

[2022] PBRA 130

## Application for Reconsideration by Lemon

### Application

1. This is an application by Lemon (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 16 August 2022 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.
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 on 14 July 2011 to imprisonment for public protection following conviction for rape of a female under 16 to which he pleaded guilty. He was convicted at the same time (but received no separate penalty) for three further counts of rape of a female under 16 and three counts of indecent assault of a female under 14. His tariff expired on 17 March 2017. The Applicant was 36 years old at the time of sentencing and is now 47 years old.
5. He was released on licence following an oral hearing on 27 October 2017 but recalled to custody on 4 May 2020 after it was discovered that he had begun a relationship with a female (with a young female child) which he had not disclosed to the Probation Service, nor his police Management of Sexual or Violent Offenders (**MOSOVO**) officer. It is reported that the Applicant accepted he had been in a relationship but denied any unsupervised contact with his partner's children. He received a further eight-week sentence in June 2020 for breach of his Sexual Offences Prevention Order (**SOPO**).

### Request for Reconsideration

6. The application for reconsideration is dated 5 September 2022 and has been drafted and submitted by solicitors acting on the Applicant's behalf.
7. It submits that the decision was both irrational and unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.



## Current Parole Review

8. The Applicant's case was most recently referred to the Parole Board by the Secretary of State in March 2021 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 Secretary of State whether the Applicant should be transferred to open conditions.
9. The case proceeded to an oral hearing on 2 August 2022 before a three-member panel, including a judicial member. The Applicant was legally represented throughout. The panel heard oral evidence from the Applicant's Community Offender Manager (**COM**), his Prison Offender Manager (**POM**) and a psychologist from HMPPS.
10. The COM and HMPPS psychologist supported the Applicant's release.
11. The panel did not direct the Applicant's release, but it did recommend a transfer to open conditions.

## The Relevant Law

12. 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*

13. 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)).
14. 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)).
15. 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*

16. 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."*

17. 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.

18. 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*

19. 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.

20. 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.

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

#### **The reply on behalf of the Secretary of State**

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

#### **Discussion**

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

24. In its conclusion, the panel states that:



*"...[the Applicant] continues to make instrumental decisions and it did not share the confidence of the professionals that he would maintain his commitment to openness once in the community. As a result, the panel was not satisfied that [the Applicant's] risk could be safely managed in the community as it was not confident that he would be consistently open and honest with professionals".*

25. From this passage, it is clear (as is contended in the application) that the primary reason for the panel's decision to refuse release was the issue of the Applicant's openness and honesty with professionals.

26. It is submitted that this issue was addressed in depth with the professionals during evidence. First, it is argued that the psychologist considered that, even with the Applicant's *"potential not to tell the truth"*, he would still be manageable in the community under a risk management plan supplemented by polygraph testing. It is argued that the panel did not give the inclusion of polygraph testing sufficient weight.

27. It is not the case that the panel did not consider polygraph testing. It concluded that it was not satisfied that *"the proposed risk management plan, even with polygraph testing, would be likely to be effective in managing risk"*. In doing so, it considered that the inclusion of polygraph testing would not be sufficient to manage the Applicant's risk in the community, and the applicant's *"new approach to being more open and honest with professionals"* needed further testing in less secure conditions.

28. It is a matter for the panel to decide how much weight should be afforded to each piece of evidence. Disagreeing with the weight ascribed by a panel does not make a decision procedurally unfair or irrational unless the decision as a whole falls within the parameters established by the case law set out above. The panel's conclusion the Applicant's plans to engage more openly with professionals needs further testing prior to release is not so outrageous that no other panel would have arrived at it.

29. The next issue raised is that of the Applicant's motivation to engage with professionals. The evidence from both the psychologist and COM is that the Applicant's motivation to engage is instrumental (i.e. to avoid recall). The most recent COM report notes that:

*"...[the Applicant's] motivation for open and honest engagement appears to relate to the fact that he has concluded that this will best suit his objectives. If he is released...[his] motivation to engage meaningfully could reduce if, for any reason, he believes that such an approach would better suit his objectives."*

30. It is submitted that the panel indicated that motivation driven by an instrumental factor is less significant than an emotional or internally driven motivation, and that this was unfair and irrelevant. In other words, if the Applicant was motivated to engage, that should be enough, irrespective of his reasons for doing so.

31. As already noted, the panel noted its concern that the Applicant continued to make instrumental decisions and did not share the confidence of the professionals that he would maintain his commitment to openness once in the community. The fact that the Applicant makes instrumental decisions is not contested. As his COM noted, there is a potential for any motivation to reduce if, put bluntly, engagement does not suit the Applicant's needs. It was not irrational for the panel to conclude (as it seems to have done) that a motivation for the Applicant to engage when it suits him is less preferable to a general internal acceptance of engagement as the norm.
32. It is next argued that the panel did not give sufficient consideration to imminence of risk, since the evidence suggested that the Applicant was more likely to offend in a familial setting, and he would not be in such a setting on release.
33. Regarding imminence of risk, **R (Secretary of State for Justice) v Parole Board [2022] EWHC 1281 (Admin)(Johnson)** states (at para. 31):
- "If an offender poses no risk, the protection of the public will not require his confinement. That does not mean the Board is to ignore anything other than immediate or imminent risk..."*
34. In other words, the Board must consider risks over the long term as well as the risks that may arise immediately or imminently on a prisoner's release. This requires the Board to consider whether risks might arise in the longer term as well as in the shorter term. For prisoners (like the Applicant) serving an indeterminate sentence, the Board must always consider risk over an indefinite period.
35. In the light of the Applicant's past conduct (particularly having spent three years in the community before beginning a relationship with a female with children), it was not irrational of the panel to consider risks in the medium to long term, particularly given the Applicant's history of deceit and his relatively new motivation for openness.
36. It is next argued that the COM was "*relatively confident*" that she would know if the Applicant was in a relationship as his potential for being untruthful is now known, and this was underestimated by the panel. Relative confidence is not a strong endorsement. Again, it is a matter for the panel to decide how much weight to give to particular pieces of evidence provided it does so lawfully and the panel's reasoning concerning the Applicant's honesty and reliability (as I have already found) is both clear and rational.
37. The next point argues that the Applicant had already shown his capability to be open and honest with professionals. That may be so, but it was not irrational for the panel to treat any such openness with caution since it was done within the confines of closed conditions and, as the panel had also rightly concluded, done with an instrumental mindset.
38. The remainder of the application essentially reiterates the points already argued and raises no new points for consideration. It concludes by submitting



that the decision was both irrational and unfair. I have found no basis for irrationality, nor that the Applicant was not given a fair hearing.

## **Decision**

39. For the reasons I have given, I do not find the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Stefan Fafinski**  
**20 September 2022**