

**[2022] PBRA 115****Application for Reconsideration by Platts****Application**

1. This is an application by Platts (the Applicant) for reconsideration of a decision of the Parole Board dated 23 July 2022 following an oral hearing on 24 June 2022. The panel declined to release him.
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: (1) the dossier, now running to some 748 pages including the decision letter; (2) the application for reconsideration dated 14 August 2022; (3) open written submissions on behalf of the Applicant; (4) closed material withheld from the Applicant but seen by his solicitor; (5) closed written submissions on behalf of the Applicant; (6) a closed decision letter.

**Background**

4. On 25 May 2017 the Applicant was convicted of the rape of a girl aged 8. He was sentenced to 9 years imprisonment with an additional 1 year licence period imposed by reason of the nature of his offence. He became eligible for parole on 23 November 2021. Unless released on licence by the Parole Board he will remain in custody until May 2026. Any licence will not expire until May 2027. The Applicant was aged 54 when sentenced and was aged 59 at the time of the review.
5. The offence took place during 1982 when the Applicant was 19 years of age. He was babysitting for the victim; he took her forcibly from her bed to her parents' room where he raped her, threatening to smack her if she did not stop resisting and crying. He denied the offence at trial and has continued to deny it. He has had no other convictions of any relevance. At the time of his arrest he was married and living with his two children.

**Request for reconsideration**

6. It was brought to the Parole Board's attention during the course of the review that further allegations had been made against the Applicant. The request for reconsideration arises out of the panel's treatment of those further allegations.
7. The application, dated 14 August 2022, is discursive in nature. It is always helpful if an application for reconsideration contains distinct, carefully framed grounds so that the points made can easily be identified. However, I do not think I need to send it back for clarification. I believe the essential points in it can be summarised as follows. It is argued -
- a. The panel misapplied **R(Pearce) v Parole Board** [2022] EWCA Civ 4 ("**Pearce**") by placing reliance on allegations without making findings of fact on the balance of probabilities.
  - b. Consequently the panel placed weight when assessing risk on allegations for which there was no proper basis, since they were entirely denied and had not been proved.
  - c. The panel received a key statement after the oral hearing; they did not ask the Applicant about key aspects of it and gave him no opportunity to deal with it; this was unfair.
  - d. The panel also placed reliance on closed material which the Applicant did not see and had no sufficient opportunity to answer; this was unfair.
  - e. The panel relied on evidence from a prison psychologist who had not met the Applicant and attended only to cover for the prison psychologist who had prepared the reports; this was unfair and irrational.
8. Grounds (a) and (b), which are developed quite fully in the application, are said to raise issues of irrationality. I accept that they do; they seem to me also to raise an issue of law about the application of **Pearce**.

### Current parole review

9. The original referral was made on 18 February 2021 ahead of the Applicant's parole eligibility date.
10. The further allegations related to a quite different, much later, time period than the index offence. They were not the subject of any criminal or civil proceedings. They arose in two distinct ways.
11. Firstly, in the course of investigating the historic rape the police took a statement dated 8 February 2016 from a witness ("X") which made allegations which were potentially relevant to risk. It was referred to in an OASys report; but it was not actually part of the dossier at the time of the final hearing on 24 June 2022. The panel asked for it to be supplied; and it was added to the dossier before final submissions and decision.

12. Secondly, the panel received information which was with-held from the Applicant under rule 17 of the Parole Board Rules 2019. A summary of the information, known as a gist, was disclosed; and the material itself was disclosed to the Applicant's representative on an undertaking not to disclose it to the Applicant. This information was before the panel at the time of the oral hearing.
13. As noted above, the oral hearing took place on 24 June 2022. The panel consisted of an independent chair and three independent co-panellists. It heard from the Applicant himself, the Prison Offender Manager, the Community Offender Manager and a prison psychologist. The prison psychologist was not the person who had interviewed the Applicant and prepared reports on him; that person had suffered an accident and was unable to attend the hearing. The prison psychologist who stood in for him had supervised his reports in co-operation with another colleague. The Applicant was represented by his solicitor.
14. The panel held a closed hearing at which it considered the undisclosed material and then an open hearing. As noted above, it then adjourned for the statement of X to be added to the dossier and concluded the case on the papers after it received written submissions from the Applicant's solicitor.
15. The panel addressed the statement of X in the open decision letter at paragraphs 1.6 and 1.7. The statement contained some specific allegations which the panel considered relevant to risk: these are summarised in the first two sentences of paragraph 1.6. The panel did not make any findings relating to the truth of these allegations. It concluded, at the end of paragraph 1.7 –
- "The panel concludes therefore that [X's] statement plays directly to risk and cannot be discounted, though it is clearly not possible to make findings of fact about its contents."*
16. In its conclusions the panel relied on the allegations contained in the statement as part of its reasoning for concluding that it was necessary for the Applicant to remain in custody for the protection of the public: this is plain from paragraphs 4.2 and 4.3 of its reasons.
17. The panel addressed the undisclosed material in a separate decision letter containing closed reasons. It summarised the allegations and the sources of information which it received. It did not make any findings about the truth of the allegations. It said that it was clearly not in a position to do so. It carried its conclusions through to its open reasons: it is plain from paragraphs 4.1 and 4.3 that it took the allegations into account in reaching its assessment of risk. In particular it accepted a recommendation by the prison psychologist which had changed in the light of the allegations.
18. In its closed reasons the panel specifically mentioned the case of **Pearce**. It said that **Pearce** confirmed that *"the panel has a duty to assess the relevance and weight of an allegation and should either choose to disregard it, make a finding of fact, or make an assessment of the allegation to decide whether and how to take it into account"*.

