

[2024] PBRA 131**Application for Reconsideration by Rahim****Application**

1. This is an application by Rahim (the Applicant) for reconsideration of a decision made after an oral hearing panel on 28 May 2024 and concluded on the papers by the panel chair not to direct 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 the decision, the dossier consisting of 465 papers including the decision letter, the application for reconsideration dated 18 June 2024, a character reference letter from another prisoner dated 2 February 2023, a Healthy Sex Programme (HSP) Suitability assessment dated 9 November 2023 and a response from Secretary of State(the Respondent) dated 3 July 2024.

Request for Reconsideration

4. The application for reconsideration is dated 18 June 2024 and is drafted by the Applicant.
5. The grounds for seeking a reconsideration are that the decision not to proceed to a full oral hearing was irrational, procedurally unfair and an error of law.

Background

6. On 22 April 2022, at the age of 60, the Applicant received an extended sentence of 8 years imprisonment following conviction for 3 counts of sexual assault. The sentence was made up of a custodial term of 3 years and an extended licence period of 5 years. The Applicant was 60 years old at the time of the offence and is now 62 years old. This is his first parole review.

Current parole review

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7. The Applicant's case was referred to the Parole Board by the Respondent) in November 2022 to consider whether or not it would be appropriate to direct his release.
8. On 9 April 2024 Panel Chair Directions (PCDs) were issued. These noted that the panel chair was minded to conclude the review on the papers as information about a police investigation into an incident in November 2023 remained outstanding. Legal representations were received requesting an oral hearing. A directions hearing was held on 28 May 2024. Following that directions hearing the decision was taken to conclude the case on the papers.
9. The panel did not direct the Applicant's release.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 28 May 2024 the test for release.

Parole Board Rules 2019 (as amended)

11. 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)).
12. 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

13. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd -v- Wednesbury Corporation* 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
14. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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. In *R(on the application of Wells) -v- Parole Board* 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was "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)". This test was adopted by a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

16. As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.
17. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
18. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

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;
 - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
 - (f) the panel was not impartial.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Error of law

22. 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.

23. 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.

24. In the cases of *Osborn v Parole Board* [2013] UKSC 61, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

25. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

26. The Respondent has provided a reply to the application which will be referenced with in the discussion below.

Discussion

27. The primary complaint of the Applicant is with regard to the failure to direct an oral hearing and he relies, as he did in earlier representations on the case of *Osborn, Booth & Reilly* [2013] UKSC6 (OBR). Two issues remained for the panel chair by the time of the 28 May 2024 hearing, the first was the outstanding allegation and the second was the absence of a required further witness. The Applicant wished to question witnesses and present evidence at an oral hearing in respect of these and other matters. The panel chair was aware that the overriding requirement in the case of *Osborn, Booth & Reilly* was whether or not to grant an oral hearing. On balance in the light of the matters before the panel, the panel chair directed that the case be concluded on the papers. The reasons given for not holding an oral hearing were that a further witness was required and the question of timeliness the



Applicant's conditional release date being in August 2024. In considering the question of fairness set out in OBR, I do not find that either of these were reasons to deny the Applicant an oral hearing.

