

[2024] PBRA 158

Application for Reconsideration by Sherriff

Application

1. This is an application by Sherriff (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 24 June 2024 not to direct the Applicant's release nor to recommend a transfer to open conditions following an oral hearing on 18 June 2024.
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 application for reconsideration, the decision of the panel and the dossier.

Request for Reconsideration

4. The application for reconsideration is dated 15 July 2024.
5. The grounds for seeking a reconsideration are that the decision was irrational and procedurally unfair. The grounds for reconsideration are lengthy but in essence it is submitted that the finding of the panel that the Applicant had an interest in sexual violence was irrational as it contradicted previous findings of the Board and was contrary to the evidence at the hearing. It is argued that the submission that the decision was irrational is supported by a lack of adequate reasons. Further it is said that the decision was procedurally unfair in that the finding that core work was outstanding was contrary to a number of previous findings by the Parole Board.

Background

6. On 9 December 2002 the Applicant was sentenced to life imprisonment for two offences of rape and the minimum period he had to serve before being eligible for parole was set at 6 years 10 months. He became eligible for parole on 9 October 2009 but has never been released. He has been transferred to open conditions on four occasions but has been returned on each occasion to closed conditions for different reasons. The transfers followed recommendations from the Parole Board which included findings on each occasion that there was no further core work to be carried out in closed conditions.



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Current parole review

7. This was the sixth post tariff parole board review of the Applicant's sentence. The hearing was adjourned on the first listing because no Community Offender Manager (COM) attended the hearing and further information was directed.
8. At the adjourned hearing on 18 June 2024 a senior probation officer gave evidence in place of the COM. The Prison Offender Manager (POM) and two psychologists gave evidence. One psychologist was a prison psychologist and the other was an independent psychologist instructed by the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 24 June 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

10. 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)).
11. 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)).
12. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

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)* on which the Applicant relies Saini J. 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.
22. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to ***R (Hill) v Parole Board [2011] EWHC 809 (Admin)*** and including ***R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)***, ***R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)***. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the



correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

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."*

Reconsideration as a discretionary remedy

24. 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

25. The Respondent has made no submissions in response to this application.

Discussion

26. The reason why the panel did not direct the release of the Applicant or recommend a transfer to open conditions was because they decided that he still needed to complete core work which had to be done in custody relating to sexual violence. There was evidence from the prison psychologist to support that view. The panel had to make their decision on all the evidence that they heard and the contents of the dossier. The panel clearly took into account the views of previous panels that there was no further core work to be done. The panel also considered the evidence of the independent psychologist who supported release and who was of the opinion that there was no more core work to be carried out and that any further work could be done in the community.

27. The panel were not bound to agree with the views of previous panels. They heard different evidence and it was for this panel to decide whether the Applicant met the test for release. If they disagreed with previous panels then they had to reach the decision that they did reach. In the conclusion to their decision the panel said *"the panel balanced what could be perceived by [the Applicant] as unfairness to him*



(given that previous Parole Board panels have concluded that there are no outstanding treatment needs and recommended open conditions) against the need to protect the public". That is the wrong test to apply; there is no balance to be struck. The job of the panel is to protect the public by deciding whether the Applicant met the test for release.

28. While I consider this is arguably an error of law it would not justify an order for reconsideration as it is unduly favourable to the Applicant.
29. The panel preferred the evidence of the prison psychologist to that of the independent psychologist and it was entitled to do so.
30. The panel considered the evidence from both sides with care and took note of previous evidence in the dossier which they were correct to do. The prison psychologist's view was supported by the details of the rapes the Applicant had committed; in the course of the rapes, the panel decided the Applicant used gratuitous violence beyond what was needed to get the victim to submit. The applicant's case was that he had used no more force than was necessary to get the victim to submit.
31. The claim of procedural unfairness is based on the panel not following the views of other panels and relying on certain parts of the dossier in support of their decision. It was not in my judgment procedurally unfair not to follow the views of other panels. For reasons that I have already explained it was the job of this panel to make up its own mind on the evidence.
32. The panel was also entitled to consider and rely on the contents of the dossier. They relied on the fact that issues about sexual violence had been raised in the past so it was right that they considered it along with the evidence presented to them.
33. One of the panel was a psychologist, so the panel had expert assistance in deciding between the evidence of the two psychologists which was one of the central issues the panel had to decide.
34. The panel having decided not to direct release went on to consider whether to recommend a transfer to open conditions. This was not a realistic possibility. The independent psychologist who supported release was opposed to it and didn't think it would work. It was supported by the senior probation officer who stood in for the COM but her argument was rejected for good reasons by the panel.
35. In my view the reasons given by the panel were sufficient to explain their decision and does not support the claim of irrationality.

Decision

36. 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.



John Saunders
21 August 2024