## The relevant law



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19. In its decision letter the panel correctly set out the test for release: the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.
20. The Applicant was serving a determinate sentence subject to initial release by the Parole Board under Chapter 6 of Part 12 of the Criminal Justice Act 2003. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28(2)(c) of the Parole Board Rules 2019.
21. The Parole Board has a duty to take decisions which are lawful. A panel must therefore apply the law correctly when taking its decisions. In this case a key question is whether the panel understood and applied **Pearce** correctly. I will address this later in these reasons.
22. The concept of irrationality is derived from public law. The test is whether the 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*". See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
23. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair or the panel lacked impartiality.

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

24. The Secretary of State has informed the Parole Board that it offers no representations in response to the application.

### Discussion

25. The decision in **Pearce** disapproved aspects of the Parole Board's Guidance on Allegations. It had been the approach of the Parole Board, when considering allegations which it considered relevant to risk, to make findings of fact about them on the balance of probabilities if it could; to discount the allegations altogether if there was no evidence in support of them; but if there was some evidence in support of them to consider whether and how they contributed to the Parole Board's level of concern about the prisoner and to take them into account in that way. Thus, it was possible for the Parole Board to evaluate an allegation and take it into account in assessing risk even if the allegation was not admitted or established on the balance of probabilities.

26. However, **Pearce** held that the Parole Board should only take allegations into account in assessing the prisoner's risk to the extent that they were admitted or it could make findings about them on the balance of probabilities. Paragraphs in the Guidance on Allegations which suggested a different approach were disapproved: see paragraphs 36 to 38 of the judgment of Macur LJ. The Court of Appeal held that an assessment of risk could only be made on undisputed or established facts: see paragraph 48. Accordingly, allegations had to be examined by the Parole Board to see whether findings of fact could be made. Sometimes an allegation as a whole might be established on the balance of probabilities. Sometimes only parts of an allegation might be established; if they were, and if they were relevant to risk, they could be relied on: see paragraphs 45 and 46 for a helpful illustration.
27. The decision in **Pearce** is problematical for the Parole Board. There are several categories of information received by the Parole Board about which it can be very difficult to reach findings of fact fairly on the balance of probabilities. The Parole Board would discount such information where there was no evidence of substance in support of it; but if the information was such as to give rise to a real level of concern it would take it into account (as would professionals who prepared reports for the Board) taking the view that a risk assessment – which is its core statutory task – ought to evaluate all the information before it, not just that which could be proved on the balance of probabilities. **Pearce** however presently represents the law. The Parole Board must apply it; and it has placed a note against the Guidance on Allegations summarising the effect of **Pearce** and stating that new guidance is being developed.
28. Although the panel was aware of **Pearce** it did not drill down to its essential message. As I have described above (paragraphs 15-18) the panel took into account allegations which were neither proven nor admitted without making findings of fact about them. The allegations were of substance and were relevant to risk; the panel's approach would have been permissible prior to **Pearce**. In the light of **Pearce**, however, it is not permissible. The panel was required to analyse the allegations carefully to see whether any of them were established on the balance of probability; and to consider those allegations, and no others, in assessing risk. I therefore uphold grounds (a) and (b).
29. I would not have upheld the remaining grounds. I will deal with them briefly. As to (c), although X's statement was not before the panel, the key points in it were contained in an OASys report which was in the dossier; I consider that the Applicant and his representative were able to address those points at the hearing and in written closing submissions. As to (d), I consider that the panel struck a fair balance by ensuring that there was a gist of the undisclosed information in the dossier, holding a closed hearing at which the Applicant was represented, ensuring that the representative had access to the undisclosed information and receiving closed submissions. As to (e), it does not appear that any party sought an adjournment because of the non-availability of the reporting psychologist; in the circumstances it was not unfair for the panel to permit the supervising psychologist to present the report and answer questions in so far as she could.

## Decision

30. For the reasons I have given, I uphold grounds (a) and (b) of the application for reconsideration and I grant the application for reconsideration.

31. In my view the best course is to direct that the case should be considered afresh by another panel. Firstly, given the importance of the panel's evaluation of the allegations to its decision, I think justice requires that the reconsideration should be by a different panel. Secondly, a fresh panel will be able to consider the case untrammelled by the view of the earlier panel that it was not possible to find any facts about the allegations on the balance of probability. If it takes a different view it is entitled to act on it.

**David Richardson**  
**31 August 2022**