

[2024] PBRA 93

Application for Reconsideration by Shorey

Application

1. This is an application by Shorey (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 28 March 2024 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 oral hearing decision, the dossier consisting of 746 pages including the decision, and the application for reconsideration.

Background

4. The Applicant received a sentence of life imprisonment on 2 July 1991 following conviction for murder of two women. His tariff was set at 20 years and one day and expired on 1 August 2010.
5. The Applicant was 35 years old at the time of sentencing and is now 68 years old.

Request for Reconsideration

6. The application for reconsideration is dated 18 April 2024 and has been drafted by solicitors acting for the Applicant. It submits that the decision was procedurally unfair and was irrational.
7. The 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 April 2019 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 was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

9. The case proceeded to an oral hearing over video link. The panel consisted of two independent members and a psychologist member. The Applicant was represented by legal representatives. The Respondent was not represented by an advocate.
10. The panel took into account a dossier of 711 pages and took oral evidence from the Applicant's Prison Offender Manager (POM), Community Offender Manager (COM), a prison psychologist who had undertaken a psychological risk assessment in February 2024 and a prisoner instructed psychologist who had undertaken a psychological report in December 2023 (an addendum report to one he had produced in January 2023).

The Relevant Law

11. The panel correctly sets out in its decision letter of 28 March 2024 the test for release and the issues to be addressed in making a recommendation to the Respondent for a progressive move to open conditions.

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 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."

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 Respondent

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

Discussion

Ground 1 – Procedural Unfairness

22. The Applicant submits that the panel's approach to his appeal and to his denial of guilt led to a biased approach to the assessment of his application. He further submits that he had "a legitimate expectation that the *de novo* hearing" would rest on the previous dossier of February 2023.

23. It is right that the panel noted that there had been no further appeal by the Applicant following the rejection of his first appeal. Even if he was not aware of the outcome of his second 1993 appeal until 2012, it was noteworthy that he did not appear to have sought to find out the outcome or lodge a further appeal or progress the case. The panel noted that his solicitors explained the position for some of the apparent delay in their subsequent written submissions. There is no evidence that the panel adopted a biased approach to their assessment. The denial of guilt is a factor in a panel's assessment of risk as would be a failure to appeal the conviction or unexplained delay in appealing the conviction. The panel's decision is reasoned and in considering the question of denial of guilt, the panel applied the correct



principles as set out in the case of **R (Owen Oyston) v Parole Board [2000] EWCA Crim 3552** and other subsequent cases. **In Oyston, The Lord Chief Justice stated:**

"43. Where there is no admission of guilt, it may be feared that a prisoner will lack any motivation to obey the law in future. Even in such cases, however, the task of the Parole Board is the same as in any other case: to assess the risk that the particular prisoner if released on parole, will offend again. In making this assessment the Parole Board must assume the correctness of any conviction. It can give no credence to the prisoner's denial. Such denial will always be a factor and may be a very significant factor in the Board's assessment of risk, but it will only be one factor and must be considered in the light of all other relevant factors. In almost any case the Board would be quite wrong to treat the prisoner's denial as irrelevant, but also quite wrong to treat a prisoner's denial as necessarily conclusive against the grant of parole."

24. As the case makes clear, a denial of guilt can be taken into account when assessing risk but it is only one factor to be taken into account and it has to be considered in the context of all the evidence. The panel clearly took into account all the other evidence presented before it in reaching a decision. There was no unfairness in the approach of the panel.

25. With regard to the previous hearing the panel noted the following:

"[The Applicant's] case was referred to the Parole Board for review in April 2019. Since that point there have been a number of adjournments and deferrals. It seems that his review was concluded but was subject to a successful reconsideration. The current panel have not had sight either of the original decision or the reconsideration decision and are unaware of the outcome of that initial hearing.

Both in her additional questions of the COM and in her closing submissions to the panel, [the Applicant's legal representative] made reference to evidence adduced only at the original hearing. The panel did not take this into consideration."

26. A hearing de novo means a fresh hearing, uninfluenced by the previous hearing and the documents that went to support that hearing. A court or tribunal hearing a case de novo will hear the case without reference to the previous decision and in that way will consider the case without being influenced by the reasoning or conclusions of the previous panel which are no longer to be applied. The panel had before it the most recent documents relating to the Applicant. The panel was right not to take into consideration documents or evidence not before it. It is not clear on what basis the Applicant had a "legitimate expectation" that the fresh hearing would rest on a previous dossier or which documents the panel were expected to place reliance upon. If there were relevant reports in the previous dossier not included in the dossier for the fresh hearing, it was always open to the Applicant to bring them to the Board's attention by a Stake Holder Response Form (SHRF) request or an application at the outset of the hearing. He does not appear to have done so. Even if all the professionals at the hearing in February 2023 recommended release as claimed in the application, nevertheless it is incumbent on a panel to consider the most recent material placed before it for consideration. In the evidence before the panel the prison psychologist who had produced a very recent report, did not



recommend release. The panel noted (paragraph 2.30) that her report provided “a far more detailed risk assessment”. No doubt the Applicant hoped for a different outcome, one that proposed release, however for the reasons given by the panel based on the evidence they heard and documents they considered the panel could not direct release. There is no unfairness in that approach or in the conclusions reached.

Ground 2 – Irrationality

27. The application submits that the panel’s reasoning is contradictory, that considerable time was spent comparing the Kaizen course with the one-to-one engaged in by the Applicant thus failing to appreciate the value of the latter course, that the value of the one-to-one work done by the Applicant and his evidence of its benefit to him was not appreciated by the panel, that the panel did not specify what further treatment is required.
28. I have carefully examined the panel’s decision from which it is clear that they have made a careful analysis of the evidence of the professional witnesses and also taken into account the evidence from the Applicant. The panel has not avoided a risk assessment on the basis of the Applicant’s denial of guilt. The panel has acknowledged the difficulties that raises in that no clear understanding for offence motivation and risk reduction work to be done is presented. But the panel acknowledge the work that has been done and what further work could in the circumstances be done. I can see no contradiction in their assessment.
29. The panel notes a number of risk factors identified by previous panels to which they are able to add further factors (paragraph 1.10) based on their own assessment and analysis of the evidence. For example, at paragraphs 2.19 to 2.21 the panel noted the Applicant’s acknowledgement of some domestic violence, his failure to de-escalate a particular situation and minimisation of his aggressive behaviour.
30. The panel was aware of the one-to-one work completed by the Applicant and in particular noted his evidence of the benefit of the course (paragraph 2.22). The evidence of the one-to-one work was dealt with in detail in the evidence of the prison psychologist (paragraph 2.31) and analysed by the panel in their decision (paragraph 4.9). In particular the panel noted that the one-to-one work “was limited to that which his POM at the time could deliver”, “was not a substitute for Kaizen” and “was not of the intensity, breadth and depth necessary to effect any significant change in (the Applicant’s) attitudes or future risk”. The panel acknowledges the Applicant’s evidence of what he gained from the one-to-one work (paragraph 2.22). However, the panel identifies at paragraph 4.12 what further work needs to be done to reduce the risks that are identified at paragraph 1.10 of their decision. The professionals, in particular the prison psychologist also identify further work to be done. The prison psychologist notes (dossier page 677) that the Applicant is not motivated to engage in further work in closed conditions. It is clear from the decision what identifiable risks are posed and what further work needs to be undertaken to minimise those risks. The decision is clearly reasoned.

Decision



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31. 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.

Barbara Mensah
15 May 2024

