evidence to support release.

39. I consider that the panel took careful account of the positive aspects of the Applicant's case. The panel noted that he had completed a range of offence focused work. However, it found that further work was necessary in particular in relation to intimate partner violence. It noted that the Applicant had managed periods of time abstaining from substance abuse, however it was concerned that this was not sustained, and it noted that drugs were linked to violent offending. The panel also noted that the Applicant appeared to admit that drugs were linked to his violent offending but then later suggested it was not, no doubt giving rise to concerns about insight. The panel also expressed concerns about the Applicant's stability and emotional well-being, as evidenced by concerns (not objected to) in the dossier about some of his behaviour. It further noted where the Applicant had engaged with relevant services to support him.

40. The panel also noted that the Applicant had engaged well with staff and prisoners, and in general with the prison regime. It further noted that he had some trusted positions with the prison and that his faith was a positive aspect of his prison life. In relation to protective factors, the panel found that the Applicant had an *."understanding of some of his risk factors and how to manage them, the development of positive coping skills such as going to the gym and working, his work ethic, family support, and his motivation to lead a more positive and pro-social life."*

41. In my view the panel took into account the positive aspects of the Applicant's case. In their assessment of risk, they agreed with the COM that the risk of both non-violent and violent re-offending was high. It also agreed that the COM's assessment of risk of serious harm to the public and to known adults was high, and to children was medium. I see no irrationality in the panel's approach to their determination of risk.

42. In relation to the panel's approach to the risk management plan, I am satisfied that the plan was fully scrutinised at the hearing. It noted the Applicant's proactive approach to developing the plan with the COM. It carefully considered



3rd Floor, 10 South Colonnade, London E14 4PU



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release address, move-on accommodation and the professional and personal support available to the Applicant. It considered the recommended licence conditions and, although not explicitly stated, my reading of the decision letter indicates that in their view this was a robust plan.

43. However, the panel had a number of concerns as detailed in the decision letter. In no particular order of importance, I note the concern of continued drug misuse; difficulties in coping; a finding that the Applicant needed to complete further offence focused work on intimate partner violence; refusal to engage with further assessments to identify the type of work; indication from the Applicant that he did not want to engage in further work in the custodial setting; concerns about lack of insight and minimisation with respect to the index offence; the COM's concerns that the Applicant had not been forthcoming and completely open with him during his interview with him.

44. In my view the panel fully discharged its duty to consider the test for release and took into consideration the positives in the case as well as any issues relating to future risk.

Decision

45. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
16 March 2023