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[2023] PBRA 67

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Parole  
Board

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## Application for Reconsideration by Rahman

### Application

1. This is an application by Rahman (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 28 February 2023 not to release the Applicant following an oral hearing on 21 February 2023.
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 application for reconsideration, the response from the Secretary of State, the dossier and the decision in *R(Bailey and Morris) -v- Secretary of State for Justice and the Parole Board 2023 EWHC 555(Admin)*(the Bailey decision).#

### Background

4. On 9 February 2012 the Applicant was sentenced to an extended sentence of 17 years for engaging in conduct in preparation for acts of terrorism contrary to the Terrorism Act. While serving the sentence he committed an offence of wounding on another prisoner and was sentenced to 2 years imprisonment to be served consecutively to his existing sentence. He was released on 22 December 2017 on licence and was recalled for breaches of his licence conditions on 22 March 2022. The breaches included having an unauthorised phone in his possession. Arising out of his recall the Applicant was sentenced to 8 months imprisonment for breaching the terrorism notification requirements.

### Request for Reconsideration

5. The application for reconsideration is dated 21 March 2023.
6. The grounds for seeking a reconsideration are that, as a result of the effect of Rule 2(22) of the Parole Board (Amendment) Rules, the panel were unable to obtain the recommendation of three professional witnesses as to whether it was no longer necessary for the safety of the public for the applicant to remain confined in prison. It is submitted that that rendered the hearing unfair.

### Current parole review



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7. This was the first review by the Parole Board following the recall of the Applicant in March 2022.
8. At the oral hearing the panel heard evidence from the Prison Offender Manager; the Community Offender Manager; an Interventions Facilitator; a prison psychologist and a police witness.

### **The Relevant Law #**

9. The panel correctly sets out in its decision letter dated 28<sup>th</sup> February 2023 the test for release.#

### *Parole Board Rules 2019 (as amended)*

10. The application for re-consideration is made only on the ground of procedural unfairness but I shall also consider illegality as it may be a relevant consideration.

#### *Illegality*

11. 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.

12. 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.

#### *Procedural unfairness*

13. 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.

14. 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;



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- (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.

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

15. By letter dated 29 March 2023 the Secretary of State submitted that it is for the panel to make a decision on the evidence it has and that clear assessments of risk were supplied to the panel by the report writers on which the panel could make up their minds.

### **Discussion**

16. For the purposes of this decision, Bayley established the following matters. On its true construction Rule 2(22) only provided that report writers were not obliged to include recommendations in their reports. It did not mean that report writers were entitled not to comply with a direction from the Board to produce a report which did include a recommendation. Nor did it mean that report writers could refuse to answer at a hearing if asked to provide a recommendation. Advice from the Secretary of State that report writers should not provide recommendations on request from the Board prior to or during a hearing was wrong and should not have been followed. Further the Court held that rule 2(22) was unlawful as it had been made by the Secretary of State for the purpose of preventing a party to litigation in which the Secretary of State was also a party from obtaining evidence which may benefit their case.

17. In practice, following the introduction of this rule, it became impossible for Panels to obtain the opinion of witnesses who appeared before them who in the past had made recommendations on the ultimate issue that the panel had to decide. That was the situation in this case.

18. As there is no indication that the Secretary of State disputes the factual basis for the application, I shall accept the assertions made in the application without checking the recording that:

- The witnesses stated when asked that they could not make recommendations.
- One of them said that she had had express instructions from the Secretary of State not to make a recommendation.
- The Panel Chair said that it would have been helpful for the panel to know the recommendations of the witnesses.
- The panel did not press the witnesses to answer.

19. In the period that Rule 2(22) was in force this was not an unfamiliar situation.

20. The decision on the '*ultimate issue*' is for the panel and not the witnesses. The panel would not and should not simply accept the recommendation, if made, without consideration of the reasons for it. It is only if the panel agrees with the reasons for the recommendation that it would adopt it in its decision. #



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21. The making of a recommendation by professional witnesses, which is what has happened for a long time, provides a useful framework for the consideration of the witness' evidence. A witness will be asked what their recommendation is and then asked the reasons for it. They will often then be asked about other matters which may tend to suggest that the recommendation is not well founded. The panel having considered the reasons for the recommendation will then decide whether they agree with it or not. A panel will not simply count up those who are recommending release as against those who are recommending no release. It is the reasons for the recommendation rather than the recommendation itself which are of the most significance to the panel.
22. In my judgment it will not be automatic that when a panel has not been able to obtain recommendations because of the effect of Rule 2(22) that there will have to be a reconsideration. It will depend on the facts of the individual case.
23. It is not surprising or a matter for criticism, in my view, that in this case the panel did not continue to press for recommendations when the witnesses had been told that they could not answer by their employer. Where the employer was the Secretary of State for Justice, an employee might be expected to assume that his directions were lawful. It is highly unlikely that the witnesses would have answered even if pressed by the panel to do so.
24. In the situation that faced this panel, what was required was a detailed examination of the evidence of the three witnesses about all the matters which could have contributed to a recommendation if they had made one. This is what they did in section 2 of the decision letter. The Applicant had been released on licence as it was determined at that time that he met the test for release. He had been on licence for over four years and had appeared to be doing well. In fact, for a significant period of his time on licence, he had been committing serious breaches of his licence. Bearing in mind the nature of the index offence and the nature of the breaches, this was concerning. What the panel had to decide was whether they could be satisfied that in the light of his behaviour on licence and what had happened in prison since his recall it was no longer necessary for him to remain in prison for the safety of the public. All these matters were explored with the witnesses and with the applicant.
25. I am satisfied that the investigation of the evidence carried out by the panel ensured that this was a fair hearing and, while the structure of the questioning, as I have explained, would have been different if recommendations had been made, the panel have looked carefully at all the factors in favour and against release and then have asked themselves the ultimate question which was for them to answer. As I have said, it is the reasons for the recommendation which need to be considered most carefully by the panel and all possible reasons were looked at. The reasons for his recall were examined; his explanations for



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his breaches were looked at; his progress and attitudes since recall were examined as were his intentions for the future.

26. In my judgment the hearing was not unfair, and all relevant matters were considered in proper detail during the hearing. While the panel may have found it helpful to have the structure of a recommendation as a start to the examination of a witness' evidence, it does not follow that it cannot be properly considered without it.

27. I have also considered whether the decision was unlawful in that it failed to take into account relevant information namely the recommendations of the professionals. While there could be cases where that renders the decision unlawful, I am satisfied it doesn't in this case as the possible reasons behind any recommendation have been considered in detail.

## Decision

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

**John Saunders**  
**17 April 2023#**