

[2023] PBRA 47

Application for Reconsideration by Ortsac

Application

1. This is an application by Ortsac (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 30 January 2023 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 and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) with a minimum term of 4 years less time on remand on the 14 September 2011 for two offences of rape of a female 16 years or over.
5. His tariff expired on 24 November 2014. He is now some 9 years post tariff and has never been released, nor progressed to less secure conditions.
6. The Applicant was 21 years old at the time of sentencing.

Request for Reconsideration

7. The application for reconsideration is dated the 21 February 2023 and has been drafted by solicitors acting for the Applicant.
8. The application sets out several grounds on which it submits the decision was irrational and/or procedurally unfair. 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

9. The Applicant's case was referred to the Parole Board by the Secretary of State in September 2021 to consider whether to direct his immediate release. If the Board did



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not direct immediate release, it was asked to consider whether the Applicant was ready to be moved to open conditions.

10. On 6 May 2022, a single member panel reviewed the case and directed an oral hearing. At that time several directions were set, including the commission of an updated Psychological Risk Assessment (**PRA**).
11. The case proceeded to an oral hearing on the 30 January 2023, before a three-member panel consisting of a psychologist specialist member, a psychiatrist member, and a judicial member. It was held remotely by video conference. The Applicant was legally represented throughout the oral hearing. Evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), a prison forensic psychologist and a forensic psychologist commissioned by the Applicant. Oral closing submissions were made on the day.
12. On the 13 February 2023 the panel made no direction for release and no recommendation for open conditions.

The Relevant Law

13. 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

14. 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)).
15. 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)).
16. 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

17. 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."

18. 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.

19. 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

20. 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.

21. 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.

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

The reply on behalf of the Secretary of State

23. The Secretary of State (the Respondent) offered not views in response to the Applicant's reconsideration application.

Discussion

24. The first ground raised by the application is that the panel's decision to refuse the Applicant's observer request was procedurally unfair.

25. It is stated that the decision was '*not in keeping*' with the Parole Board's policy on Observers 2019 v3. In particular, it is highlighted that the panel did not give due consideration to the needs of the Applicant, failed to consider imposing conditions (which might have allowed the Applicant's partner to attend at least part of the hearing), and also failed to take into account the Applicant's particular mental health issues/vulnerabilities. It is also submitted that the panel '*prejudged*' the Applicant's

relationship in a manner which was negative and failed to take into account the impact of questioning the Applicant in relation to the genuineness of his childhood trauma, without the moral support of his partner being present.

26. It should be noted that the Applicant's partner was employed by the Prison Service as a Forensic Psychologist when the couple first met and there is a suggestion (although unconfirmed, and disputed by the couple) that the Applicant's partner may have completed one to one treatment with the Applicant at, or around, the time that their relationship began. Naturally, the disclosure of this relationship has given rise to an investigation, although limited information is provided in the papers about its progress or findings. The Applicant has a history of forming inappropriate relationships with female staff members.
27. Having checked the case management system, it appears the initial observer request was submitted on the 16 January 2023. This request was made on a Stakeholder Response Form (**SHRF**). The Respondent did not provide any views. The content of the SHRF is brief and does not set out any other reason for the Applicant's partner's attendance other than to offer '*moral support*'.
28. On the 24 January 2023, some 8 days later, the panel chair returned the SHRF and refused the application. At that time, the panel chair gave a clear explanation for their refusal, referring to evidence within the papers (Oasys 2023-Offender assessment System) which suggests that the Applicant's partner '*was being investigated*' and confirmed that the ongoing investigation '*raises a question*' as to '*whether or not*' the Applicant's partner has been manipulated by the Applicant. The panel chair also acknowledged within the SHRF, that both the Applicant and his partner had told others that their relationship started '*after her clinical relationship had ended*'.
29. No further submissions or objections were made in response to the panel chair's decision to reject their observer request on the 24 January 2023 until the submission of this reconsideration application.
30. When considering this application, due consideration has been given to both the Parole Board Policy on Observers 2019 v3 and also the Parole Board Rules 2019 (as amended). Rule 14 (1) of the Parole Board Rules 2019 (as amended) states that '*a party who wishes to be accompanied at an oral hearing by an observer must make a written application to the Board but such an application may not be made later than 12 weeks before the date of the allocated hearing under rule 22*'. I find therefore that the observer application submitted on the 16 January 2023 was prima facie submitted out of time.
31. Notwithstanding this late submission, the panel chair agreed to consider the observer request (implicitly using the power provided by rule 9).
32. The application was duly considered and the panel chair provided reasons for their refusal, which are clear and unambiguous, in my view as mentioned at paragraph 28 above.
33. Turning now to the specific grounds for reconsideration on the basis of procedural unfairness, I do not accept that the reasons set out by the panel chair in the SHRF observer request evidences prejudgement of the Applicant's relationship. As mentioned

at paragraph 28 above, the panel chair refers to evidence contained within the papers and also mentions, in terms, that the Applicant and his partner deny their relationship started before their clinical relationship had ended. The panel chair also states, in terms, that *'this raises questions'* the applicant's partner had been manipulated. It does not seek to answer those questions. It is clear to me that the panel chair is merely identifying potential issues in the case which could require further exploration in oral evidence (and could be more difficult to explore if the Applicant's partner were present). I find the panel chair's comments in respect of the relationship to be balanced overall. I do not accept that an inference can be drawn that the panel had prejudged the Applicant's relationship at the time of the application, nor drawn negative inferences from it, based on the evidence before me.

