

[2022] PBRA 108

Application for Reconsideration by Ryan

Application

1. This is an application by Ryan (the Applicant) for reconsideration of a decision, issued by a panel of the Parole Board (the Panel) following a hearing on 6 April 2022. The Panel decided not to direct the release of the Applicant, nor to recommend his progression to open conditions.
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 dossier of 468 pages, the application for reconsideration amounting to 8 pages, and the decision letter amounting to 15 pages.

Background

4. On 6 February 2006 the Applicant was sentenced to imprisonment for public protection following his conviction of robbery. The Applicant was 30 years old at the time of sentencing and is now 41 years old.
5. At the time of committing the offence, the Applicant was subject to licence supervision for another offence of robbery and was unlawfully at large as there were recall proceedings against him.
6. A minimum term of 2 years, 6 months and 10 days was imposed. That period ended on 15 August 2008. The Applicant was subsequently released but recalled on two occasions, in 2016 and 2018, and this was the Applicant's eighth review by the Parole Board.
7. At the hearing on 6 April 2022, the Applicant's application was for release. That application was not supported by either the Prison Offender Manager (POM) or the Community Offender Manager (COM) who both gave evidence at the hearing.

Request for Reconsideration



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8. The application for reconsideration is dated 20 July 2022.
9. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.
10. The grounds for seeking a reconsideration are as follows:
 - **Ground 1: the decision to proceed with the hearing in the absence of the Applicant on the 6th of April 2022 resulted in the proceedings being fundamentally flawed and therefore producing a manifestly unfair, flawed or unjust result.**
 - **Ground 2: by failing to defer the hearing and allowing him an opportunity to attend he was not afforded a fair hearing and was prevented from putting his case properly**

Current parole review

11. On 6 April 2022 a panel consisting of an independent chair member and a specialist (psychologist) member, conducted a hearing of the review. A dossier of 367 pages was made available to the panel prior to the hearing, with no material being withheld from the Applicant. Following the hearing, additional reports were provided to assist the panel in their deliberations. Those reports were also provided to the Applicant's solicitor, who submitted two sets of representations commenting on the new evidence and the conclusion of the review.
12. At the hearing, oral evidence was taken from the POM and the COM.
13. The Applicant did not attend the hearing, which is central to this application for reconsideration. He was legally represented throughout the review and at the oral hearing.
14. This review has a long history, which was set out in detail in the panel's decision letter of 30 June 2022, and is summarised below.
15. The review began in June 2019. In March 2020, a decision 'on the papers' (i.e., without a hearing) was made by a Parole Board member. That decision was set aside in June 2020 following representations by the Applicant's legal representative and the case was directed to an oral hearing, to be heard on 9 July 2021.
16. Between June 2019 and July 2021, the Applicant had twice been transferred to open conditions and twice returned, at his own request because of his concerns about his safety.
17. The July 2021 hearing was adjourned prior to the hearing day because the panel had identified that a psychological risk assessment was necessary to their decision-making. The panel also indicated their concern about the Applicant's worries about his safety.

18. Several attempts were made by prison-based psychologists to engage the Applicant in the preparation of the directed psychological risk assessment, but to no avail. An email from a Trainee Forensic Psychologist at Prison A (a closed prison), dated 9 February 2022 and shown to the panel, sets out the efforts made. Those efforts included two visits to see the Applicant at Prison A, two appointments made to see him at Prison B (an open prison) (which the Applicant declined to attend because of ongoing perceived fears about his safety), and several unanswered notes and phone calls to the Applicant. Eventually at the beginning of February 2022 the Applicant made it clear to prison psychologists, according to the Trainee Forensic Psychologist's email, that "*there was nothing staff could do to make him feel safe enough to engage with this assessment*". An offer was made to complete a paper-based assessment without the involvement of the Applicant, which was accepted by the panel.
19. The oral hearing was relisted to take place on 6 April 2022. On 16 March 2022 a Stakeholders Request Form was submitted to the panel, indicating that the paper-based assessment had been unable to be undertaken, due to the allocated psychologist being unwell. At the same time, the Applicant's legal representative informed the panel that he had received instructions from the Applicant to ask the panel to conclude the review without a hearing, with a decision not to direct his release. The legal representative repeated that the Applicant continued to feel unsafe and was trying to move establishment or wing. He also informed the panel he was having difficulties obtaining access to a legal visit with the Applicant, indicated that the Applicant may not attend the scheduled hearing on 6 April 2022, and suggested that the hearing was converted to a directions hearing with a further adjournment to allow time for consultation between him and the Applicant, and for a new prison-based psychologist to be allocated to the report.
20. That suggested course of action was declined by the panel, who indicated that the hearing would proceed on 6 April 2022 where the proposed course of action could be renewed and reconsidered at that point.
21. A further message was passed to the panel prior to the 6 April 2022 hearing indicating that on 31 March 2022 the legal representative had arranged an appointment with the Applicant which the Applicant did not attend, and that the Applicant was at that time refusing to engage with prison staff. On 1 April 2022 the COM also passed a message to the panel indicating that the Applicant had refused to attend an appointment with her, and refused to answer written questions she had had passed to him which she had hoped to use to inform her evidence to the panel.
22. On 6 April 2022 the panel convened for the hearing, but were informed that the Applicant refused to attend the hearing. His legal representative attended, and applied for an adjournment indicating that he had no current instructions from the Applicant.
23. The application to adjourn was made on the basis that the Applicant had only ceased engaging with the prison staff and the parole review since January 2022, that other delays in the review had not been his fault, and it would be unfair and procedurally wrong for the panel to go ahead in his absence.
24. The panel adjourned to consider the application, and then asked the POM to offer the Applicant a final opportunity to attend the hearing, by asking a member of staff to speak directly to the Applicant in his cell. The POM informed the panel that the Applicant

