

[2023] PBRA 208

## Application for Reconsideration by Davis

### Application

1. This is an application by Davis (the Applicant) for reconsideration of the decision made by a panel following an oral hearing not to direct his release. The decision was finalised on 23 November 2023.
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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier consisting of 672 pages, and the application for reconsideration.

### Background

4. The Applicant received a sentence of imprisonment for public protection on 14 May 2010 following conviction after trial on three counts of rape and assault occasioning actual bodily harm. The tariff was set at 10 years and six months less time spent on remand. It expired in August 2019.
5. The Applicant was 33 years old at the time of sentencing and is now 46 years old. This is his second parole review.

### Request for Reconsideration

6. The application for reconsideration is dated 29 November 2023 and has been drafted by solicitors acting for the Applicant.
7. It argues that the decision was procedurally unfair and/or irrational. 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 referred to the Parole Board by the Secretary of State (the Respondent) in July 2022 to consider whether or not it would be appropriate to direct his release. If release was not directed, the Board was asked to advise the Respondent whether the Applicant should be transferred to open prison conditions.



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9. The review progressed to an oral hearing on 27 September 2023 before a three-member panel, including a psychologist specialist member. Oral evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), a programme facilitator and an HMPPS psychologist.
10. The case was adjourned for further information concerning the Applicant's health and how that might impact upon his risk. Additional reports were directed, and the case was scheduled to be concluded on the papers on 27 October 2023.
11. The directions were not fully met, and the case was further adjourned to conclude on the papers on 13 November 2023. Undated closing legal submissions were put forward on behalf of the Applicant seeking his release.
12. In the professional opinions of the COM, POM and HMPPS psychologist, the Applicant was suitable for release. The panel did not direct the Applicant's release.

### The Relevant Law

13. 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*

14. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
15. 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)).
16. 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*

17. 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.



18. 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.

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

### *Irrationality*

20. 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."*

21. 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.

22. 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 Respondent**

23. The Respondent has submitted no representations in response to this application.

### **Discussion**

24. First, it is submitted that the panel placed insufficient weight on the opinions of the professional witnesses, all of whom were supporting release and some of whom have known the applicant for a very long time (for example, the COM has held his case for over nine years).

25. Panels of the Parole Board are 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 (while 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.

26. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should clearly explain 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 (Admin).
27. In this instance, I find that the panel's reasons meet that heightened duty and clearly set out why it disagreed with the recommendations of the professional witnesses. It concluded that the triggers and drivers for the Applicant's offending behaviour were not fully understood and therefore further work was necessary in custody. It did not think the proposed risk management plan would be capable of managing the Applicant's risks in the community. It also has concerns about the Applicant's ability to be open and honest in supervision. These are all conclusions that the panel was reasonably entitled to make. It may disagree with the views of witnesses, provided that it explains why, and, in my view, it has done so. The first ground therefore fails.
28. Second, it is submitted that the panel has placed significant weight on security intelligence which did not result in any behaviour warnings or adjudications.
29. The same analysis applies here. The panel may give any evidence the weight that it chooses, provided it is not unreasonable and that it explains itself. The panel's decision clearly explains why the intelligence in question was relevant to its assessment of risk in the context of the Applicant's ability to be open and honest in supervision. This ground also fails.
30. Third, it is submitted that the panel have insufficient weight to the risk reduction work completed, particularly since the Applicant maintains his innocence. It is submitted that maintaining innocence should not be a bar to release if a prisoner can show as reduction of risk in risk areas that were live at the time of the index offences.
31. Again, the weight the panel attributes to any evidence is a matter for the panel, provided it does so reasonably and with reasons. The panel has not refused progression on the fact that the Applicant maintains his innocence. Indeed, the panel commends the Applicant for undertaking work that will have addressed some of his risk factors and resulted in a decrease in his risk. This does not, however, inexorably lead to a conclusion that the panel must release the Applicant. It can only do so if the risk has been reduced to a level that may be safely managed in the community under a risk management plan. The panel found that the Applicant's risk had not been sufficiently reduced and made no direction for release. Its reasons (as already explained) for doing so are clear. This ground also fails.
32. Fourth, it is submitted that the panel placed too little weight on the impact that the Applicant's poor health has had on his risk, insight, future priorities, and impact to reoffence. It is argued that physical disabilities and the impact of these should be considered at length (citing *R(P) v Home Secretary* [2002] EWHC 1018 (Admin)).



33. *R(P)* concerned the lawfulness of a prison service policy relating to a prisoner in poor health seeking re-categorisation from Category A conditions to Category B conditions. Mr P had a severely ulcerated leg potentially requiring amputation which would have made escape more difficult for him than a more able prisoner. The High Court held that a blanket policy relating to dangerousness which excluded any assessment of the individual's escape risk was unlawful:

*"In the absence of justification...such part of the policy which does not differentiate between the escape potential of individual prisoners is illegal and must be quashed"* ([39] Turner J).

34. The judgment in *R(P)* relates to a specific Prison Service policy in circumstances which are different to those faced by the Applicant. I do not therefore consider myself to be bound by *R(P)*. However, distilling a general principle of fairness from *R(P)*, risk-based decisions which relate to the progression of a prisoner must be taken in consideration of all relevant individual circumstances relating to that prisoner. In both *R(P)* and the present case, health is a relevant individual circumstance: relating to potential for escape and potential for reoffending respectively.

35. The panel's decision records the efforts it made to gain full evidence on the Applicant's health and prognosis, including an adjournment for various clinical opinions. It cannot be said to have acted in ignorance of the Applicant's well-documented medical condition. It then agreed with the view of the psychologist who did not consider the Applicant's sexual dysfunction alone may not reduce the risk of sexual reoffending. It is a reasonable and reasoned conclusion for the panel to have made. This ground also fails.

36. Finally, it is submitted that the panel did not consider the Applicant's medical condition when describing his responses as "*dismissive and evasive*", noting that the Applicant was discharged from hospital five days before his hearing, had been taking strong painkillers and had been experiencing "*chemo brain*". The Applicant's medical history is extensively documented throughout the dossier and referenced in the closing written submissions. The panel could not be said to have been unaware of it. Moreover, the decision's use of "*dismissive and evasive*" was only made in connection with the Applicant's responses to his past pattern of intimate partner violence. If the Applicant's medication led to a difficulty in answering questions, it is not unreasonable to assume that any such difficulty would have been seen in general. Similarly, the Applicant was legally represented throughout the hearing and any difficulties in presentation could have been addressed at the time. This ground also fails.

## Decision

37. For the reasons set out above, the panel's decision was not procedurally unfair or irrational and the application for reconsideration is refused.

**Stefan Fafinski**  
**14 December 2023**

