

[2023] PBRA 60

Application for Reconsideration by Pearson

Application

1. This is an application by Pearson (the Applicant) for reconsideration of a decision of an oral hearing dated 22 February 2023 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, (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 Decision Letter dated 22 February 2023
 - The Application dated 20 March 2023
 - The dossier, which contains 764 numbered pages, the last document being the Decision Letter: see the Note below.
4. Note: I read the papers in the order set out above. I saw from the Decision Letter and the Application that the Applicant objected and still objects to the panel having read a document referred to as the Canterbury Questionnaire, appearing in the dossier at **p518**. She also objected to a Healthcare document at **p570**. I took the decision on reading the papers that I would not look at the contested documents, beyond checking to see what they are, rather than what they say, unless it was necessary for me to do so in order to decide the Application. It has not proved necessary. The documents relate to the management of the Applicant's health and well-being, not directly to her risk, and I discuss them below in that context.

Background

5. The Applicant is now 67 years old. In 1987, when she was 31, she received a life sentence for the murder of her husband's new partner. 10 years earlier she received a suspended sentence of imprisonment for assaulting a woman who had formed a relationship with her first husband. She has other previous convictions for dishonesty. The tariff expiry date on her life sentence was 24 October 1998.


Request for Reconsideration

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6. The application for reconsideration is dated 20 March 2023.

7. The grounds for seeking a reconsideration are as follows:

I. Procedural unfairness

- (1) The panel should have recused itself because it had looked at the Canterbury Questionnaire. As a result of the panel doing so, the Applicant felt humiliated, embarrassed and uncomfortable at the adjourned hearing.
- (2) The Decision Letter records the Applicant as having given partial evidence, whereas in fact she gave full evidence at the first hearing, as the panel acknowledged at the start of the adjourned hearing. After being offered the opportunity to give further evidence at the adjourned hearing if she wished, she chose not to do so.
- (3) The panel chair refused to allow a psychologist (Ms O'S) who had been working with the Applicant to attend the second hearing as support for her: she had attended the first hearing in that capacity.
- (4) "As a side note" the panel attributed the wrong first name to the Applicant's brother.
- (5) The Applicant had personally written a letter requesting that a judicial member be on the panel. She did not receive a reply.

II. Irrationality

- The panel took account of the evidence of a psychologist, Dr F, when
- (1) Although he said he had interviewed the Applicant for 2½ hours, the Applicant says he only did so for 10 minutes.
 - (2) He gave evidence 15 months after the interview, without having any contact with the Applicant or any of the report writers in the interim. Despite this he commented on her behaviour during that time as increasing her risk.
 - (3) He claimed to have had contact with professionals, including Ms O'S. Ms O'S, in a statement which appears in the dossier, denies this. NB: The only statement from Ms O'S in the dossier says she had contact with Dr F in October and November 2021.
 - (4) At the hearing Dr F discussed unproven allegations that appear in the dossier without having discussed them with the Applicant, OMU or probation.
 - (5) He accessed NOMIS records that other witnesses had not or could not.
 - (6) Separately from any concerns about Dr F, the panel took account of the NOMIS entries without their being proven.

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release or a recommendation for transfer to open conditions. She sought release. This was the ninth review of the Applicant's case. Its progress was exceptionally complex, set out in almost 4 pages of the decision letter. So far as is relevant to this Reconsideration Application, I note that the first hearing, by video link, took place on 13 April 2022. Leading counsel represented the Applicant. The Applicant

was supported in the hearing room by Ms O'S. At that hearing the panel heard evidence from the stand-in for the previous Prison Offender Manager (POM), the Applicant's key worker, the current POM and the Applicant herself.