would be reassured that he would be escorted on the way to the hearing room, and that he had been escorted to collect medication and have showers. She then reported that he had told staff he would not attend, and he was content for the hearing to proceed without him. The POM also indicated that the Applicant had left his cell to collect medication unescorted, which later emerged to not be the case.

25. The panel then decided to refuse the application for an adjournment on the basis of the Applicant's fluctuating engagement with the psychological risk assessment, his lack of engagement with his POM or COM, lack of engagement with his legal representative, and the uncertainty of when that situation may improve. The panel also indicated that in light of the length of time the review had been ongoing, in their view further delay could in itself cause further upset to the Applicant. They were content that the Applicant had been given the opportunity to be escorted safely to the hearing room so he could participate in the hearing, but he had declined to do so.
26. Evidence was taken at the hearing from both the POM and COM.
27. At the conclusion of the hearing, the Applicant's legal representative made a further application for an adjournment, which was granted so that further information could be provided to inform the panel's decision.
28. Later, in written submissions, the Applicant's legal representative disputed the information provided to the panel in relation to the Applicant's non-attendance, which caused a further adjournment for that information to be checked. On receipt of that further information, closing written legal submissions were sent to the panel, who reviewed the evidence and concluded the review without further hearing.

The Relevant Law

29. 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)

30. 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)).
31. 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)).
32. 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**.

Procedural unfairness

33. 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.
34. 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.
35. The overriding objective is to ensure that the Applicant's case was dealt with justly.
36. It is for me to decide whether the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

The reply on behalf of the Secretary of State

37. No representations were submitted by or on behalf of the Secretary of State.

Discussion

Ground 1

38. The panel clearly made considerable efforts, in the lead up to and during the hearing on 6 April 2022, to facilitate and encourage the Applicant's attendance at the hearing. Those efforts are set out in detail in the decision letter and summarised above. Those efforts included asking for a further attempt to be made to encourage the Applicant on the morning of the hearing itself. Only after that attempt was unsuccessful did the panel decide to proceed in his absence.
39. The Applicant was consistent in his reasoning for refusing to engage and attend the hearing and other meetings, namely his own concerns for his safety. Information provided to the panel by the Violent Reduction Officer between 6 April 2022 and the conclusion of the review indicated that the Applicant self-isolated at Prison B from 12 November 2021 due to perceived threat from other prisoners. On 31 November 2021 the Safer Custody Governor is reported to have confirmed there was no intelligence to suggest there was a direct threat to the Applicant at Prison B. However, it is accepted that the Applicant clearly perceived a significant threat to himself, as was accepted by the panel.

