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**[2023] PBRA 177**

# Application for Reconsideration by Theckston

## Application

1. This is an application by Theckston (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 18 September 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 423 pages; the application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

## Background

4. On the 16 December 2016, when the Applicant was 15 years old, she was sentenced to an extended determinate sentence of imprisonment for the offences of attempted murder and possession of an offensive weapon. The custodial element set by the judge was 10 years and the extended period was 4 years. The Applicant's Parole Eligibility Date (PED) was the 25 December 2022. Her Conditional Release Date (CRD) is in April of 2026.

5. The Applicant planned to commit the offence. The Applicant took a knife into school and attempted to stab a schoolchild in the chest.

## Request for Reconsideration

6. The application for Reconsideration is dated the 22 September 2023.

7. The grounds for seeking a reconsideration are set out below.

## Current parole review

8. The Applicant is now 22 years old. This was her first review by the Parole Board.

9. The Applicant was in an open prison at the date of the oral hearing.

## Oral Hearing

10. 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), and the Community Offender Manager (COM). The Applicant was represented by a solicitor.

11. A dossier consisting of 399 pages was considered by the panel.

## The Relevant Law

12. The panel sets out in its decision letter dated 18 September 2023 the test for release. The panel correctly indicated that the test for release was "*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 should be confined."* This test is embedded within the template used by Parole Board members.

13. Rather confusingly and perhaps unnecessarily, the panel also referred (at paragraph 4.2) to a wording of the test used in some decisions of the High Court (in particular Johnson EWHC 1282 (Admin)) that wording is expressed as "*whether the prisoner's release would cause a more than minimal risk of serious harm to the public".* Whilst a correct reflection of the cited High Court decision, panels are in danger of causing their readers, and possibly themselves, confusion by citing two versions of the test for release in the same decision.

*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 Secretary of State (the Respondent)**

23. The Respondent offered no representations.

**Reconsideration grounds and discussion**

**Ground 1 - Irrationality**

24. The Applicant's solicitor submits that the panel failed to take account of the evidence of professionals. In particular the evidence of the Applicant's COM, who, at the oral hearing, indicated that the Applicant posed a medium risk of serious harm and that there would be *"identifiable factors"* which would present themselves before risk escalated.

25. The panel disagreed with view of the COM and indicated in their decision that they (the panel) "*struggled to identify*" what those identifiable factors (external signs of risk escalation) would be.

26. The Applicant's solicitor submits that the "identifiable factors" were in fact detailed and referenced in a report by a prison instructed psychologist which formed part of the dossier.

27. The Applicant's solicitor also submits that these warning signs were identified in oral evidence by the COM. The appeal ground argued by the Applicant's solicitor is that insufficient weight was given to the views of the professionals and that the warning signs of an escalation of risk were clearly identified by the professionals.

**Discussion**

28. In applying the statutory test for release, panels of the Parole Board are not obliged to adopt the opinions, views or 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 receive, 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 fail to do just that. As was observed by the divisional Court in **DSD** they have the expertise to do it.

29. However, if the panel were to make a decision contrary to the opinions and recommendations of professional witnesses (as occurred in this case), it is important that it explains clearly its reasons for so doing and that its stated reasons should be sufficient to justify its conclusions. In particular, where a panel directly disagree with a view taken by a professional, the panel's rationale and reasoning for such a disagreement must be clearly set out to enable the prisoner to understand why that evidence was rejected. These matters were refenced in the decision of **R (Wells) v Parole Board [2019] EWHC 2710**.

30. In the decision letter the panel identify its concerns relating to warning signs and state (as set out above) *"the panel struggled to identify what external signs there would be if that pattern of behaviour was to return".*

31. The panel also indicate in their decision, a belief that the Applicant would find it *"relatively easy…to circumvent measures to monitor her use of the internet".*

32. Whilst the panel clearly identified these concerns, and the panel had a right and a duty to make up their own minds about these matters, as indicated above the panel had a duty also to explain clearly its reasons for so doing. In a case where all the professionals were arguing to the contrary the panel were obliged, to fully engage with the evidence of the professionals and to explain to the Applicant why it rejected the views of those professionals.

33. The panel's decision was inadequate in this respect. The panel, in stating that it would struggle to identify the external signs which would elevate risk, failed to say why the external signs suggested by the prison instructed psychologist and the COM, which were clearly set out in their reports, had apparently been rejected.

34. In particular the prison instructed psychologist had applied detailed psychological tools – HCR- 20V3 (Historical, Clinical, Risk Management), and FAM (Female Additional Manual) and SAPROF (Structured Assessment of Protective Factors) - in order to reach a conclusion in relation to the Applicant. The panel in my view were obliged to address these conclusions and to explain clearly why they, in their determination, those conclusions were either wrong or inadequate.

35. I have therefore determined that the panel failed to apply the test alluded to in the case of **R (Wells)** referred to above. The panel failed to engage with the evidence of the professionals and to explain clearly and simply its reasons for rejecting the opinions and views of those professional witnesses.

