

[2022] PBRA 109

Application for Reconsideration by Price

Application

1. This is an application by Price (the Applicant) for reconsideration of a decision of an oral hearing dated the 04 July 2022 not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the 353-page dossier provided by the Secretary of State which included the Panel's written decision, the application for reconsideration submitted by the Solicitor representing the Applicant and an email from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State dated 28 July 2022. I have also listened to the audio recording of the oral hearing.

Background

4. The Applicant was sentenced 27 January 2017 to an extended sentence comprising of 8 years custodial and 4 years extension for robbery, attempted robbery and in being possession of an imitation firearm. The Applicant's Parole Eligibility Date was 03 March 2022. This is the Applicants first review.

Request for Reconsideration

5. The application for reconsideration is dated 20 July 2022.
6. The grounds for seeking a reconsideration are as follows:

Ground 1:

- The Applicant states the focus and conclusions of the Panel were so far removed from three professional witnesses, who agreed on the primary risk factor, that the conclusion of the Board is irrational.

Ground 2:

- The Applicant states the Board places irrational focus on areas of risk that were not seen as unmanageable.

7. No matters of procedural unfairness are raised.



Current parole review

8. On 27 May 2021, the case was referred to the Parole Board by the Secretary of State to consider whether or not it would be appropriate to direct the Applicant's release.
9. The case was directed to an oral hearing after consideration by a Parole Board Member as part of the member case assessment process on 22 November 2021.

The oral hearing took place before a three-member panel of the Parole Board on 22 June 2022 with all parties attending by way of video link; in addition to hearing from the Applicant, who applied for release, the panel heard from the Prison Offender Manager and the Community Offender Manager. The panel also considered the contents of the dossier which ran to 344 pages. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

The Relevant Law

10. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.
11. The panel correctly sets out in its decision letter dated 04 July 2022 the test for release.

Parole Board Rules 2019

12. 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)).

Irrationality

13. In **R (on the application of 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."

14. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

15. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
16. 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."

Procedural unfairness

17. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.
18. Procedural unfairness means a procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.
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; and/or
 - (b) The Applicant was not given a fair hearing; and/or
 - (c) The Applicant was not properly informed of the case against him/her; and/ or
 - (d) The Applicant was prevented from putting his/her case properly; and/or
 - (e) The Panel was not impartial.
20. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).
21. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.



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

The reply on behalf of the Secretary of State

23. The Secretary of State confirmed by way of email dated 21 June 2022 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

Ground 1

24. The Applicant states the focus and conclusions of the Panel were so far removed from three professional witnesses, who agreed on the primary risk factor, that the conclusion of the Board is irrational. It is submitted by the Applicant that *"All professionals recommended that [the Applicant] be released on licence. Their evidence was consistent with all risk assessments, OGRS/OGP and OVP etc, which were all graded as low to medium. These risk assessments were also supported by psychological opinion, following a full psychological risk assessment. Throughout all assessments in this case and in live evidence, all witnesses felt that substance misuse was the primary risk factor in this case."*

25. Simply disagreeing with professional recommendations is not sufficient to establish irrationality. If it were, there would be no need for a panel to exercise any judgement in cases where professional witnesses were all in agreement. This would extinguish the panel's purpose as an independent risk assessor and decision-making body.

26. That said, if a panel makes a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, following **R (Wells) v Parole Board [2019] EWHC 2710**

27. The written decision does not make reference to a full psychological risk assessment nor does it make reference to hearing any evidence in the oral hearing from a psychologist witness. After considering the written dossier and audio recording of the hearing, there is no evidence that a full psychological risk assessment was completed or available to the panel at this review and the panel did not hear live evidence from a psychologist witness.

