

[2024] PBRA 130

## Application for Reconsideration by Thomas

### Application

1. This is an application by Thomas (the Applicant) for reconsideration of a decision of an oral hearing panel dated 11 June 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.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 863 pages), and the application for reconsideration (undated, but received by the Parole Board on 24 June 2024).

### Background

4. The Applicant received an extended sentence of ten years imprisonment with a four year extension period on 3 April 2017 following conviction after trial in two counts of rape.
5. The Applicant was 26 years old at the time of sentencing and is now 33 years old.

### Request for Reconsideration

6. The application for reconsideration has been submitted by solicitors on behalf of the Applicant. However, the Applicant has drafted the application personally and the solicitors who submitted the application are not acting for him in the reconsideration matter.
7. It argues that the decision not to release the Applicant contained three errors of law.
8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

### Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether or not it would be appropriate to direct his release. This is the Applicant's first parole review.



10. A three member panel of the Parole Board including a judicial chair and a psychologist specialist member convened to hear the Applicant's case on 6 June 2024. It heard oral evidence from the Applicant, together with his Prison Offender Manager (POM), his Community Offender Manager (COM), a Chartered Forensic Psychologist commissioned by HMPPS (Psychologist) and a Consultant Forensic Psychiatrist.
11. The Applicant was legally represented throughout the hearing. The Respondent was not legally represented.
12. None of the professional witnesses supported the Applicant's release. The panel did not direct the Applicant's release.

## The Relevant Law

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.

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

14. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
15. 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)).
16. 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.

### *Error of law*

17. 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.

18. 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.

## **The reply on behalf of the Respondent**

19. The Respondent has submitted no representations in response to this application.

## **Discussion**

### *Allegations*

20. It is first submitted that the panel made an error of law in admitting allegations that the Applicant had raped his grandmother. It is argued that the judgment of the Supreme Court in *R(Pearce and another) v Parole Board* [2023] UKSC 13 only allows the Parole Board to consider allegations that have not been adjudicated on, and that the allegations had, in fact, been tried and the Applicant had been acquitted.

21. *Pearce* concerned the lawfulness of the published Parole Board Guidance on Allegations (as it stood at the time). While *Pearce* is authority for the fact that the Parole Board cannot give weight to allegations that have been tried and held to be unfounded, it does not follow that a panel is prohibited from recording that an allegation arose as a matter of historical fact.

22. By the Applicant stating that he was acquitted, he impliedly acknowledged that there must have been an allegation made against him, and the dossier is clear that he was found not guilty of the alleged rape of his grandmother or intent to commit a sexual offence. The panel has not given this allegation any weight, and this is entirely correct. Far from departing from *Pearce*, the panel has applied it perfectly correctly. There is no error of law, and this ground fails.

### *Necessity of offending behaviour work*

23. It is next submitted that the panel mistakenly suggested that there was an outstanding need to complete offending behaviour work, but such work is neither necessary nor required following *R(Gill) v Secretary of State for Justice* [2010] EWHC 364 (Admin). As such, it is argued that it is unlawful to refuse release due to the Applicant not having done any offending behaviour work.

24. The primary issue in *Gill* was whether the Secretary of State had breached his duty towards a prisoner with a learning disability by failing to take steps to enable him to undertake some type of offending behaviour work. That is not the issue in the Applicant's case.

25. However, the Divisional Court in *Gill* stated (at para. 80) as follows:

*Offending behaviour programmes are neither a necessary nor sufficient condition for release from prison. There are other recognised pathways to reduce re-offending and to achieve release.*

26. Therefore, the Court rightfully acknowledges that there are various means by which a prisoner can reduce his risk to a level that is safely manageable in the community. In this case, the panel is not refusing release simply because the Applicant has not completed a course. Neither would the panel have automatically directed release if he had. The panel concluded that, in all the circumstances, the Applicant had risk factors that needed to be dealt with and that those risk factors were sufficiently great that he could not be safely released. That is its job. *Gill* does not mean that a panel cannot agree with professional opinions in favour of completing offending behaviour work. There is no error of law, and this ground fails.

#### *Availability of risk reduction work*

27. Finally, it is submitted that the panel failed to follow paragraphs 16 and 17 of *R(Dich and Murphy) v Parole Board* [2023] EWHC 945 (Admin). It is argued that there are currently no offending behaviour programmes on offer and therefore there is no possible risk reduction work available to the Applicant.

28. *Dich and Murphy* concerned the test to be applied by the Parole Board when considering the risk posed to the public by the release of a prisoner serving an extended determinate sentence (as is the case here). Paragraphs 16 and 17 are as follows:

*16. Where such a case arises, the statutory test to be applied by the Parole Board is the same, namely whether it is necessary for the protection of the public that the offender should be confined. However, the application of the test is different from its application in the context of a life prisoner.*

*17. In a non-life case, if continued incarceration up until the sentence expiry date will do nothing to avoid or reduce the risk thereafter, then it is not necessary for the protection of the public that the offender should be confined. The position is different if continued incarceration would reduce the risk to the public after the sentence expiry date (for example, by preventing the prisoner from taking steps that are preparatory to an offence, or by facilitating rehabilitative work that might reduce the risk post release). It follows that there must be a causal link between continued detention and prevention or reduction of risk.*

29. It is initially difficult to see the point the Applicant is trying to make here. However, in an attempt to help him, I presume his argument is that continued incarceration up until the sentence expiry date would do nothing to avoid or reduce his risk thereafter (since there is no possible offending behaviour work available), then, following *Dich and Murphy* it is not necessary for the protection of the public that he should be confined.

30. It does not follow that this means that a prisoner who is assessed as presenting a high risk of future contact sexual reoffending and a high risk of domestic violence should be released early as his risk to the public would be the same at the point of early release as it would be at the end of his sentence. If risks are unmanageable, continued incarceration until sentence end serves the purpose of protecting the public during that period. The availability and suitability of risk reduction

programmes are not a matter for the panel. The panel, and all witnesses, agreed that the Applicant's risks were such that he could not be safely released and that is the end of the matter. There is no error of law here.

## Decision

31. For the reasons set out above, the application for reconsideration is refused.

**Stefan Fafinski**  
**15 July 2024**