9. There was insufficient time to conclude the hearing. The details of the lengthy sequence of events thereafter do not seem to be relevant to the Application, save as follows. The Applicant changed her legal representation and, in July 2022, her new solicitors raised objection to the inclusion in the dossier of the two documents mentioned above. The solicitors also said that it was their intention to commission a neuropathology report. They said that the Applicant would like her brother to attend the next hearing.
10. The panel chair replied to these applications by pointing out that the panel had already read the documents complained of, and could see no justification for removing them. Since they were said not to be relevant to risk, it was difficult to see what prejudice or unfairness would result. She refused the applications as to the documents, but granted that in respect of the Applicant's brother.
11. Thereafter the solicitors asked for Ms O'S to attend the hearing. It was not clear whether this was as an observer or a witness. The panel chair took the view that Ms O'S had not submitted a report, she could not provide information relevant to the panel's decision, and the Applicant would have her legal representative present in the room to support her. Accordingly, the panel chair refused to allow Ms O'S to attend the hearing. The solicitor reiterated the request, making it plain that she wanted Ms O'S as an observer, and saying that the Applicant wished to have Ms O'S present during the reading of the Victim Personal Statement. The panel chair refused that request on the same grounds.
12. The second hearing took place face to face on 17 January 2023. The Applicant declined, as was her right, to be present during the reading of the Victim Personal Statement. Dr F gave evidence, as did two Community Offender Managers (COMs), and another POM. The panel considered the written reports of psychologists instructed on the Applicant's behalf.
13. The panel consisted of two independent members and a psychologist member of the Parole Board. It considered, in addition to the witnesses mentioned above, a dossier containing (at that stage) 739 pages, to which were added NOMIS case note entries and the statement from Ms O'S produced at the hearing, and detailed legal submissions on the Applicant's behalf.

The Relevant Law

14. The panel correctly sets out in its decision letter dated 22 February 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.
15. 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.
16. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

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"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

17. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)).
18. 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)).
19. 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**.

Illegality

20. There is no suggestion that the panel acted illegally.

Irrationality

21. 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."

22. 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.
23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

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24. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

Procedural unfairness

25. 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.

26. 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.

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

27. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.

The reply on behalf of the Secretary of State

28. The Secretary of State has indicated that he does not wish to make any representations in regard to this Application.

Discussion

29. Complaints I(2) and I(4) under the heading of procedural unfairness raise no discernible issue of procedural unfairness. Neither the name attributed to the Applicant's brother nor the possible misdescription of whether she gave partial or full evidence at the first hearing, provided she was given (as she was) the opportunity to give evidence again at the end of the second hearing if she wished, had, or could have had, any effect on the panel's decision.
30. As to I(5), it is for the Parole Board, not the Applicant, to decide who will hear her case. This was not a case which called as a matter of necessity for the involvement of a judicial member of the Parole Board, if in fact there ever is such a case, nor is there any suggestion that the decision would have been different had there been a judicial member on the panel.
31. As to I(1). There is no reason why a panel of the Parole Board must recuse itself even if it has read material which should not be in the dossier: see **R (McGetrick) v The Parole Board [2013] EWCA Civ 182**. There is no suggestion that this panel did not properly continue with its task of risk assessment after seeing these documents.
32. In any event, these documents were properly in the dossier. They contain material which would be highly relevant to the management of the Applicant's case should she be released, or, as was discussed in evidence, recommended for open conditions. Had the panel concluded that the Applicant passed the test for release, it would have had to consider licence conditions, to which these documents (whatever they may contain) would have been relevant. It should be noted that the final written submissions on behalf of the Applicant adduced, as a factor in favour of her release, the fact that she is now disabled: see **p668**. Presumably the evidence for that is contained, at least in part, in the disputed documents.
33. With regard to Ground I(3), there is nothing advanced to indicate that the absence of Ms O'S as a support for the Applicant during the hearing had any effect on the evidence the panel heard. The first hearing was remote. The second was face-to-face. The Applicant had with her at that second hearing her legal representative and her brother, as she requested. It cannot be said to be unreasonable to have refused her still further support; and, even if it had been unreasonable, it had no effect on the outcome.
34. The suggestion that the panel's decision is vitiated by any element of procedural unfairness is not made out.
35. As to irrationality, the main complaint seems to be that the panel paid attention to the evidence of Dr F when it should not have done so. The panel accepted Dr F's assertion that he had interviewed the Applicant for 2½ hours. The Applicant suggested, the panel noted, in submissions, though not in evidence, that the interview lasted only 10 minutes: see **p670**. In fact, so far as I can see from the dossier, Dr F said he assessed the Applicant via video link on 2 November 2021 from 2.00 pm – 4.15 pm, and then discussed his report with her in a disclosure meeting on 4 November 2021 by telephone (at the Applicant's request) from 2.20 pm – 3.30 pm.
36. I cannot find, nor have I been referred to, any evidence upon the basis of which the panel would have been obliged to reject the narrative of Dr F about the time he spent in interview with the Applicant. He gives a detailed account of her conversation and behaviour only consistent with an interview of far more than 10 minutes. For example,

he mentions (at p311 of the dossier) that she spoke at length about the prowess of her current legal representative: bearing in mind who was in fact representing her at that stage, it is difficult to believe that Dr F did not, on that point at least, accurately represent what she said.

