

[2024] PBRA 118**Application for Reconsideration by Swan****Application**

1. This is an application by Swan (the Applicant) for reconsideration of a decision of the Parole Board following an oral hearing on 24 April 2024 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are:
 - a. The dossier now comprising 338 pages including the Decision Letter (DL) sought to be reconsidered.
 - b. Submissions dated 29 May 2024 on behalf of the Applicant in support of his application.

Background

4. The Applicant is now 42 years old. In April 2018, he was sentenced to 8 years imprisonment with an extension period of 4 years for an offence of robbery. His Conditional Release Date is April 2026 and his Sentence Expiry Date is April 2030. This hearing was the first since the sentence was passed. The panel at the hearing under consideration did not direct his release.

Request for Reconsideration

5. The application for reconsideration is dated 29 May 2024.
6. The grounds for seeking a reconsideration are – in summary - as follows:
7. Under the heading of “irrationality”:
 - a. The panel was wrong to use the fact that the Applicant had only been in open conditions for a short time as a factor pointing away from release. There is no legal requirement for a prisoner to be held in open conditions for a particular period of time for him to be deemed suitable for release.



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- b. The criteria used by the SoSJ in determining whether to transfer an offender to open conditions involve a finding that the offender presents a low risk of harm.
- c. The panel placed insufficient weight –
 - i. On the progress that the Applicant has made during his sentence.
 - ii. On the Applicant’s positive behaviour in spite of the pressures of the Covid epidemic and the death of his brother while in custody.
 - iii. On the reports that the Applicant had been open and honest with his family and with the professionals concerned with his case.
- d. The panel found that there had been no recent concerns concerning ‘drug misuse or mental health issues’ was inconsistent with its ultimate decision not to direct release.
- e. Likewise, the panel’s statement that ‘the test is whether he can maintain that resolution in the community’ was irrational since however long the Applicant was in open conditions he still would not be ‘in the community’.
- f. A number of the reports within the dossier indicate that the Applicant has been open and honest during his sentence with both his family and the professionals who have been involved with his case.
- g. The fact that he has recently been transferred to open conditions is a strong indication that his risk is sufficiently reduced to mean that his release should have been directed.

8. Under the heading of “procedural unfairness”:

- a. The panel gave insufficient reasons for rejecting the opinions of the two witnesses who recommended release. The passage from *Wells* set out below at paragraph 24 is cited.
- b. The panel’s statement at paragraph 4.3 of the DL that “*Whilst risk may not be imminent, it could heighten rapidly if [the Applicant] loses hope and relapses into drug use*” while no doubt true was “an entirely hypothetical” statement. No evidence was cited to indicate that the panel had reasons for supposing that that was likely to occur. On the contrary, significant events such as the death of the Applicant’s brother had not resulted in his relapsing into drug use in spite of the availability of such drugs in prison.
- c. The fact that the Applicant has not been eligible for, and has therefore not completed any “*accredited interventions*”, which in fact contributed to the panel’s final decision not to order release means that its decision was procedurally unfair.
- d. The panel’s finding – at paragraph 4.8 of the DL – that a “*sustained period of compliance, abstinence and stability*” would be necessary before his release could be directed was procedurally unfair.
- e. The panel was wrong to reject – and gave insufficient grounds for rejecting – the psychologist’s opinion that “*warning signs...would be apparent.*” In addition, there were strong grounds for concluding that signs would be apparent and would be highlighted in time for any risk of serious harm to be averted. The Applicant would be subject to weekly drug testing and close members of his family (as had happened in the past) would be likely to notice and to report on such warning signs.
- f. The panel was wrong to conclude that the Applicant does not have “*sufficient insight*” to support the risk management plan. Both the Community Offender



Manager and the prison psychologist had indicated to the contrary in reports within the dossier.

Current parole review

9. The case was referred to the Parole Board by the SoSJ (the Respondent) in October 2022.
10. The case was heard by a three-member panel on 24 April and the decision was issued on 10 May 2024.

The Relevant Law

11. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019 (as amended)

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
13. 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)).

Irrationality

14. 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.*"
15. 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.
16. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC**



1282 Admin) (the Johnson case) adopted a 'more modern' test set out by Saini J in BR (**Wells**) v Parole Board [2019] EWHC 2710 (Admin).

17. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that "*no reasonable panel could have reached the impugned decision*". That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.
18. In the **Wells** case Saini J set out '*a more nuanced approach*' at paragraph 32 of his judgment when he said:

"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 regard 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".
19. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that "*this approach is simply another way of applying*" the Wednesbury irrationality test.
20. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a Judge dealing with a Judicial Review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all the evidence, that he or she should allow the application.
21. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.
22. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.
23. The giving of reasons by a decision maker is "*One of the fundamentals of good administration*" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.



24. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".

25. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was *Wednesbury* unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

26. 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.

27. 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.

28. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

29. 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.

30. 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

31. No submissions have been made by the Respondent with respect to this application.

Discussion

32. In reality the grounds submitted – save possibly that summarised at paragraph 8a above – allege irrationality rather than procedural unfairness.

