

[2023] PBRA 207

**Application for Reconsideration by the Secretary of State for Justice  
in the case of Smith****Application**

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing dated 12 September 2023 to direct the release of Smith (the Respondent).
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)) 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;
  - the application and the revised application for reconsideration;
  - the response;
  - the dossier, which now contains 798 numbered pages, concluding with the decision letter; and
  - transcripts 1 and 2.
4. The original application (dated 9 October 2023) was based, to a significant extent, on the notes of evidence of counsel for the Applicant. It was obviously right that I should have an agreed accurate version of the parts of the evidence relied on. The Applicant obtained transcripts of all the evidence, and his revised application incorporates both verbatim extracts from and references to those transcripts. For obvious reasons, this has delayed the decision on this application well beyond what the Parole Board normally expects to achieve.

**Background**

5. The Respondent is serving a sentence of life imprisonment imposed on 3 July 1996 for three offences of murder. He killed his three infant children on separate occasions, in 1989, 1993, and 1994. He denied (and continues to deny) all responsibility for the first two killings. He pleaded not guilty to the murder of the third baby, aged 2½ months when she died, but guilty to manslaughter. The trial judge reported to the Lord Chief Justice that the defence advanced the partial defence of provocation, due to the baby crying. At the oral hearing counsel for the Applicant suggested that the defence had been lack of intent to kill or cause serious



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injury. The jury convicted him of all three murders. The trial judge imposed a whole-life tariff. The tariff was later set at 24 years, which expired in November 2018.

6. In 2019 a panel of the Parole Board recommended to the Applicant that the Respondent be transferred to open conditions. The Applicant agreed, and in October 2019 the Respondent transferred to open conditions, where he has remained.

### Request for Reconsideration

7. The application for reconsideration is dated 9 October 2023, and revised on 27 November 2023. I have worked off the revised version.

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

Several potentially determinative elements of the Board's reasoning (and thus the reasoning as a whole) are unlawful and/or irrational.

In summary the panel's decision is vitiated by:

- (i) An error of law and/or irrationality, in that the panel failed to consider at all a very significant topic raised by the witnesses during the hearing and relied on by the Applicant, namely the extent to which the Respondent would report difficulties or emerging risks to professionals; and
  - (ii) A further error of law, in that the panel failed to apply the correct statutory test.
9. Ground (ii) is particularised as concerning the panel's approach to "*unknown risks*" and the test for release.

### Current parole review

10. This is the Respondent's fourth parole review. The Applicant referred his case to the Parole Board for consideration of release, and that was the outcome the Respondent sought.

11. The hearing took place by video link on 6 September 2023. The panel consisted of two independent members and a psychologist member of the Parole Board. The witnesses who gave evidence were the Prison Offender Manager (POM), the Community Offender Manager (COM), a psychologist based at the prison, and the Respondent. The mothers of the victims read statements at the hearing. I have read the statements that appear in the dossier. Both the Applicant and the Respondent were legally represented. The dossier consisted of 773 pages, to which the representatives added their written submissions after the hearing.

### The Relevant Law

12. The panel correctly sets out in its decision letter 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.



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.
14. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

*"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)*

15. 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. This is an eligible decision, as it relates to an indeterminate sentence.

#### *Illegality*

16. An administrative decision is unlawful under the broad heading of illegality if the panel:
- (a) misinterprets a legal instrument relevant to the function being performed;
  - (b) has no legal authority to make the decision;
  - (c) fails to fulfil a legal duty;
  - (d) exercises discretionary power for an extraneous purpose;
  - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
  - (f) improperly delegates decision-making power.

17. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the *Parole Board Rules*, but it may also be an enunciated policy, or some other common law power.

#### *Irrationality*

18. 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."*

19. 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.

20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
21. 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."*

*Other*

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 Respondent

23. The response points out that the Applicant has not supplied to the Respondent (as at the date of the response he had not supplied to the Parole Board) the transcripts on which he relies. As soon as I received the response, I directed that that be remedied. The Respondent suggests that it would make sense to look at the whole of the psychologist's evidence. I have done so. Indeed, I have read both transcripts supplied.
24. As to Ground (i), the Respondent submits that the evidence relied on by the Applicant was tested in detail by the panel, who felt that the concerns were not sufficient to prevent the Respondent from meeting the test for release. The Respondent further submits that the panel's analysis of the evidence, particularly the evidence relating to the Respondent's contact with his partner, demonstrates a proper understanding of the evidential position. The panel was not obliged to detail every point of evidence. The panel considered the external controls available on release. The panel summarised the Applicant's arguments and cannot therefore be said to have ignored them.