34. It is further submitted that the panel did not give adequate consideration to the Parole Board Policy on Observers 2019 v3, and in particular, paragraph 8 of that policy which states that the panel can impose conditions, *'for example that the observer 'observe part of the hearing'*. Again, I reject this claim. Those instructed did not request any such conditions in their original application, nor did they seek to challenge the panel chair's blanket refusal of their application on the 24 January 2023. Had they considered conditions necessary or beneficial they ought to have raised them ahead of the hearing in my view.
35. It is further asserted that the panel chair failed to give adequate consideration to the Applicant's mental health issues, including his recent detention under section 47/49 of the Mental Health Act when refusing the Applicant's observer request. Again, I have carefully considered the submissions in this regard, but again I am not persuaded. It is noted that the Applicant engaged in a lengthy oral hearing, there is no evidence in the written decision that he struggled to cope with the hearing, he was supported by a legal representative throughout, and there is no evidence within the detailed and comprehensive decision to suggest that the Applicant was not able to meaningfully engage on the day. In addition, those instructed did not raise any concerns around the Applicant's mental health issues at the time of their original observer application, nor were any preliminary matters raised at the hearing itself. The Mental Health Report within the papers (and available to the panel ahead of the hearing) does evidence past trauma, a history of suicidal ideation and other mental health issues, although it is stated that the Applicant case *'is not currently open to MHT'* and issues linked to the Applicant's mental health concerns do not appear to have featured heavily throughout the lengthy parole hearing, based on the written decision. I do not accept, therefore, that the panel's cited failure to properly consider the Applicant's mental health issues when considering the observer request led to any procedural unfairness in the case.
36. Finally, the Applicant's legal representatives argue that the Applicant was further disadvantaged by the absence of his partner at the oral hearing on the 30 January 2023 as a result of the panel's questioning around the genuineness of his childhood sexual abuse. This is said to have *'traumatised'* the Applicant. Again, I do not accept this proposition based on the evidence before me. Given accepted concerns around the Applicant's past issues with honesty and differing accounts of his index offending over the years (all of which are largely based on self-report) I find it appropriate that the panel sought to explore this matter with witnesses. It is material to any risk assessment. In addition, it is clear from the decision letter that the panel accepted the Applicant's account of his childhood abuse, for example it is stated *'the Applicant's 'childhood was characterised by severe emotional neglect and sexual victimisation'* and

that it was *'safe to proceed on the basis his present account is broadly accurate'*. Whilst it is accepted that this line of questioning may have been upsetting for the Applicant, the panel has a duty (and a right) to explore all relevant issues which go to risk. A panel may ask any questions it wishes to satisfy itself (rule 24(2)(b)). Again, there is no evidence within the decision, or any additional submissions or correspondence provided, that the legal representative or the Applicant himself raised concerns about this line of questioning at the time or that it negatively impacted on the Applicant's ability to engage with his parole review more generally.

37. In conclusion I do not find that the panel acted in a procedurally unfair manner by disallowing the Applicant's partner from attending the Applicant's hearing as an observer. It is clear to me that the panel chair correctly exercised the power granted by rule 24(4)(b). The panel chair was plainly concerned that the presence of the Applicant's partner at the oral hearing, who unusually is an ex-employee of the Prison Service and who may have been known to witnesses in this capacity, especially the prison psychologist. It is reasonable, in my view, to conclude that this situation could negatively impact on the ability of witnesses to provide best evidence. Based on the evidence available at the time, including the Applicant's history of inappropriate and manipulative relationships in prison (as cited in various reports within the parole dossier) I do not find that the panel's decision not to allow the Applicant's partner to attend the hearing as an observer to be procedurally unfair based on all the evidence before me.

38. The second ground for procedural unfairness is linked to the nature of the Applicant's IPP sentence and, specifically, the panel's cited failure to give due consideration to the Applicant's IPP status and overall targets to release IPP prisoners. I find no evidence to support this claim based on the detailed and comprehensive evidence before me. The panel was clearly alive to the Applicant's IPP sentence. His case was effectively managed at the Member Case Assessment (MCA) and Panel Chair Direction (PCD) stages, in line with Parole Board guidance. The Applicant's case was identified as being complex and set down for a full day's hearing. Comprehensive evidence was taken from all parties, including the Applicant. It is clear from the decision letter that the panel was alive to (and applied) the requisite statutory tests, which apply to all prisoners, regardless of their sentence. At the hearing all options were carefully considered, including release, a progressive move, and closed conditions. No witnesses recommended release. As such I do find this argument persuasive.

39. In summary I find no evidence of procedural unfairness in respect of either ground one or two of the Applicant's application.

40. Finally, it is claimed that the panel who presided over the Applicant's case acted irrationally. This appears to be based on several factors which include the panel's approach to the Applicant's failure to complete work, issues linked to the Applicant using self-harm as a maladaptive coping strategy, the lack of sexual offending work having been completed and the lack of stressors during the review period. I have carefully considered all of the above concerned individually, however, having regard to the evidence before me, I am not persuaded that the decision of the panel can be considered to be irrational. The decision runs to some 31 pages and is comprehensive and detailed. In my assessment, the letter provides accurate and balanced analysis of the evidence provided by all professional witnesses and the Applicant himself. The

decision arrived at is rational, fair and evidence based (and supported by report writers) none of whom supported release.

Decision

41. Applying the tests as defined in law, I do not find the panel's decision not to release the Applicant to be irrational or procedurally unfair. The application for reconsideration is dismissed.

Heidi Leavesley
21 March 2023