

[2023] PBRA 54

Application for Reconsideration by Percy

Application

1. This is an application by Percy (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 on 6 August 2007 following conviction for sexual activity with a female child under 16 (with penetration) and sexual assault of a female child under 13. He pleaded guilty to both offences. The tariff was set at three years less time spent on remand and expired in April 2010.
5. The Applicant has been released and recalled twice on this sentence.
6. The Applicant was 29 years old at the time of sentencing and is now 45 years old. This is his fourth parole review.

Request for Reconsideration

7. The application for reconsideration is dated 27 February 2023 and has been drafted by solicitors acting for the Applicant.
8. It argues that the decision was both irrational and 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 (the Respondent) in June 2021 to consider whether to direct his release. If release was not directed, the Parole Board was asked to consider



whether the Applicant continued to be suitable for open conditions (having moved to open conditions in November 2019 following an oral hearing).

10. The matter proceeded to an oral hearing on 9 December 2022 before a three-member panel. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, his Prison Offender Manager (**POM**) and his Community Offender Manager (**COM**).
11. The panel did not direct the Applicant's release, but it recommended that the Applicant remained in open conditions.

The Relevant Law

12. 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. 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)).
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)).
15. 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

16. 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."



17. 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.
18. 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

19. 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.
20. 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.
21. 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)

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

Discussion

23. It is submitted that the panel's decision was both irrational and procedurally unfair as it placed too much emphasis on the evidence of the Applicant's COM.
24. First, the application particularly notes a situation which arose in relation to the Applicant's releases on temporary licence (**ROTL**). During these periods of ROTL, the Applicant spent time working at the family farm. It is acknowledged within the application that the family farm contained a working campsite. The Applicant did not mention the campsite in discussions with his POM after returning from ROTL. A report from the Applicant's former COM



(16 March 2022) noted that the campsite was advertised online with concessions for young children (*"toddlers and children are free"*) and had been in operation since 2017.

25. The report goes on to note that neither the Applicant, nor his family, had disclosed the campsite. In supervision appointments with his COM, the Applicant did not mention the campsite when asked what the farm was used for, but later said he did not think the campsite was still running. He did not disclose the existence of the campsite with his POM either.
26. The Applicant's position is that he was not fully aware of the existence of the campsite, that there was no evidence to suggest it was fully operational, or that he had come into contact with children during his time there. He denies being wilfully dishonest towards professionals.
27. In its decision, the panel notes that it found the Applicant's position that he was unaware of the campsite given his close relationship to his family and his general awareness of the family business.
28. His COM was of the same opinion. She was concerned that his failure to disclose the campsite was an indicator that he could not be relied upon to be open and honest with professionals.
29. The panel concluded that the Applicant lacked insight into the need to be fully open and honest with professionals. It does not go so far as to say the Applicant was wilfully dishonest.
30. The second point raised concerns the Applicant's attitude towards his COM. The COM stated that she found the Applicant to be generally hostile when she first took over his case. In its conclusion, the panel expressed its disappointment about the Applicant's attitude. The Applicant denies being hostile.
31. It was not irrational for the panel to conclude that it doubted the Applicant's version of events regarding the campsite. The panel sets out clear reasons why it did so, and the COM's view was not the only piece of evidence the panel considered in reaching its conclusion. Similarly, it was not irrational for the panel to give weight to the COM's view of the Applicant's attitude. While the Applicant may disagree with both points, doing so does not make the panel's contrary findings irrational.
32. Moreover, looking at the decision as a whole, the campsite issue and the Applicant's hostility were not the sole determining factors in the panel's overall decision. The panel ultimately found that there was insufficient evidence that the Applicant understood his levels of risk and risky situations in order for his release to be safely directed. The legal test for irrationality sets a very high bar for irrationality, and I cannot conclude that all other panels would have released the Applicant based on the evidence before me.
33. Furthermore, there is no evidence of procedural unfairness.



Decision

34. The panel's decision is not procedurally unfair or irrational and the application for reconsideration is dismissed.

Stefan Fafinski
28 March 2023



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