25. As to Ground (ii), the Respondent submits that the panel considered the issue of "unknown risks" and was entitled to come to the conclusion it did.

## Discussion

26. As the Respondent correctly points out, the panel noted the Applicant's submissions in the decision letter, specifically mentioning the concerns advanced on behalf of the Applicant about whether he was still deceptive in his dealing with professionals. The panel explored this with the psychologist (transcript 2 p17-18), who maintained his professional opinion that the Respondent passed the test for release. Counsel for the Applicant asked the psychologist no questions on this point.

27. It does not follow from the panel not further discussing this aspect of the case in the decision letter that the panel did not consider it. As the parties agree, the panel is not obliged to mention every aspect of the case in its decision letter.

28. The Applicant underlines that he is not concerned about deliberate deception, but about the Respondent being dishonest with himself.

29. The issue that the Applicant therefore raises, whether this prisoner is sufficiently honest with himself to be honest with his supervisors, arises in many, if not most, cases with which the Parole Board deals. It is something of which every oral hearing panel is aware, and which the panel itself explored in evidence. The Respondent comments accurately on the experience of this panel. The question must be, whether the level of potential deception, to use the strongest available word, is such that it impacts on the risk to the public, which must be the Parole Board's focus.

30. The panel came to very clear conclusions, firmly based on the evidence. The key conclusion is set out at paragraph 2.29 of the decision letter: "*The risk towards young children is very specific and it seems very unlikely that [the Respondent] could ever be in a similar situation as was faced at the time of the index offences.*" The Applicant does not challenge this conclusion. The panel went on to say "*The [Applicant] contends that this risk is poorly understood and should be treated with extreme caution. The panel do not agree.*" The Applicant does challenge this conclusion.

31. The "deception" issue relates essentially to the question of whether there would be information available to his supervisors of any deterioration in the Respondent's state of mind, and/or in his relationships. It was in that context that the panel was entitled to assess the relevance of this part of the evidence. It cannot be said that not to discuss the matter further than the panel did is an indication of irrationality in the sense discussed above. The panel was fully aware of the level of oversight to which the Respondent would be subject under the Risk Management Plan. The panel was entitled to be satisfied on the evidence that the risk to very young children is adequately understood, based on an analysis of what the Respondent admitted with regard to the third murder.

32. The panel was entitled, on the evidence, to take the view that it did: that any element of "deception" did not increase the Respondent's risk of serious harm to



the public, particularly in the light of the intensive supervision to which he will be subject.

33. I do not find that Ground (i) is made out.

34. Ground (ii) seems, as it is particularised in the application, to be something of a semantic complaint. The Applicant suggests that the panel has misinterpreted the evidence of the COM when she said that the risk of harm arose in all close relationships, not "*just' against his biological children.*" The COM went on to describe these as "*unknown risks*". The panel was entitled, on the evidence, to regard this, however it is described, as a suggestion with little, if any, foundation. The panel considered that "*Risk of serious harm within an intimate relationship is accurately assessed as medium ... and not likely to be imminent [in] the panel's view.*"

35. The panel carefully considered and assessed the evidence about, for example, the Respondent's previous offence of possession of an offensive weapon, and the evidence about how he spoke to his new partner. The panel plainly regarded the suggestion that the Respondent poses a risk outside that to small children as speculative. However, the panel expressed it, that was a conclusion to which the panel was entitled to come on the evidence.

36. I do not find that Ground (ii) is made out.

37. Overall, and applying the test as expressed in **Wells** above, I do not find the panel's conclusions to be irrational.

38. The suggestion of unlawfulness is based, it seems, on an assertion that the panel applied the wrong test for release. I can find no basis for this assertion. The complaint focuses on the panel saying it found it difficult to understand how unknown risks could be reliably or fairly assessed. The Applicant suggests that that statement shows that the panel was approaching the issue on the basis that risks that are not fully understood should be discounted. That is not what the panel said. The panel was entitled not to take into account risks of the existence of which there was no evidence.

39. A finding that there was no evidence that the Respondent posed a risk outside the very narrow scope of his index offences cannot be criticised as unlawful.

## Decision

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

**HH Patrick Thomas KC**  
**12 December 2023**