28. With regard to the further witness, no details are provided either in the decision letter or in the grounds of who the witness was, of who required the attendance of the witness, of what relevant further evidence the witness could provide and the witness's availability to attend a hearing, possibly at short notice and/or remotely.
29. With regard to the question of timing the panel chair explained that even if she had considered that an oral hearing was appropriate in this case, in the light of the conditional release date in August 2024, by the time of a reconvened hearing it would be a matter of weeks before the Applicant would be automatically released. I do not agree that should have been a consideration to deny him a hearing. If the hearing could have been convened before his release he could have participated in the hearing. The oral hearing could have assisted the panel's decision making and would have allowed the Applicant to participate in a decision where he had something to contribute and which had important implications for him.
30. The Applicant raises a number of other matters in his grounds. He makes extensive submissions regarding the matter awaiting a charging decision. An oral hearing may not have advanced that particular matter further as the panel chair stated that she did not take it into account when considering questions of risk or manageability of risk (paragraph 2.7).
31. With regard to the Applicant's wish to challenge the reports and question the professionals, the panel chair considered that the professionals had considered the matters he raised, taken into account his condition (autism spectrum disorder) and the panel chair further noted that none of the professionals offering an opinion had recommended release. She fully considered the reports presented and the representations made by his legal representative on behalf of the Applicant and she made no direction for release. The overriding requirement is the consideration of fairness and this was a case in which the panel itself had recognised on an earlier occasion should have had an oral hearing.
32. The MCA directions of 7 July 2023 identified the need for an oral hearing. In particular those directions noted the complexities of the case, the history of assessment and the further reports requested. The case was set for an oral hearing but on the day listed there was the absence of a witness. In the panel chair's opinion an adjournment would not have resulted in an effective hearing as the Applicant would be automatically released just weeks after any hearing. She went on to note that it was highly unlikely that an approved premises would be available before his conditional release date and that any decision would be provisional for 21 days to take into account the reconsideration period.
33. It is unfortunate that there was such a long delay from the MCA directions in July 2023 to the hearing date of May 2024, much of which may have been as a result of the allegations which were being investigated by the police. The MCA was correct in identifying that an oral hearing was required and it is difficult to see why that view changed, whether it was because of little time between any hearing and a release date or because of missing evidence or because the professionals appeared



to have fully considered matters and come to a conclusion that appeared unarguable. The need for an oral hearing was stressed in the submissions from the Applicant's representative dated 10 May 2024. I agree with those submissions that fairness required an oral hearing.

34. In his grounds the Applicant raises a further concern with regard to the OASys report in which the selection of a box for "interview" gave the impression that the Applicant had been interviewed before completion of the OASys report when he had been interviewed after the report. It is not clear that this was a matter raised before the panel. In reply the Respondent states that the selection of the "interview" option was in relation to sources of information for the whole assessment including information on previous offending and current offence which was built up over time. This response presents a danger of ambiguity or lack of clarity. The decision letter makes no reference to this and it does not appear to have been raised at the time of the panel's consideration of the case, no valid complaint can be levelled therefore against the decision in respect of that matter.
35. With regard to the insufficiency of time to hold an oral hearing the Applicant states that the possibility of a priority hearing in the first week of August was mentioned but then rejected. That is not reflected in the decision letter. But even if considered, it is clear from the decision letter that the panel chair took the position that an oral hearing could not be convened until just weeks before the Applicant would be automatically released.
36. In his application the Applicant urges a full oral hearing, asking that such a hearing be prioritised for the beginning of August due to the urgency of a hearing taking place before his automatic conditional release date at the end of August 2024. There are logistical considerations to be taken into account before an oral listing can be convened – updated reports may be ordered and attendance confirmed between all the witnesses – which may take many weeks. There is even less time now to try to reconvene a hearing and I cannot say that would be possible before the Applicant's release date, although it would have been possible had the decision been taken at the earlier hearing.

Decision

37. I have found there to have been procedural unfairness and do not need to also consider if there have been other grounds for the decision. I do consider, applying the test as defined in case law, that the decision to refuse an oral hearing to be procedurally unfair in denying the Applicant the opportunity to put his case at an oral hearing. I do so solely for the reasons set out above.
38. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel or whether it should be reconsidered at all.
39. I have come to that conclusion having taken into account all the circumstances of the case, including the potential for a different decision to be reached (the panel chair, whilst she had not held an oral hearing, had nevertheless thoroughly considered all the matters in the dossier) and including the greater unlikelihood of



being able to convene a hearing in reasonable time. An updated Community Offender Manager report and Risk Management Plan would take time to obtain as it may require interviewing of the Applicant. Updated reports would be needed, availability dates of witnesses in August obtained, finding a panel at relatively short notice are all matters which support the conclusion of the unlikelihood of an expedited hearing before the conditional release date in August 2024. The passage of time has made the obtaining of even an expedited oral hearing untenable at this stage. For those reasons I do not direct a reconsideration of the panel decision.

B Mensah
12 July 2024