

[2024] PBRA 6

Application for Reconsideration by Penrose

Application

1. This is an application by Penrose (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 1 December 2023 not to release the Applicant following an oral hearing on 21 November 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 decision of the panel, and the dossier.

Background

4. On 16 September 2008 the Applicant was sentenced to imprisonment for public protection with a minimum period to serve of four years and three months for two offences of robbery. The Applicant's tariff expired on 7 September 2011. Prior to his first release the Applicant had been transferred to open conditions on two occasions and transferred back to closed conditions on both occasions. The Applicant has been released and recalled to prison on five occasions during his sentence. His last release was on 12 October 2020, and he was recalled to custody on 15 November 2021. The Applicant was recalled following an incident which resulted in the Applicant being convicted of a racially aggravated public order offence and sentenced to 28 days imprisonment.

Request for reconsideration

5. The application for reconsideration is undated but was received by the Parole Board on 14 December 2023.
6. The grounds for seeking a reconsideration are that in various different respects the decision was procedurally unfair and irrational.

Current parole review

7. This is the first Parole Board review since the Applicant's latest recall in November 2021.
8. At a remote oral hearing on 21 November 2023, the panel heard evidence from the Applicant, the Community Offender Manager (COM), the Prison Offender Manager (POM) and a prison psychologist. The Applicant was represented by a solicitor who made submissions during the oral hearing to the panel after the evidence was completed.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 1 December 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)). The application to reconsider the decision not to release is eligible to be reconsidered.
11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

Irrationality

12. 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 paragraph. 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."

13. 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.
14. In terms of parole decisions, the test for irrationality is that no reasonable panel could have reached the decision reached by this panel.

Procedural unfairness

15. 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.
16. 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.
17. The overriding objective is to ensure that the Applicant's case was dealt with justly.
18. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
- (a) the progress of the prisoner in addressing and reducing their risk;
 - (b) the likeliness of the prisoner to comply with conditions of temporary release
 - (c) the likeliness of the prisoner absconding; and
 - (d) the benefit the prisoner is likely to derive from open conditions.
19. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.
20. 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

21. The Respondent has made no submissions in response to this application.

Discussion

22. There are a number of different grounds for the application for reconsideration. I shall consider them all individually and then cumulatively.
23. **Ground 1– Evidence of procedural unfairness – Failure to consider legal closing submissions.** The Applicant complains that there is no mention of the submissions made by his solicitor's representations at the end of the hearing and no indication that they were taken into account by the panel in reaching their decision.
24. This submission has no merit. The panel listened to what was said and would have taken these submissions into account. If the panel or any member of the panel was obviously not listening, then the solicitor for the Applicant would have been obliged to mention it. There is no need for a panel to say that submissions have been made and have been taken into account. In the absence of any evidence to the contrary that can safely be assumed. There is nothing procedurally unfair in not mentioning or referring to the submissions in the decision.
25. **Ground 2 - Evidence of procedural unfairness – Incorrect information.** In this ground the Applicant complains in two different ways about how the panel dealt with the incident which led to his most recent recall. First, he complains that at paragraph 2.8 of the decision the panel incorrectly records that "*the police had been called to attend an address where [the Applicant] was alleged to have arrived and be kicking the door in*". Like the Applicant, I cannot find a reference in the dossier to him being alleged to be kicking the door in. The police were called to a disturbance where the Applicant was arrested but I shall deal with this part of the application on the basis that the panel have made a mistake about the nature of part of the allegation against the Applicant. Importantly it played no part in the decision the panel made. At paragraph 2.16 the panel set out their findings on what happened at the incident which led to the Applicant's recall. They did not make any finding about the Applicant kicking the door in and accordingly it is impossible to find that it made any difference to the decision. As is set out in paragraph 19 above decisions will only be procedurally unfair on the basis of a mistake of fact if that mistake played a material part in the decision. It is clear that the panel made no finding that the Applicant did kick the door in, and it had no effect on the final decision. That mistake did not render the hearing procedurally unfair. The Applicant further complains in relation to the same incident that the panel say that they were "*concerned that [the Applicant] lacked insight into the impact that even a small amount of alcohol could have on him.*" There was clear evidence from which the panel could conclude that the Applicant's behaviour on that night which included a

racially aggravated public order offence was affected by alcohol which is a risk factor in his case. The Applicant's case was that although he had consumed alcohol it was only a small amount. On that basis the panel was entitled to be concerned that the Applicant did not realise the risks that he was taking in consuming any amount of alcohol. There was nothing procedurally unfair about that.

26. **Ground 3 – Evidence of Procedural Unfairness – Body worn camera footage.**

There was evidence before the Panel that there was some CCTV evidence of the incident which led to the recall, but it came from a camera worn by a police officer, so it does not show what happened before the police arrived. Complaint is made that the panel should have adjourned to try and obtain the CCTV footage. The panel did not adjourn but they were not invited to by the Applicant's lawyer who could have asked them to if she considered that it might be unfair to continue without it. The panel used third party accounts of what was on the CCTV as evidence that the Applicant was unsteady on his feet and under the influence of something and that in contrast to his evidence before the panel the CCTV does not record the Applicant as complaining about pain in his back when abusing the police officer. The panel were entitled to conclude that on the night of the incident leading to recall the Applicant was affected by alcohol, whatever amount he may have consumed. The issue of whether or not he was complaining to the police about his back is not something which played a significant part in the decision. To adjourn a case like this in the middle of the hearing, which would almost certainly have led to a significant delay in completing the parole review, is not something which should happen unless a fair hearing cannot be held without doing it. The decision not to adjourn did not affect the overall fairness of the hearing and accordingly was not procedurally unfair.

27. **Ground 4 – The decision was irrational.** The Applicant contends that no reasonable panel could have reached the decision reached by this panel, principally because the professionals recommended release and had concluded that there was no further core reduction work which needed to be carried out. It was said that any risk was not imminent. The risk management plan was accepted by the panel as being robust.

28. The panel are not bound to accept the recommendations of the professional witnesses. It is the decision and responsibility of the panel to decide whether the test for release has been met. What the panel are bound to do is to give adequate reasons so that it can be understood why they have not accepted the recommendations. If they do not do that then the inference may be drawn that failure to follow the recommendations was irrational. I am satisfied that in this case the panel have given adequate reasons for not following the recommendations. The recommendations were given cautiously by the COM and prison psychologist. The latest risk assessment highlighted the Applicant's lack of insight into what had led to his recall. It was accepted that this meant there was an increased risk of non-compliance if released on licence. The COM agreed that there was no evidence of internal change by the Applicant which increased the risk of non-compliance. The panel were concerned that emotional management was an area of risk that remained outstanding. The panel considered that the Applicant had core risk factors which remained active. I consider that the panel were entitled on the evidence to reach the conclusion that it did. The decision was certainly not irrational in the way that I have defined it.

29. Having concluded that none of the individual grounds justify reconsideration, I have gone on to consider their cumulative effect. While it is a matter of concern that the Applicant is still in custody so long after his tariff has expired the test that the panel has to apply remains the same. I do not consider that even looking at the complaints cumulatively the Applicant has made out a case for reconsideration.

Decision

30. 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.

Sir John Saunders
08 January 2024