

[2024] PBRA 4

Application for Reconsideration by Hussain

Application

1. This is an application by Hussain (the Applicant) for reconsideration of a decision of an oral hearing panel dated 21 November 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 the oral hearing decision, the dossier (consisting of 496 pages), and the application for reconsideration.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) on 5 October 2011 following conviction for sexual activity with a child under 13. He also received a concurrent determinate sentence of one year for failing to comply with the requirements of sex offender registration. His tariff was set at three years less time spend on remand and expired in November 2013.
5. The Applicant was 36 years old at the time of sentencing and is now 48 years old.

Request for reconsideration

6. The application for reconsideration is dated 12 December 2023. It has been drafted by solicitors acting on behalf of the Applicant. It submits that the decision was irrational. No submissions were made regarding procedural unfairness or error of law.
7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in September 2022 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it



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was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

9. The case proceeded to an oral hearing on 22 September 2023. The panel consisted of three independent members. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**) and an HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The hearing adjourned for further information about the proposed risk management plan. Updates were received from the POM and COM, together with legal representation on the Applicant's behalf.
11. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the decision not to release the Applicant that is open for reconsideration.

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.

The reply on behalf of the Respondent

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

Discussion

20. It is submitted that it the panel's decision was irrational since:
 - a) There was consensus among the professional witnesses that the Applicant did not need to complete any further offending behaviour work in closed prison conditions;
 - b) It was acknowledged that the Applicant had completed one-to-one work with a forensic psychologist to help him recognise and understand his problematic personality traits and to develop strategies to manage his tendency towards impression management and wanting to control others and that there was evidence that he had developed some insight;
 - c) The Applicant has completed a period in open conditions and his return to closed conditions did not justify the level of risk set out in the decision;
 - d) As such, it was unclear how the panel arrived at its decision not to direct the Applicant's release.
21. The decision notes that, although there was consensus among witnesses that the proposed risk management plan would be sufficient to protect the public, the HMPPS psychologist and the COM nonetheless expressed a strong view that the Applicant should progress to open conditions. The POM agreed, although it is noted that he felt conflicted in offering a professional opinion either way.
22. From this, it appears that, although there was a risk management plan in place, the professional witnesses were, to a greater or lesser extent, of the view that it was necessary for the Applicant to move to open conditions. It follows, then, that they did not consider that the Applicant should be released directly, notwithstanding the progress that he had made during the course of his current parole review period, nor the external controls provided within the proposed risk management plan.

23. If a prisoner has completed all core risk reduction work, it does not automatically follow that they must be released. To say otherwise would undermine the Parole Board's role as a statutory independent assessor of risk.
24. The panel sets out very clear reasons why it concluded that the Applicant did not meet the test for release. It carefully considered its duty to consider risk over the entire period of the Applicant's IPP licence. It noted his history of very serious sexual offending and the link between the Applicant's personality traits and his risk of future reoffending. It noted that his ability to work with professionals was yet to be fully tested in less secure conditions. It also noted the Applicant's demeanour in the hearing (which it is entitled to do). It cannot be said that it is unclear how the panel arrived at its decision. The panel has discharged its duty to give reasons.
25. The legal test of irrationality is essentially that the panel's decision not to release the Applicant was so illogical that every other panel would have decided otherwise and released him. The evidence before me suggests there was no support for direct release from any of the witnesses, despite the external controls within the proposed risk management plan. The Applicant may disagree, but disagreement is not enough to establish irrationality in law. The legal test sets a high bar which this case does not meet. Accordingly, this application must fail.

Decision

26. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
4 January 2024