

[2023] PBRA 90

Application for Reconsideration by Gilchrist

Application

1. This is an application by Gilchrist (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 16 February 2023 not to release the Applicant following an oral hearing on 7 February 2023.
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 response from the Secretary of State and the dossier.

Background

4. On 28 June 2007 the Applicant was sentenced to an indeterminate sentence for public protection for attempted rape. His minimum tariff expired on 28 December 2011. He was convicted at the same time of failing to comply with his sexual offence prevention order (SOPO) having failed to register a change of address.
5. The Applicant had previous convictions for attempted rape and multiple indecent assaults for which he had received custodial terms of imprisonment. His index offending occurred just over a year after release on licence for these offences, one month after his licence conditions ended.

Request for Reconsideration

6. The application for reconsideration is dated 9 March 2023.
7. The grounds for seeking a reconsideration are as follows:
 - a) Procedural unfairness due to an over reliance upon the Judge's sentencing remarks.
 - b) Procedural unfairness and irrationality caused by a failure to place sufficient weight on individualised psychological work.
 - c) Procedural unfairness as there was a consideration of evidence of risk without a risk assessment having been completed by the witness being relied upon, arising from the questions asked of the witness.



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- d) That evidence was misinterpreted, resulting in a procedural unfairness and that this was irrational.
- e) That there was irrationality in the consideration of move-on plans.
- f) That there was irrationality in the determination that there would be significant benefits to future planning for the Applicant to spend time in open conditions.

Current parole review

- 8. The case was referred to the Parole Board by the Secretary of State on 20 August 2021. The referral was considered by a Member Case Assessment panel on 11 February 2022. The case was directed to oral hearing. The hearing was adjourned on the day on 6 September 2022 and relisted for 7 February 2023. This was the Applicant's 7th review.
- 9. The oral hearing took place via video link on 7 February 2023 by a three-member panel, which included a psychologist member. Oral evidence was heard from the Prison Offender Manager (**POM**), the Community Offender Manager (**COM**), a prison appointed psychologist and a psychologist from the Forensic Outreach Liaison Service as well as from the Applicant. The Applicant was legally represented during this hearing.

The Relevant Law

- 10. The panel correctly sets out in its decision letter dated 16 February 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.
- 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. 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)). 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 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. By email of 13 March 2023 the Respondent offered no representations in response to the application.

Discussion

22. The decision letter extended over 19 pages (not including the annex) and was comprehensive. It is clear that the panel considered the evidence it had before it with great care.

Ground 1 - Procedural unfairness due to an over reliance upon the Judge's sentencing remarks.

23. A Judge's sentencing remarks are a contemporaneous record from the time of sentencing. The sentencing remarks are normally given considerable weight by a panel. The Applicant was convicted after a trial, with the trial Judge having heard the evidence and reached conclusions as to the Applicant's dangerousness. The assessment helps to inform the Parole Board of the risks for the future as revealed by the conduct of the Applicant when committing his index offence.

24. The panel has rightly considered the Judge's sentencing remarks as part of all the evidence before it. The specific complaint concerns a paragraph which is within the section of the decision letter entitled '*Analysis of Offending Behaviour (The Past)*', it being observed that there was no reference to the Applicant's neurodevelopmental diagnosis, which had not been made at the time of sentencing. This is not an accurate portrayal of the decision letter which must be read as a whole. It is plain from the later sections of the letter which deal with Analysis of Offending Behaviour (The Present) and Analysis of the Manageability of Risk (The Future) and that the panel considered the current diagnosis of neurodevelopmental disorder, making specific reference to the evidence received and the impact on risk. There is no evidence of a procedural unfairness.

Ground 2 - Procedural unfairness and irrationality caused by a failure to place sufficient weight on individualised psychological work.

25. The Applicant had been assessed as needing psychological treatment but been ineligible for standard programmes. He therefore engaged in individual work with psychologists in 2014 and 2021. The panel considered what this work was and what impact it had. Their assessment was that this was largely psycho-educational and related to the neurodevelopmental diagnosis of the Applicant. They considered that to that degree it appeared to have had some success.