40. There were however discrepancies between the information provided by the prison, and that submitted on the Applicant's behalf, in support of the request to relist the hearing to allow the Applicant another opportunity to attend, set out in the Applicant's legal submissions dated 19 May 2022. It was submitted by the Applicant that he had been taken to hospital and sustained heavy bruising as a result of an assault by another prisoner. The panel enquired into that incident. The information provided to the panel, from the Violent Reduction Officer at Prison B and from his POM, was that the Applicant had been assaulted on 29 November 2021 by another prisoner who slapped him in the face and no hospital treatment was required. Similarly, the Applicant indicated that he spent all of each day locked in his cell, but the information from his POM and the Violence Reduction Officer was that he spent some time out of his cell associating with two or three other prisoners in their cells, as well as being seen by Safer Custody Officers and wing staff regularly.
41. Whilst clearly the Applicant was experiencing distress as a result of his perception of the threat to him, the panel was entitled to take the information it received into consideration when deciding whether to proceed with the hearing in his absence.
42. The Applicant was legally represented at the hearing. His legal representative had represented him throughout the review, and was very familiar with the case having also represented the Applicant at his oral hearings in 2018 and 2019. I am satisfied that he was afforded the opportunity to ask questions of the witnesses, having heard their oral evidence, and to make submissions on the Applicant's behalf.
43. By 6 April 2022 the review had been ongoing for almost three years, and the Applicant's engagement was deteriorating rather than improving, with disengagement from his POM, COM and even his own legal representative in the weeks leading up to the hearing. There was no guarantee that that would change and therefore when he would be likely to attend a hearing.
44. The attendance of a prisoner at their oral hearing can be an important part of the process, but their absence does not automatically render the process unfair. Rule 23(1) Parole Board Rules 2019 (as amended) makes provision for proceeding in the prisoner's absence, and sets out that
- "a prisoner must notify the Board and Secretary of State if –*
 - (a)...*
 - (b) The prisoner does not want to attend an oral hearing which has been listed."*
45. Rule 23(2) Parole Board Rules 2019 (as amended) says:
- "An oral hearing may take place in the absence of a prisoner where-*
 - (a) a prisoner has notified the Board in accordance with paragraph (1);*
 - (b) a represented prisoner has not notified the Board in accordance with paragraph (1) but the prisoner's representative is in attendance*
- ..."*
46. Earlier in the review (on 16 March 2022 and therefore relatively close in time to the decision to proceed with the oral hearing in his absence), the Applicant had given a clear indication that he wished the review to be concluded on the papers without an oral hearing, acknowledging this would lead to a decision not to direct his release.

47. In the period between giving that indication and the date of the oral hearing, the Applicant variously refused to speak to his POM, his COM and his solicitor. I am satisfied that the panel were entitled to take this information into consideration when deciding whether to proceed with the hearing on 6 April 2022, as it was recent evidence of the Applicant disengaging from the process.
48. I am therefore satisfied that the panel were entitled to take the decision to proceed with the oral hearing in the absence of the Applicant, and that the proper procedure was followed in accordance with Rule 23 Parole Board Rules 2019.
49. As the Applicant was legally represented at the oral hearing, where evidence was taken and the Applicant's solicitor was able to question witnesses and subsequently make written submissions, I am satisfied the panel had taken reasonable steps to enable the Applicant to participate in the process itself. Whilst the panel did not hear evidence directly from the Applicant, I am satisfied that the panel was entitled to conclude that an adjournment would not ensure that evidence would be forthcoming, based on the history of the Applicant's behaviour and his actions in March and April 2022.
50. Furthermore, the panel took reasonable steps to make further enquiries arising from the legal submissions, which resulted in reports being provided by the COM, Phoenix Futures (a service working with people with a history of drug misuse), the Mental Health In Reach Team, the Security Department at Prison B, the POM, and the Violence Reduction Officer. The panel also invited further closing legal submissions, which commented on some of that information.
51. In those circumstances I am satisfied that the Applicant was afforded a fair hearing of his case. I am not satisfied that the Applicant was prevented from putting his case properly, where he was legally represented and had made the informed decision not to attend the hearing. The panel went to extensive lengths to conduct a fair review, and the decision letter makes it clear that it carefully balanced the needs of the parties and the protection of the public throughout its decision-making.
52. There is no suggestion within the application for reconsideration that the Applicant was not properly informed of the case against them, nor that the panel were not impartial, and therefore I have not considered those limbs of the test under Rule 28.

Ground 2

53. Much of my reasoning in considering this ground is included above in paragraphs 38 to 52, because there is significant crossover in the two grounds. This ground, however, focuses on the further decision to refuse the request to defer the hearing to another panel (after it had been adjourned on 6 April 2022) and to conclude the review on the papers without any further oral hearing.
54. In the legal submissions of 19 May 2022, it is submitted that the Applicant in fact would have attended a further oral hearing if he had been offered an escort. The information from the POM was that on 6 April 2022 he had been offered an escort, but had declined to attend, nonetheless. The Applicant takes issue with the evidence of the POM, pointing to an error in the information she gave to the panel on the 6 November 2022 that he and gone to collect medication unescorted. The POM later corrected that

information, and confirmed that, as set out in the legal submissions of 19 May 2022, in fact he had not attended to collect medication unescorted. However, that inaccuracy and correction in itself does not indicate that the other information provided was all incorrect, and I find that the panel was entitled to rely on the information which it was provided on subsequent dates given its source and inherent consistency.

55. I am therefore satisfied that the panel was entitled to decide not to direct a further hearing, having afforded the opportunity for written submissions, acted on those submissions and received evidence on which it could rely, and which enabled it to make its decision.

Decision

56. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Victoria Farmer
18 August 2022