

[2024] PBRA 7

## Application for Reconsideration by Alcobias

### Application

1. This is an application by Alcobias (the Applicant) for reconsideration of a decision of a paper panel (the present panel) dated the 26 October 2023 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:
  - a) The decision letter dated the 26 October 2023;
  - b) A request for reconsideration from the Applicant's legal representative, dated the 27 December 2023; and
  - c) The dossier, numbered to page 617, of which the last document is a Duty Member decision of 7 December 2023 refusing the Applicant's application for an oral hearing.

### Background

4. The Applicant is now 30 years old. On 12 January 2015, when he was 21 years old, he received an extended determinate sentence consisting of a custodial period of 5 years and 9 months and an extension period of 3 years following his conviction for offences of robbery and having an imitation firearm.
5. On the 12 July 2019, the Applicant was released on licence automatically under the law. He was recalled to prison on 22 November 2019 following an allegation of further offending, although he was later acquitted of the alleged offending upon the prosecution offering no evidence at court.
6. The present panel's review of the case is the second review by the Parole Board. The first review by an earlier panel was conducted over a lengthy period, during which time the Applicant engaged with therapeutic work in custody and had indicated a wish to complete further work to address his risk of reoffending so that he might be able to avoid violence in the future.

7. At the time of the earlier panel's review, there had been a delay to proposed coursework because of staff shortages at the prison where the expected course would be delivered. Nevertheless, the Applicant had been accepted onto the course and he had made clear to the earlier panel that he was committed to completing the work.
8. By the time of the present panel's review of the case, the Applicant had been transferred to an alternative prison, being held at an establishment for prisoners whose cases are of interest to the Home Office.
9. He had not completed the work that had been identified to the earlier panel and it was not available at his current location. Reports before the present panel noted that the course would be on offer at an alternative prison, but the Applicant had been reluctant to transfer to that prison. It seems that he later advised his legal representative that he would be prepared to complete the course and this information was communicated to his probation officer. At the time of the present panel's review of the case, the Applicant had not moved to the prison where the course could be undertaken.
10. The present panel considered the case on the papers, taking note of the Applicant's legal representations and did not direct his release.

### Request for Reconsideration

11. The application for reconsideration is that the present panel's decision was irrational and/or procedurally unfair in that:
  - a) The present panel did not explain why it preferred the professional evidence about the Applicant's motivation over that set out in his representations and elsewhere in the written evidence, and that there was an unexplained evidential leap in the present panel's conclusion of the case;
  - b) The decision letter *"includes a manifestly obvious error of fact ... by stating in its conclusion that 'there is no evidence of any trauma or risk reduction work ...', and this error "... directly contributed to the [present panel's] ... decision making ... [and] .... Overall Conclusion not to re-release [the Applicant] ..."*;
  - c) The present panel did not give *"... sufficient and/or any reason why [it] adopted certain recommendations in the Psychologist's report dated August 2021 but disregarded others ... in the alternative, [the present panel] has given ... inadequate weight to the Psychologist's recommendation for an up-to-date risk assessment once ... [the Applicant] had completed trauma therapy..."*;
  - d) The present panel *"... makes findings on what continues to be core risk reduction work, in the absence of up-to-date expert psychological opinion and makes findings on actuarial/standardised risk assessments in the absence of up-to-date expert psychological opinion"*;
  - e) The dossier of evidence did not include an assessment of the Applicant before and after the completion of trauma therapy or an up-to-date psychological risk assessment. In the absence of these assessments, the present panel did not provide adequate reasons for its assessments and findings in the Applicant's case; and
  - f) The present panel's decision was *'fundamentally flawed'* and procedurally unfair.

## The Relevant Law

12. The present panel correctly sets out in its decision letter dated the 26 October 2023 the test for release.
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 (as amended)*

14. 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)). 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)).

### *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.

*Other*

22. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.
23. 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.
24. 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."*

25. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

### **The reply on behalf of the Secretary of State (the Respondent)**

26. On the 29 December 2023, the Respondent confirmed that he would not be submitting any representations.

### **Discussion**

#### *Grounds a - c*

27. I take Grounds a – c together. The Applicant's application is misguided in respect of the points he raises.

28. In reading the entire decision letter, it is clear that the present panel properly reflected the case, both in terms of what professionals had written about the Applicant and what the Applicant had put forward in his representations. This included his view on proposed offending behaviour work.

29. On reviewing the entire decision letter, the reference to the 2021 psychological report set out the background to the case and was not determinative of the current position. Indeed, the present panel reflected the history of the case, including the earlier panel's review and then identified a lack of '*trauma or risk reduction work*' since that earlier review.

30. There is no error because the present panel made clear that it had considered the earlier panel's assessment of the case and it was reviewing the developments in the case since that earlier review. It was clear that the present panel was aware of the trauma work that had been completed and that this had been noted by the earlier panel. The present panel was simply identifying, correctly, that nothing further had been completed despite the stated intention of the Applicant at the earlier review.

#### *Grounds d – f*

31.I take these Grounds together because they seek to argue the same point. It is submitted that there was an absence of professional assessments and therefore the present panel could not properly conclude that further work needed to be completed by the Applicant in custody or that he would not be safe to be released.

32.I am afraid there is nothing to this argument. The present panel was not obliged to seek professional assessments and it had the expertise to properly and fairly consider the case on the available evidence. That evidence had been produced by the Secretary of State, although it was open to the Applicant to submit any evidence that he considered to be relevant to his case. If he was minded that a psychological risk assessment was critical to the review of his continued detention, he was entitled to instruct his own expert as often happens in a Parole review.

33.It was of course open to the present panel to direct that such an assessment be produced but it does not follow that this would be necessary in this case. In fact, the Applicant's case was fairly straightforward. At the earlier review, he had indicated a commitment to complete further risk reduction work in custody. His recognition of the need for this work to be undertaken was noted by the earlier panel which stated:

*"Having fully discussed the circumstances with [the Applicant] and his legal representative and giving him the option of asking the panel chair to reconvene the oral hearing to enable him to apply for release, he remains convinced that he needs to do this work and his will to do so before he presents an application for release remains undiminished despite the fact that he cannot start the work until March 2023 at the earliest. He accepts that he needs to complete the ...intervention before he could safely be released and although he was very upset and frustrated by the delays, he was prepared to complete [the proposed course] in closed conditions. He declined the opportunity of testing the evidence in an oral hearing and asked the panel to conclude the case on the papers in the full knowledge that this was likely to lead to a negative decision."*

34.Since the earlier panel's review, the work that the Applicant himself had confirmed a need to complete had not been completed. In the absence of this work, the present panel reasonably concluded that his continued detention remained necessary, and it did not direct release.

35.The Applicant may disagree with the present panel's view and its ultimate decision, however, there was nothing irrational in the decision made by the present panel and its approach to its decision making was not procedurally unfair.

36.Therefore, the application fails.

## Decision

37.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.

**Robert McKeon**  
**02 January 2024**