28. The panel heard oral evidence only from two witnesses, the Community Offender Manager (COM) and the Prison Offender Manager (POM). The panel's written decision clearly evidences that the panel have taken into account that the COM recommends the Applicant's release and that she believed that the Applicant's risk of serious harm is manageable in the community. The POM's



recommendation is not recorded in the decision letter. The POM, both in written and oral evidence, (the report in the dossier dated August 2021) does not offer a recommendation as to suitability for release. This may be due to the Offender Management in Custody model requiring only the COM to make a clear recommendation as to release.

29. The written decision makes reference to the risk assessments of OGRS, OGP and OVP placing him in the low categories for risk of non-violent reoffending, and in the medium category for the risk of violent reoffending. However, the written decision of the panel also states:

"If he were to reoffend, OASys assesses his risk of serious harm to be high to the public and low to a known adult, children and staff.

Considering [the applicant's] index offences, his history of offending and his custodial behaviour the panel agreed with the risk assessments."

30. Paragraph 1.12 of the written decision identifies:

"...misusing substances as a coping mechanism, his substance misuse is linked to violence, lack of compliance, chaotic lifestyle, financial motivation to fund his substance misuse, poor thinking skills including lack of consequential thinking, inability to manage emotions, pro-criminal attitudes, associating with negative peers and willingness to carry weapons and imitation weapons."

31. The written decision of the panel states that the POM identified instrumental violence as a key risk factor. In oral evidence, in addition to drug misuse, the POM and COM also identified risk factors to include associates and use of weapons. The panel identified a number of risk factors, which reflects the written and oral evidence available and it was not assessed that risk factors were limited to the primary risk factor of substance misuse.

32. Whilst the panel did not concur with the recommendation of the COM, it was taken into account and after hearing all evidence, the panel considered that *"the Applicant's risk is likely to escalate if he experiences challenging situations and misuses substances as a coping mechanism and/or responds impulsively including with physical violence and if he associates with negative peers."*

33. The written decision explained that *"The COM confirmed he has outstanding risk reduction work to complete but this can be accessed in the community including further work regarding substance misuse, developing problem solving skills and consequential thinking. She confirmed to the panel that [the Applicant] has not completed work which addresses use of weapons, instrumental violence and problem solving during his sentence."*



34. While the common law duty to give reasons is a matter of procedural unfairness not raised in the application, the panel nonetheless gives clear and cogent reasons for its disagreement with the recommendations of the COM, which is not supported by psychological opinion as submitted, as the panel did not have a psychological risk assessment or oral evidence from a psychologist witness. It cannot be said in view of the panel's stated reasons that its decision is outrageously illogical in the sense expressed above. There is no irrationality on this point.

Ground 2

35. Within the reconsideration application, it is submitted that *"the panel focus on under developed coping strategies, focusing on a minor incident, whereby it was accepted [the Applicant] was not the aggressor. This is placing irrational focus on areas of risk that were not seen as unmanageable by all other expert witnesses."*

36. It is understood that the 'minor incident' referred to by the Applicant is the proven adjudication received in February 2022 for fighting. The evidence provided in the oral hearing from the POM indicates that the Applicant was not the instigator, but that the two prisoners involved, were seen to throw punches at each other and that the Applicant has described it as a lapse in behaviour.

37. The written decision also makes reference to the evidence that the Applicant has not fully engaged with two Therapeutic Communities and has not managed himself in open conditions on two occasions. The panel therefore considered that the Applicant has outstanding risk reduction work to complete in custody to enable him to develop internal skills to manage his risk factors including developing an ability to manage his emotions when challenged and not to respond impulsively to difficult situations.

38. A proven adjudication for violence in custody is not a minor incident and in any event, other factors are cited by the panel as to why they considered the Applicant has outstanding risk reduction work and why they considered this should be completed in custody rather than in the community as recommended by the COM. There is no irrationality on this point.

Decision

39. I have considered the specific submissions of the Applicant. I am satisfied that this decision was not 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. I do not consider any of the points raised under Ground 1 or 2 have succeeded. Consequently, these grounds fail.



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

Katy Barrow
11 August 2022



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