37. In the circumstances, a decision to accept the evidence of Dr F as to his contact with the Applicant cannot be categorised as irrational: it was a finding available to the panel on the evidence.
38. The next complaint is that Dr F asserted he had had contact with professionals involved in the Applicant's case in the 15 months between his assessment of her and the final hearing, at which he gave evidence. This is said to be contradicted by the statement of Ms O'S. Ms O'S's statement refers to two contacts she had with Dr F in October and November 2021. Contrary to what is asserted in the Application, that statement does not specifically say she has had no other contact since, but perhaps that is a reasonable inference to draw. What the panel records is that Dr F had reviewed his assessment in the light of the NOMIS entries and had been part of discussions when he attended case review meetings. The NOMIS entries are now in the dossier. There is no evidence of which I have been made aware to contradict Dr F's assertion that he attended case review meetings. I cannot find anything in this complaint that affects the reasonableness of the panel's findings.
39. The Application is not very clear at this point, but it may be that there is a complaint that Dr F based part of his opinion as to risk on the contents of the NOMIS entries. This seems to be followed up by a complaint that the panel took into account unproven allegations and security intelligence.
40. As to Dr F's use of the NOMIS entries, that must be unexceptionable. An expert witness, assessing risk for the assistance of the Parole Board (which must itself assess his evidence, and the basis for it, before coming to its own conclusion) is entitled to look at any material which in his professional judgement may inform him, provided that he makes it clear what that material is, so that the panel can decide what weight can be given to his opinion in the light of the material he based it on. Here Dr F did that, and was available for questioning on it by the Applicant's advocate. There can be no irrationality, or unfairness, in this procedure.
41. The panel itself was careful in its use of the material. It discussed it in Paragraph 2.21 of the Decision Letter, and specifically (at Paragraph 2.33) disregarded the most recent allegations, which were at the time of the hearing awaiting adjudication. There have, however, been confirmed reports of violence in both custody and hospital setting throughout the Applicant's sentence. Her most recent proven adjudication for violence was in February 2020, but since that time there have been proven adjudications for threatening behaviour and reports of assault consistent with circumstances of previous violence and aggression. The panel's conclusion from this material was restrained and carefully stated: "*the panel therefore considers that the risk of impulsive violence is greater than that reflected by assessments.*" That was a finding open to the panel on all the evidence it discussed, of which the NOMIS entries formed a part. The panel specifically made reference to the Applicant's good conduct during escorted town releases, and considered the weight to be attached to that. Overall, the panel came to balanced conclusions on this area of the evidence that cannot be considered irrational.

42. The panel's principal concerns with regard to release were the Applicant's changeable attitude towards compliance and engagement and her strong tendency to engage only on her own terms. The panel discussed a combination of factors which, in its view, made her risk unmanageable in the community. In particular, she is not likely to disclose matters which she considers private and not of concern to professionals, even when they plainly are. The panel did not consider it likely that the Applicant will be able to identify or be willing to discuss potentially risky situations. Her lack of insight into her personality difficulties, her risks and her offending behaviour, the panel considered, when coupled with her apparent unwillingness or inability to engage appropriately with significant professionals involved in her case, her objections to sharing information, and her attitudes and behaviour which raise the risk of conflict and the development of grievances, made her risk unmanageable in the community.
43. On all the evidence, and having examined closely the grounds for reconsideration advanced, I cannot find the panel's decision not to direct release to be irrational.
44. The Applicant's is an exceptionally complex case, and she is, as was submitted on her behalf, well past her tariff date. I have therefore looked at the case in detail, and specifically at the arguments raised on her behalf both by her current representative, and also by leading counsel who represented the Applicant before the High Court in 1999, at her previous Parole Board hearing in 2020 which resulted in her being recommended for a transfer to open conditions, and at her first hearing before the current panel. I have not found any proper basis for directing a reconsideration of the Applicant's case either on the grounds raised or elsewhere.

Decision

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

HH Patrick Thomas KC
05 April 2023