36. The panel also failed to engage with the detail of the Risk Management Plan (RMP) and explain why the plan would not meet the concerns relating to risk, in particular the safeguards relating to internet usage. The panel indicated that the safeguards could be easily circumvented, but again gave no explanation as to why it reached this conclusion and why the licence conditions relating to internet usage were thought to be inadequate.

**Ground 2 - Procedural unfairness**

37. Whilst not specifically raised by the Applicant's solicitor in this case, I note in the decision letter that a psychological risk assessment had been ordered by the Parole Board and had been undertaken and completed by a prison instructed psychologist. The prison instructed psychologist had been directed to attend the hearing. A note on the dossier indicates that on the day before the hearing the panel were informed that the psychologist was on maternity leave and that neither she nor any other psychologist from her department would be able to attend the hearing.

38. The panel appropriately raised this matter at the hearing and asked the Applicant's solicitor for representations. The note within the panel's decision letter indicates that the Applicant, through her legal representative, made it clear that she wished to proceed with the hearing rather than adjourn to a date when the (or an alternative) psychologist could attend. The panel then indicated that, after consultation, they would proceed without the psychologist.

**Discussion**

39. This was a complex and difficult case. The Parole Board member who was tasked to manage the preparation of the case, the MCA (Member Case Assessment) member, specifically directed that a psychologist member should form part of the panel. The rationale for that decision was the young age of the Applicant at the time of committing the index offence and the need for an assessment of the therapeutic

and behavioural work which had been undertaken by the Applicant. It was clear therefore that this was a case involving psychological issues. It also involved a prisoner who had spent a considerable part of her childhood in prison. As indicated above, a substantial psychological risk assessment had been undertaken by a prison instructed psychologist. The views and comments by that psychologist were clearly important in assessing risk.

40. The absence of the prison instructed psychologist was a matter of concern. Although no further information is provided within the decision, the fact that a substantive and important witness failed to attend the hearing without notice, and without an opportunity for the parties to consider the position in advance, was also a matter of great concern. Clearly, by the time of the scheduled hearing, the parties were in an extremely difficult position. The panel correctly sought representations from the Applicant through her solicitor. The Applicant was likely to be in an exceptionally compromised position. The Applicant and her solicitor would have been aware that if they raised an objection to proceeding with the case, in the absence of the psychologist, the case would have been adjourned for many months awaiting a fresh date. It is perhaps no surprise therefore that the Applicant instructed her solicitor to proceed in any event.

41. However, a matter of importance is that Parole Board hearings are inquisitorial by nature and accordingly witnesses are examined by both the parties and by the panel members themselves. Any decision to dispense with a witness must be taken in the light of the knowledge that the panel itself will have no opportunity to test the particular witness's evidence.

42. In electing to proceed with the hearing, in the absence of the prison instructed psychologist, both the panel and the Applicant had no opportunity to examine, develop and test the views of the psychologist. The psychologist had concluded that the risk of violence by the Applicant would be moderate in the community, subject to a "responsive" RMP. The psychologist also set out the factors which might lead to an escalation of risk. These were exactly the matters which the panel addressed in reaching its conclusion. The panel made no reference, in its concluding remarks, to the factors which the prison instructed psychologist indicated would increase risk. In particular no comment was made as to whether the conclusions of the psychologist were rejected or accepted, and if rejected why they were rejected.

43. As indicated above, this case was complex, in the sense that it involved an exceptionally serious offence by the Applicant, who was a child at the time of committing the offence. The analysis of the offending therefore involved a careful assessment of the psychological and psychiatric issues relating to the Applicant and her ongoing risk.

44. In my assessment the panel's decision to dispense with the evidence of the psychologist at the outset of the hearing was premature. The panel had the opportunity to defer the decision relating to adjournment, and to await the outcome of the reception of the remainder of the evidence. At that stage the panel and indeed the parties would have been in a better position to assess whether the oral evidence of the missing psychologist was important. Indeed, as it transpired, the issue of

identifying external signs of an elevation of risk was fundamental to the panel's conclusions. The panel would have had the opportunity to reflect upon the oral evidence and reassess whether the oral evidence from the psychologist was required. It is highly likely that, were the panel to have considered this matter at a later stage in the hearing, they would have concluded that it was essential to receive the evidence from the reporting psychologist and to assess whether the view of the psychologist concerning risk was credible.

45. Unusually therefore I have concluded that the panel's decision to proceed with the matter, in the absence of this important witness, amounted to procedural unfairness. Although the applicant herself had consented to proceed, that in my determination was not an end to the matter. The panel had a wider duty to consider whether the parties would be unfairly hampered in presenting their case. Whilst the panel correctly sought the views of the Applicant, they were obliged to make an independent assessment as to whether it was fair to proceed in the absence of the witness.

46. In the light of my conclusions in relation to these grounds I have not addressed other issues raised by the Applicant's solicitor in the application.

**Decision**

47. For the reasons set out above I find there to have been a procedural irregularity and, applying the test set out above, I also find the decision to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by way of an oral hearing.

**HH Stephen Dawson**
**9 October 2023**