33. The Applicant is a man who has put members of the public at risk of serious harm and has done so on many occasions, most recently the index offence of robbery committed in 2018 against a woman of 94, and sometimes in breach of previous court sentences. The transfer by the Respondent of a prisoner from closed to open conditions is not – as the grounds seem to suggest – a finding which effectively requires the Parole Board to conclude that the offender's risk has been reduced sufficiently for his release on parole to be automatic.

34. As to the individual grounds:

- a. Ground 7a. The panel was entitled to consider the length of time during which the Applicant had been in open conditions in assessing whether the risk of serious harm he currently poses was sufficiently low to direct his release.
- b. Ground 7b. The contention that a decision by the Respondent to transfer an offender to open conditions is tantamount to a conclusion binding on the Parole Board that the offender should be released when his case is next considered is as surprising as it is erroneous.
- c. Ground 7c. I have considered the 3 matters alleged in support of this ground with care against the contents of the dossier and the DL. All 3 of the matters set out in this ground were considered by the panel.
 - i. His progress is adequately summarised at paragraphs 2.1-3 and 2.5 of the DL.
 - ii. His brother's death and its consequences for the Applicant are adequately dealt with at paragraph 2.4.
 - iii. His Prison Offender Manager records his "*openness and honesty*" concerning his family and the death of his brother at page 309 of the dossier. The DL – at paragraph 4.7 – made it clear that in the panel's view and in the light of his previous record the Applicant needed to be



able to demonstrate the same qualities during the later stages of his stay in open conditions before his release could be directed. There is nothing irrational about such a finding.

- d. Ground 7d. The fact that there have been no recent concerns about drug use or mental health cannot lead to a conclusion that release must be directed.
- e. Ground 7e. The panel's conclusion that for his risk to be shown to have reduced sufficiently to justify an order for his release a period during which he spent time in the community on day or overnight releases was entirely rational.
- f. Ground 7f. This is in effect a repetition of the ground summarised above at paragraph 34 c iii.
- g. Ground 7g. This ground appears to suggest that the mere fact of the Applicant's transfer to open conditions should in effect be a guarantee of release following a parole hearing. The suggestion is a fanciful one. If correct it would require a wholesale change in the law and practice of Parole Board decision-making.
- h. Ground 8a. I have considered this ground against the line of cases cited culminating in *Wells* – see paragraphs 14-24 above. The panel clearly explained its reasoning on this matter at paragraphs 4.6-9. In addition to the reports and evidence of the professionals the panel heard from the Applicant. While it may be the case that a different panel may have reached a different conclusion, that is far from concluding that the panel's conclusion was either "*procedurally unfair*" or "*irrational*".
- i. Ground 8b. This is the strongest point made by the Applicant – albeit it belongs under the heading of "*irrationality*". It was undoubtedly true – as reported in the dossier at e.g. pages 58-9, 71 and 178 – that the Applicant seemed to have coped well with the stress caused by his brother's early death in 2022. The fact of the death and the Applicant's evidence concerning his reaction to it is set out at paragraph 2.4 of the DL. It is not specifically referred to as a matter which in the panel's increased or reduced his risk. It is clear however that the panel was principally concerned with the nature and persistence of the Applicant's previous offending behaviour and the need for more to be done while in open conditions to ensure that on release the risk that he might revert to such behaviour might increase and result in further violent offending.
- j. Ground 8c. The lack of "*accredited interventions*". This fact – though of course no fault of the Applicant's because most recently the non-availability of particular interventions was due to his location in the prison in which he was housed. The panel rightly noted that he had completed such an intervention during a previous sentence in 2015 and that he had nevertheless gone on to commit the index offence following his release. The panel was entitled to take the lack of such intervention during the current sentence into account when considering its decision.
- k. Ground 8d. The panel's statement quoted in the ground is an accurate statement of the law. That is indeed the test which parole panels have to apply. While good behaviour in prison may be a helpful indicator it cannot be a determining factor. There is nothing irrational – or procedurally unfair – in the DL's quoted statement.
- l. Ground 8e. '*The warning signs*'. The panel accurately summarised the conclusions of the prison psychologist on this topic at paragraph 3.5 of the DL and deals with its own conclusions on it at paragraphs 4.7-8. There was



nothing irrational – or procedurally unfair – in the way in which the panel approached this topic.

- m. Ground 8f. The issue of 'insight' or the lack of it. The panel dealt with this issue at paragraphs 3.6, 3.11 & 4.7 of the DL. The Community Offender Manager in her report of 20 February 2024 expressed a positive opinion about his insight and his triggers to offending in a report which recommended release or, in the alternative, transfer to open conditions. In fact he was almost immediately transferred to open conditions. The panel was entitled - having tested the evidence and heard from the Applicant to reach the conclusion it did. There was nothing irrational – or procedurally unfair – in the way in which the panel approached this topic.

35. For the reasons I have given, I do not consider that the decision was irrational or procedurally irregular. Accordingly, this application for reconsideration is refused.

Sir David Calvert-Smith
19 June 2024

