

[2024] PBRA 161**Application for Reconsideration by Dickens****Application**

1. This is an application by Dickens (the Applicant) for reconsideration of a decision of an oral hearing panel dated 8 July 2024 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 Letter dated 8 July 2024;
 - The Application, dated 29 July 2024 and signed by the Applicant's solicitor; and
 - The dossier, which now consists of 721 pages ending with the Decision LetterI have also listened to the recording of the hearing on 11 September 2023.

Request for Reconsideration

4. The application for reconsideration is dated 29 July 2024.
5. The grounds for seeking a reconsideration are as follows:
 - (1) Procedural Unfairness
 - (i) The panel was hostile to witnesses, particularly the Applicant. In particular, one panel member pursued an aggressive line of questioning with the Applicant which impacted negatively on him, interfering with his ability to give best evidence.
 - (ii) The Applicant wants to get out his full explanations of the way he thinks through matters. He can be long winded and can unintentionally get easily diverted.
 - (iii) The questioning of other witnesses was challenging beyond what would normally be expected.
 - (iv) The panel came into the hearing with a pre-defined view and were intent on challenging all report writers who had a view they did not agree with.

- (v) The Board is entitled to challenge the Applicant and the witnesses, but here the line of unfairness was crossed.
- (vi) The panel should not have relied on a short email from the psychiatrist witness following the evidence. It should have directed a full report setting out his reasoning.
- (vii) The panel allowed excessively lengthy adjournments after the evidence to enable the Applicant to engage with the IIRMS service. *I find it difficult to understand how this is suggested to be procedurally unfair, especially since the Applicant's representative consented to the proposed adjournments, but it may be that the complaint is that this raised an expectation in the mind of the Applicant that he would be released. I will deal with this item on that basis.*

(2) Irrationality

- (i) *"It is the applicants (sic) case that the Board came into this review with a predefined view as amplified by the procedural issues that arose in this case and their ultimate decision was irrational in the face of the majority of the evidence."*
- (ii) All the professional witnesses except the psychiatrist supported release. The psychiatrist's post-hearing email did not explain his reasoning (though I think it is accepted that his evidence did).
- (iii) The panel conclude that the index offence could be categorised as intimate partner violence (IPV). The witnesses disagreed. The witnesses considered that any work on IPV could be done in the community.
- (iv) The panel should have approached the evidence of the psychiatrist with more caution than it did, because the psychiatrist had not read all the reports.
- (v) The panel failed to address the fact that the Applicant had been under stress in open conditions, because the establishment where he was placed contained a large sex offender population.
- (vi) The panel failed to set out what the Applicant could do in open conditions that he could not equally well do in the community.
- (vii) While the panel reviews the evidence there is no clear statement as to why it disagrees with the witnesses' conclusions.
- (viii) *A number of other issues are raised relating to points of detail within the dossier, all of which seem to me to amount to disagreement with the panel's conclusions rather than anything that could give rise to a finding of irrationality as defined below.*

6. I have done my best to extract from the Application a coherent set of complaints. As formulated, the Application contains much repetition, sometimes expressed in different words, but to the same effect as other complaints.

7. On listening to the recording of the hearing, I found that one member of the panel left the hearing about 20 minutes before the end. The Applicant's representative consented to the hearing continuing, the implication being that the panel member would continue to take part in the panel's decision, on the basis that she could listen to the recording and/or would receive a copy of the panel chair's note of evidence. This event does not form part of the Application. On consideration, I think this was



a procedural irregularity, but in the light of the representative's express acquiescence at the time I do not find it to be procedurally unfair. No doubt that is why it is not pleaded as such.

