

[2023] PBRA 161**Application for Reconsideration by Cardwell****Application**

1. This is an application by Cardwell (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 9 August 2023. The decision of the panel was not to direct 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, and/or (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 consisting of 792 pages; the Application for reconsideration submitted by the Applicant; and the response by the Secretary of State (the Respondent).

Background

4. On the 11 May 2007 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection in relation to an offence of rape. The minimum term fixed by the judge was three years, four months and twenty-one days. The Applicant was aged 20 at the time he was sentenced and is now 36 years old.
5. The victim of the offence was a former partner of the Applicant. The Applicant had been on bail in relation to an earlier assault upon the partner. The Applicant was at the partner's home. He was under the influence of alcohol and drugs. The Applicant became angry when the partner refused to discuss the ending of their relationship. The Applicant then entered a bedroom with a knife and committed the offence of rape.
6. Prior to the commission of the index offence, the Applicant was noted to have an extensive criminal history. His offending included offences of burglary and offences involving violence. The panel found that the Applicant's offence history indicated a pattern of aggressive and violent offending potentially linked to substance misuse. Some of the offending was directed against an intimate partner.

Request for Reconsideration

7. The application for reconsideration is dated the 24 August 2023.



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8. The ground for seeking a reconsideration is set out below.

Current parole review

9. The Applicant had been released by the Parole Board in October 2020 having spent some time in an open prison.
10. In September of 2021 the Applicant's probation officer became concerned about his behaviour on licence. It was reported that he had taken up a position working as a door supervisor in a night club. This had not been disclosed to his probation officer. He had also begun a friendship with a female which had not been reported, as it should have been, to his probation officer. Various further conditions were imposed, and warnings issued. Later in September of 2021 it was reported that the Applicant had been involved in a violent altercation with another man in a public house. This had resulted in "splitting" the man's eyebrow. There were also reports of verbal abuse to a licensee. The Applicant had been barred from local licensed premises as a result.

Oral Hearing

11. The review was conducted by an independent Chair of the Parole Board, a psychiatrist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (**POM**), a prison instructed psychologist and a Community Offender Manager (**COM**). The Applicant was represented by a solicitor.
12. A dossier consisting of 760 pages was considered.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 9 August 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

14. Pursuant to 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)).
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.
22. 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."*

The reply on behalf of the Respondent

23. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

Reconsideration ground and discussion

Ground - Irrationality

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24. The Applicant submits that the panel were irrational in not directing release in the light of the fact that both the COM and the two reporting psychologists took the view that the Applicant's risk could be managed in the community and were supportive of a direction for release. Further that any risk related behavioural work that required completing could be completed in the community.

Discussion

25. I have considered the decision letter in this case. The panel in that decision set out the evidence reflected in both the dossier and in the oral testimony taken at the hearing.
26. The panel acknowledged at paragraph 2.26 that both psychologists were in agreement that the Applicant could be released based upon their assessment of risk. There were some minor differences in the views about partner violence but in general terms the psychologists had indicated that, in their view, the Applicant's risk could be managed in the community.
27. The panel also acknowledged that the Applicant's COM (at paragraph 2.64) took the view that the Applicant would, in the community, have a low imminence of risk particularly with the addition of polygraph testing and alcohol monitoring. The Applicant's COM recommended release with a licence condition that the Applicant commence, whilst in the community, a behavioural course relating to improving relationships.
28. Despite the views of the professionals the panel concluded, having considered the evidence, that the Applicant presented a higher risk of reoffending particularly because he had yet to demonstrate a full understanding of the areas of behaviour and thinking which would lead him to further offending. The panel indicated that they took the view that, whilst in the community, the Applicant had demonstrated poor insight into his risk factors. The panel were particularly concerned that the Applicant viewed the index offence as a consensual act, and therefore had a limited understanding of the level of sexual and violent risk which he might pose. The panel also reflected upon the fact that the Applicant had failed to be open and honest about a new relationship that had formed when he was in the community. The panel also took the view that the Applicant was resistant to attempts to manage his risks. This resistance was illustrated by the failure to be honest about the developing relationship and about incidents of violence which took place while he was on licence.
29. The panel indicated at paragraph 4.5 the reasons why they took a different view to the reporting professionals. The panel took the view that the Applicant's risk of serious harm could not be managed in the community until he had addressed areas of thinking skills. The panel took the view that these remaining areas of risk related behavioural work amounted to core risk reduction work and therefore was work which required to be completed before release.
30. A Parole Board panel is not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the

public from serious harm (whilst also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it. However, if the panel makes a decision contrary to the opinions and recommendations of professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should sufficiently justify its conclusions as explained in the case of **R (Wells) v The Parole Board 2019 EWHC 2710**.

31. In this case I am satisfied that the panel took account of the views of the professionals and considered with care the test which should be applied. The panel disagreed with the professionals view that the matters relating to risk of serious harm which remain to be addressed by the Applicant, could be addressed in the community. Whilst the disappointment of the Applicant is understandable the panel's decision was based upon exercising its judgement on the evidence before it. The panel had the opportunity to consider the written evidence and the oral testimony from witnesses. It would be inappropriate to direct that any decision be reconsidered unless it was manifestly obvious that there are compelling reasons for interfering with that decision. Disagreement with the views of professionals is not such a compelling reason and does not in my view amount to irrationality in the sense set out above.
32. In this case I find no reasons for interfering with the decision of the panel which is clearly explained within the decision letter.
33. Accordingly, the application for reconsideration is refused.

HH S Dawson
12 September 2023