

[2023] PBRA 85**Application for Reconsideration by Alam****Application**

1. This is an application by Alam (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 13 April 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 13 April 2023;
 - b) A request for reconsideration from the Applicant's legal representative; and
 - c) The dossier, numbered to page 750, of which the last document is the panel's Decision Letter.

Background

4. The Applicant is now 34 years old. In 2007, when he was 18 years old, he received a sentence of detention at Her Majesty's pleasure following his conviction for murder (the index offence). He was also sentenced for possession of cannabis and being concerned in the supply of cannabis, receiving concurrent determinate sentences.
5. The index offence resulted from the Applicant's involvement in the supply of drugs. He believed that he had been set up by the victim when a drug dealer took £500 and did not return with any drugs. He stabbed the victim, who died of his injuries.
6. The tariff set by the sentencing court meant that the Applicant would not be eligible to be considered for release until May 2019. However, in 2017, the Applicant received a determinate sentence for offences committed in prison. This related to the supply of drugs and mobile phones. The Applicant's conditional release date on the new sentence was in June 2022.
7. The Secretary of State referred the Applicant's case to the Parole Board in September 2021 for it to consider whether to direct his release on the sentence for the index offence or, in the alternative, whether to make a recommendation for him to move to an open prison.



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8. The case was reviewed on the papers in February 2022 and an oral hearing was directed. The panel reviewed the Applicant's case at an oral hearing on 6 April 2023. The panel heard oral evidence from the Applicant, his probation officer in the community, the official responsible for his case in custody, a psychologist employed by the prison service, a psychologist instructed by the Applicant's legal representative and from two security analysts at the prison.
9. The Applicant's legal representative produced closing written submissions on 11 April 2023 and the panel then issued its Decision Letter dated the 13 April 2023. The panel did not direct the Applicant's release and did not recommend that he should progress to an open prison.

Request for Reconsideration

10. The application for reconsideration is that the panel's decision was irrational and/or procedurally unfair, in that:
 - a) The views of security at the prison and of the security intelligence was not interpreted fairly; and
 - b) The panel should have adjourned for a fully informed risk management plan and in not doing so it implies that the decision had been pre-determined.

The Relevant Law

11. The panel correctly sets out in its decision letter dated the 13 April 2023 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.
12. 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)

13. Under Rule 28(1) of the Parole Board Rules 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)).
14. 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)).

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.

Other

22. 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.
23. 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."*
24. 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)

25. On the 4 May 2023, the Respondent confirmed that he would not be making any representations.

Discussion

Ground a

26. The Applicant expands on his submission about security views and intelligence. He goes on to include other evidence from the panel's review. In my view, much of the further detail outlines why the Applicant disagrees with the panel's assessment of his case. I accept that there is evidence to support the Applicant's claim that he has not used drugs in the community and that the psychologist instructed by the Applicant's legal representative may have considered that the test for release was met. However, the panel did not refuse release on the sole basis that there was a

concern about past substance misuse. The panel was required to complete its own assessment of risk and its own assessment of whether the test for release was met. The view of the psychologist was not, in my view, a deciding factor. There was sufficient explanation within its Decision Letter to demonstrate why the panel reached the decision that it did. The Applicant may disagree with the panel's assessment of the evidence, however, this does not meet the test for irrationality or procedural unfairness.

27. The Applicant rehearses the security intelligence and the evidence before the panel. In his view the panel placed too much weight on unproven matters, particularly when there were no adjudications or warnings against the Applicant in custody in relation to the security entries.
28. The Applicant submits that this is a mistake in a finding of fact or a mis-recording of fact, and that this was irrational. The panel reached its own independent assessment of the security intelligence having heard all the oral evidence and having considered the written evidence in the dossier, together with the Applicant's closing submissions. The fact that its assessment differs from the view of the Applicant is irrelevant. It does not evidence irrationality and there was nothing unfair in the panel's approach to the evidence. The panel gives clear reasons for its assessment of the case and in fact highlights the Applicant's closing submissions about the security intelligence and the challenges made in the case. It is clear to me that the panel approached its review of the evidence with care.

Ground b

29. The Applicant's submission that the panel should have adjourned for a fully informed risk management plan is not persuasive. No application was made by the legal representative in closing written submissions and in reality there was little more to be produced. In its Decision Letter the panel had referenced consideration of an adjournment to obtain an update on accommodation. However, the proposal of designated accommodation was within the risk management plan considered by the panel. The only information that was absent was a referral and a date for a bedspace. That is not information that would be fundamental in the panel's assessment of the risk management plan because a) a bedspace would be sought by probation if release were to be directed and b) any release would not take place until the bedspace was in place. The panel does not set the release date in any case, it is a function performed by the Respondent.
30. I do not accept that the absence of a date for a bedspace or the panel failing to adjourn for this information evidences that the panel had predetermined the Applicant's case. There is nothing to show that the panel's decision was irrational or that its procedure in reaching its decision was unfair. In fact, the panel's Decision Letter sets out in detail why the Applicant did not meet the test for release.

Decision

31. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether its conclusions were adequately and sufficiently explained.

32. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision which sets out in detail the findings, assessments, operative reasoning and conclusions of the witnesses and takes fully into account all of the evidence given to the panel, including that of the Applicant himself, the panel in my judgment satisfied the public law duty to provide evidence-based reasons that in my judgment adequately and sufficiently explained the conclusions they reached.
33. 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
10 May 2023