

[2024] PBRA 23

Application for Reconsideration by Ward

Application

1. This is an application by Ward (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 13 December 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.
3. I have considered the application on the papers. These are:
 - a) The Decision Letter dated the 13 December 2023;
 - b) A request for reconsideration from the Applicant's legal representative dated the 4 January 2024; and
 - c) The dossier, number to page 566, of which the last document is the Decision Letter.

Background

4. The Applicant is now 45 years old. In 2007, when he was 29 years old, he received a sentence of imprisonment for public protection following his conviction for the sexual assault of a child under the age of 13. The sentencing court determined that the Applicant must serve 30 months prior to being eligible to be considered for release by the Parole Board. The Applicant reached that eligibility date in September 2008.
5. On the 25 August 2021, the Applicant was released from custody following a direction by the Parole Board. He was then recalled to prison on 6 May 2022 following concerns about his behaviour.
6. The Secretary of State (the Respondent) referred the Applicant's case to the Parole Board for it to consider whether his re-release could be directed or, in the alternative, whether he was suitable for a move to an open prison.
7. The panel considered the Applicant's case at an oral hearing on the 30 November 2023. Evidence was heard from the Applicant, a probation officer, the official



responsible for him in custody and from a prison psychologist. The Applicant was legally represented at the hearing.

8. Witnesses at the hearing considered that the Applicant met the test for release and that if not released he met the test for a place in an open prison.
9. The panel heard oral evidence which established new issues. For example, the Applicant's relationship history and his possession of a mobile phone on licence in the community for longer than had been known.
10. Witnesses were alive to those matters when they made their recommendations to the panel. The panel concluded that the risk management plan, should the Applicant be released, "was very dependent on probation supervising [the Applicant] more closely than previously...".
11. In its conclusion, the panel stated:

"Although there has been professional support for release or a move to open conditions, there are clearly concerns. Probation had previously been unaware of the extent of [the Applicant's] failure to disclose his actions (eg visits by his relatives with his young nephew, the speed with which he acquired a smartphone and the help in this from a family member) and [the Probation Officer] was sceptical about his honesty about whether he had been in reality living at his approved address."

"There is a robust risk management plan and [the Applicant] was recalled before serious harm arose. However, the panel is concerned that management of [the Applicant's] risk depends on external measures rather than internal controls. He has not spent time since returning to custody in reflecting on risk scenarios or recording and reviewing sources of sexual arousal. He was forthcoming with the panel on many matters, but he has been less so with probation, and possibly with [the prison psychologist], on whose assessment other professionals have placed considerable weight. The panel therefore cannot conclude that his risk has reduced since returning to custody, and panel members consider that further work is needed to develop his insight, internal controls, consequential thinking and readiness to be open about his sexual thoughts, before he is re-released."

12. The panel disagreed with the evidence that had been presented, finding that there remained a need for further work to be completed to address risk in this case. It did not direct the Applicant's release and did not recommend his progression to an open prison.

Request for Reconsideration

13. The application for reconsideration is that the panel's decision was irrational and procedurally unfair in that:
 - a) The panel failed to follow the unanimous and comprehensive recommendations tested in evidence;
 - b) The panel further failed to consider the evidence in the dossier from the Independent Psychologist and her professional opinions, which also agreed with the other professionals in respect of suitability for release; and

- c) It was incorrect to state that there was no evidence of internalised reduction in risks.

The Relevant Law

14. The panel correctly sets out in its decision letter 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.
15. 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)

16. 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)).
17. 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

18. 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."

19. 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.
20. 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

21. 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.
22. 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.
23. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

24. 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 Respondent

25. In an email communication dated the 15 January 2024, the Respondent confirmed that he would not be submitting any representations.

Discussion

26. In his representations, the Applicant accepts that the panel was not bound by the recommendations of the witnesses. However, he submits that the panel disregarded those recommendations and failed to mention the opinion of the independent psychologist contained in her report in the dossier.
27. The psychological report the Applicant is referring to was produced on the instruction of his legal representative in November 2022.
28. I am satisfied that the panel was aware of the report because on the 24 November 2023, the panel agreed to revoke the direction for the attendance of the author of the independent psychological report at the request of the Applicant's legal representative.

29. The Applicant's application to revoke the attendance of his psychologist witness was made *"in light of the professional opinion offered ... on the basis that the [prison psychologist and probation officer] have subsequently offered the same opinions regarding suitability for release"*.
30. In agreeing to revoke attendance, the panel noted that the Applicant's psychologist witness *"reached the same conclusion last year as [the prison psychologist] has done more recently ... the panel has no objection to [the Applicant's psychologist witness] being stood down, provided that [the Applicant's legal representative] is confident that there can be a fair hearing in her absence."*
31. In my view, it is clear that the panel was aware of the other psychological report. It was not required to detail in its decision every document it had reviewed and I am satisfied that it gave the report due consideration in its assessment of the Applicant's case. The report reached similar conclusions to the oral evidence presented and the absence of any direct mention of it in the Decision Letter was not fatal to the panel's decision, and did not evidence procedural unfairness.
32. As noted in **Oyston [2000] PLR 45**, the panel was required to explain its reasoning so that the Applicant (and others) could understand the decision reached. It was not required to rehearse all the evidence, both written and oral.
33. Although all witnesses at the oral hearing, and the Applicant's psychological report supported his re-release, the panel was not obliged to follow those recommendations. The panel was required to make its own assessment of risk and reach its own conclusion on whether the Applicant met the test for release. It would be failing in its duty if it did not do so.
34. In my view, the panel properly explained why it disagreed with the recommendations made. It found that there was a need for the Applicant to do more to address risk prior to any re-release. It was entitled to reach that conclusion based on the evidence before it. It is possible that another panel may have reached a different conclusion, however, that does not mean that the conclusion of this panel was irrational.
35. The Applicant's argument that the panel was incorrect to find that there had been no evidence of internalised reduction in risk is not made out. The panel had reflected on the external controls of the risk management plan provided by the probation officer. The panel was not satisfied that the Applicant would be able to manage himself safely, i.e. utilising his own internal controls. The panel found that any risk management would be reliant on supervision by probation. It was a view the panel was entitled to reach based on the evidence and it does not evidence irrationality.

Decision

36. For the reasons I have given, the Applicant's submissions of irrationality and procedural fairness are not made out. I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Robert McKeon
23 January 2024