26. The panel set out that they were uncertain from the evidence received as to whether this work had had the effect of significant risk reduction. They reviewed all the evidence, in particular the psychological risk assessment of the prison psychologist and the psychological evidence in the dossier and concluded that there remained core treatment needs

27. The weight to be placed upon evidence is a matter for the panel. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of witnesses. It is their responsibility to make their own risk assessments. They formed their own view on the totality of the evidence that the test for release was not met, nor the test for a recommendation for transfer to open conditions. They have the expertise

to do so and the reasons for their decision are clear and sufficient within the decision letter. There is nothing in this ground.

Ground 3 -Procedural unfairness as there was a consideration of evidence of risk without a risk assessment having been completed by the witness being relied upon, arising from the questions asked of the witness.

28.This ground arises from the questions asked of the psychologist from the FORS during the hearing. It is not particularly comprehensible as a ground. The grounds claim that the questioning of the psychologist on areas of risk, when they had not undertaken a risk assessment, and the evidence provided by them would have *'undoubtedly formed/effected the decision of the Parole Board to an extent'*. It is then said that because that evidence was not all included in the decision letter, but would have affected the panel's decision, that this has made the hearing fundamentally unfair. No specific examples of questions asked of the psychologist are given in the application for reconsideration.

29.The Parole Board has an inquisitorial function, performed with the benefit of its expertise in risk assessment. The evidence obtained from witnesses, alongside that in the dossier assists the panel in reaching its conclusions about the issues of risk that it needs to determine. It is for the panel to consider the questions it wishes to ask to assist them. If the evidence elicited does not assist in the risk assessment, then it is unsurprising that it is not recorded in the decision letter, which is not a transcript of the hearing. There is no evidence of procedural unfairness here.

Ground 4 - That evidence was misinterpreted, resulting in a procedural unfairness and that this was irrational.

Ground 5 -That there was irrationality in the consideration of move-on plans.

30.Grounds 4 and 5 are considered together as they both relate to the transition between closed conditions and open or release.

31.The misinterpretation of evidence concerns the evidence about how the Applicant would manage transitions. It is said that the panel has misinterpreted this evidence causing them to place a greater weight on the need to test his skills in a transition to open conditions and to have a fully formed risk management plan than they should have done.

32.There is nothing in the decision letter which indicates a lack of understanding or misunderstanding by the panel of the evidence it received. The letter sets out the evidence received about transitions and then proceeds to analyse it carefully. The panel accepted the evidence that transition was likely to be difficult for the Applicant but considered that *'the reality would be that there would be a number of transitions in his future.'* Their concerns were that the testing that open conditions would provide and the benefit in planning future management had been somewhat overlooked in an approach that focused on the impact on the Applicant.

33.The decision is said to be irrational as the panel's concern about management of transitions led to the panel concluding the risk management plan was inadequate.



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Reasons are given in the decision letter for the panel's view that the risk management plan was inadequate. There was no settled move-on plan from the Approved Premises, and they formed the view that further work would need to be done in relation to the scope and wording of licence conditions to make them as clear and workable as possible for the Applicant. Ultimately, however it was the panel's views about risk which meant that they did not consider the risk management plan was sufficient to manage the Applicant's risks in the community.

34. Given these conclusions, there is nothing in either of these grounds to support the application for reconsideration.

Ground 6 - That there was irrationality in the determination that there would be significant benefits to future planning for the Applicant to spend time in open conditions.

35. Irrationality is said to arise from the panel's conclusion that there were significant benefits to future planning if the Applicant were to spend a period in open conditions, given the evidence of how he would process the transition process, and the distance of an open prison from the local area of release. I consider this ground to relate to the decision not to recommend a transfer to open conditions and as such it is not eligible for reconsideration under Rule 28 of the Parole Board Rules 2019.

Decision

36. Refusal – 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.

Angharad Davies
15 May 2023