

[2023] PBRA 57

Application for Reconsideration by Birmingham

Application

1. This is an application by Birmingham (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 21 February 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 life imprisonment on 22 October 1997 following conviction after trial for murder. The tariff was set at 20 years and expired in August 2016.
5. The Applicant was 32 years old at the time of sentencing and is now 57 years old. This is his fifth parole review.

Request for Reconsideration

6. The application for reconsideration is dated 13 March 2023 and has been drafted by solicitors acting for the Applicant.
7. 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

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2021 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Parole Board was asked to consider whether the Applicant should be transferred to open conditions.



9. The matter proceeded to an oral hearing on 25 January 2023 before a three-member panel which included a judicial member and a psychologist specialist member. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, a stand-in Prison Offender Manager (**POM**), a prison psychologist, a psychologist/therapist, and his Community Offender Manager (**COM**).
10. The panel did not direct the Applicant's release and made no recommendation for open conditions.

The Relevant Law

11. 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)

12. 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)).
13. 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)).
14. 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

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




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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.

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

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

Discussion

22. It is first submitted that the panel's decision was procedurally unfair as two of the panel members were also on the panel of his previous oral hearing. The Applicant had expressed concerns regarding an earlier review in which information regarding alleged historic offending had not been disclosed to him.

23. His COM notes that the matter has been explored with the Applicant since the previous hearing and he acknowledges that his COM was unable to disclose the information to him at the time of the investigation.

24. No objections to the panel composition were raised at the hearing.



25. It is argued that the Applicant "*fears there may have been some unfairness within the Parole process*". This is not evidence on which I can make a finding of procedural unfairness. There is nothing to suggest the current panel did not make its decision fairly. If the Applicant thought he would have been disadvantaged by the panel being in some way tainted by having considered his case previously, then it was open to him (either directly or via his legal representative) to say so. The composition of the panel is known well before the hearing and the Applicant had ample opportunity to object. He did not do so, and he cannot retrospectively cry foul. There is no other evidence of procedural unfairness raised in the application and this ground fails accordingly.

26. It is next submitted that the decision not to make a recommendation for open conditions was irrational. The recommendation for open conditions falls outside the reconsideration mechanism and this ground must therefore fail automatically.

27. The application finally reiterates the submission that the Applicant's risk can be managed in the community and that he meets the statutory test for release. Again, this is not a matter for the reconsideration mechanism.

Decision

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

Stefan Fafinski
29 March 2023