

[2022] PBRA 97

Application for Reconsideration by Banfield

Application

1. This is an application by Banfield (the Applicant) for reconsideration of a decision made by an oral hearing panel not to direct his release. The decision is undated but was issued to the parties on 27 June 2022.
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, and the application for reconsideration.

Background

4. The Applicant was sentenced to life imprisonment on 14 November 1985 following conviction after trial for murder. His tariff expired in February 1997.
5. The Applicant was aged 23 at the time of sentencing. He is now 59 years old.

Request for Reconsideration

6. The application for reconsideration is dated 6 July 2022 and has been drafted and submitted by solicitors acting on behalf of the Applicant.
7. It submits that the decision was both procedurally unfair and irrational. These submissions are 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 in May 2021 to consider whether it would be appropriate to direct his release. If the Parole Board did not direct release, it was invited to advise the Secretary of State on the Applicant's continued suitability for open conditions (the Applicant being in open conditions).



9. The case proceeded to an oral hearing on 15 June 2022 before a three-member panel, including a psychiatrist specialist member. The Applicant was legally represented throughout. oral evidence was given by the Applicant's Prisoner Offender Manager (**POM**), his Community Offender Manager (**COM**) and a HMPPS psychologist.
10. All three witnesses supported the Applicant's release. The panel did not direct his release but advised the Secretary of State that he remained suitable for open conditions.

The Relevant Law

11. 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

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)).
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**.

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.

Irrationality

18. 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."

19. 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.

20. 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 Secretary of State

21. The Secretary of State has submitted no representations in response to this application.

Discussion

Eligibility

22. The panel's decision was made under rule 25(1) and is therefore eligible for reconsideration under rule 28.

Procedural unfairness

23. It is first submitted that there is a fundamental error in the panel's decision. The conclusion section of the decision (at para. 4.5) states:

"The psychologist who in 2014 conducted a psychological risk assessment noted the Applicant has strong traits of psychopathy...she did not conduct [a formal psychopathy assessment with a recognised assessment tool], but considered such an assessment would be useful..."

24. Paragraph 4.5 of the decision also states:

"[The Applicant] has been subject to [a formal psychopathy assessment] in the past, but this was not in the dossier."

25. However, the 2014 psychological risk assessment within the dossier does contain this formal assessment, with its findings discussed over seven pages in paragraphs 6.13 to 6.31, and the underlying scores provided in Annex F. The formal assessment is again referred to in the conclusion of the 2014 report which states:

"[The Applicant] does not meet the diagnostic criteria for psychopathy...however, he does present a significant level of psychopathic traits."

26. The Parole Board has a statutory duty to consider any documents given to it by the Secretary of State and any other oral or written information obtained by it (Criminal Justice Act 2003, s 239(3)). In **CCSU v Minister for the Civil Service [1985] AC 374, 411B**, Lord Diplock stated the procedural unfairness would encompass *"failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument in which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."*

27. It is clear from the panel's decision that it did not consider the formal psychopathy assessment within the dossier: it could not have done so as it erroneously stated that it did not exist. In failing to do so, the panel has put itself outside the procedural rule requiring it to consider the totality of the evidence before it.

28. I find that the panel has therefore breached its statutory duty to consider the whole of the evidence and its decision is rendered procedurally unfair as a result, even if consideration of the formal psychopathy assessment would have made no difference to its decision.

29. The first ground moves on to note the panel's statement (also in para. 4.5) that:

"...the panel, including a psychiatrist member who was present in the room with [the Applicant] considered that he presented with facets of his nature that appeared to be verging on 'psychopathic' in nature"

30. It is not unfair for a panel to form a view on a prisoner's personality based upon their demeanour in a hearing. It would be unfair for a panel to elevate any such observation to the status of a formal diagnosis, but that is not the case here, as is clear from the decision's use of the words 'appeared' and 'verging'. In any event, there is ample evidence within reports contained in the dossier to suggest that the Applicant has problematic personality traits. The view expressed by the panel in its decision is not solely based on the views of the specialist member.

31. Nonetheless, I find that the first ground is successful, and the decision of the panel was procedurally unfair for failing to consider all the evidence before it.

Irrationality

32. The second ground is that the decision of the panel was also irrational. The legal test of irrationality sets a high bar. Irrationality requires the panel to have acted so unreasonably in reaching its decision that no other panel acting reasonably would

do as it did. A reasonable panel would have considered all the evidence within the dossier. It would not have said a particular piece of evidence was missing when it was not, nor said that the evidence it missed would be material to a decision of a future panel. I find that the panel's failure to act reasonably renders its decision irrational.

Decision

33. Applying the tests as defined in case law, I find the decision not to release the Applicant to be both procedurally unfair and irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reconsidered at an oral hearing by a new panel appointed under rule 5(2). Having found a failure to consider evidence and irrationality, it would not be appropriate for the same panel to hear the case.

Stefan Fafinski
02 August 2022