Background

8. The Applicant is now 56 years old. In 2005, when he was 37 years old, he received a sentence of life imprisonment following his plea of guilty to murder. The minimum term to be served was 15 years less time on remand. The tariff expired in February 2020.
9. The victim (V) was a man aged 89, with whom the Applicant had had a long and complicated relationship since he was 15 and living in care. V took on what has been described (somewhat strangely) as a grandfatherly role, helping the Applicant out in exchange for sexual favours. The Applicant said he felt coerced and controlled by V. The killing took place at V's home. V suffered 5 broken ribs, a fracture to the upper end of his breast bone and two fractures to the spine.
10. The panel considered the index offence could be characterised as intimate partner violence (IPV). The Applicant's previous convictions included an offence in 2000 of wounding a partner: the Applicant apparently denies that she was his partner at the time.
11. In May 2021 a previous panel of the Parole Board recommended that the Applicant transfer to open conditions. The Secretary of State (the Respondent) accepted that recommendation, and the Applicant moved to an open prison in October 2022. There he allegedly started to show increasingly aggressive behaviour towards staff and residents. He was said to be intimidating and bullying towards others on his residential unit. There was an allegation of sexual assault made by another prisoner, in respect of which no action seems to have been taken. The Applicant accepted that he had had some difficulties in open conditions: indeed, he told the panel that he was deliberately self-sabotaging. He disliked being in custody among prisoners who had been convicted of sexual offences, but, he said, he could tolerate sex offenders if they did not boast about what they had done. He was returned to closed conditions after about 3 months.

Current parole review

12. This was, therefore, the second review of the Applicant's life sentence. The Respondent asked the Parole Board to consider release or a recommendation for open conditions. The hearing took place on 11 September 2023. The panel consisted of three members of the Parole Board, an independent chair, a psychiatrist and an independent member. The dossier then consisted of 618 pages. The panel heard evidence from the Applicant, the prison-based psychologist, a psychologist instructed on behalf of the Applicant, the Prison Offender Manager (POM), the Community Offender Manager (COM), and a psychiatrist. The Applicant was represented throughout by an experienced solicitor, who asked questions of all the witnesses.

13. The panel adjourned for further information. It was particularly concerned that treatment options in the community, possibly including engagement with Offender Personality Disorder (OPD) services and/or psychologically informed groups, should be confirmed prior to release.
14. The panel issued a further adjournment notice on 17 November 2023, noting a number of changes in the release proposals and requiring all witnesses to confirm whether there was any change in their recommendations in the light of them. The panel issued another adjournment notice on 19 December 2023, noting that on 29 November 2023, in a Stakeholder Response Form (SHRF), the Community Offender Manager (COM) had requested a 6 month adjournment to enable the Applicant to undertake in-reach work before transition into the community. The Applicant's representative agreed to an adjournment "for a suitable period" (he suggested 3 months), to allow for a sufficient period of testing the work to be done and for final reports to be prepared by all report writers. The representative had not at that time been able to take the Applicant's instructions, but he did not thereafter indicate any change in his approach to the SHRF. The panel granted the adjournment sought, giving directions for updated reports and legal submissions by the end of May 2024. The panel said that the case would be decided on the evidence available without a further hearing. As I have set out above, the Decision Letter is dated 8 July 2024.

The Relevant Law

15. The panel correctly sets out in its Decision Letter 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.

Parole Board Rules 2019 (as amended)

16. The decision not to direct release from a sentence of life imprisonment is eligible for reconsideration under the Parole Board Rules.
17. 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

18. 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.
19. 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."



20. 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)**.
21. 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.
22. 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.
23. 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

24. 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.
25. 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.
26. The overriding objective is to ensure that the Applicant's case was dealt with justly.
27. 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 Respondent

28. The Respondent has said she does not wish to make any representations with respect to this Application for Reconsideration.

Discussion

(1) Procedural Unfairness

29. I have listened to the recording of the entire hearing. In the course of the questioning of the Applicant by one of the panel members the hearing became fractious. The Applicant objected to the tone in which the panel member was asking questions: *"Don't take that tone with me ... I want to know what your angle is, I want to know why you're asking me that ... Just get on with asking your questions ... I asked you a question, please, answer me that ... Don't talk to me like that ... I suggest you adjust your tone ... I'm not being spoken to like that."*

30. In turn, the panel member suggested that the Applicant was making threatening gestures and attempting to control the hearing.

31. The Applicant's representative intervened to complain that the panel member's tone, particularly when asking about complex issues, was going too far. *"It is not allowing him the opportunity, he needs time to answer, he is being talked over, he is not being given the opportunity to give his evidence fully."* The representative said *"The panel is descending into too much argumentation."*

32. The representative did not make any application – he simply wanted to make his comments for the record. In the event, his intervention had the desired effect. The panel chair calmed the situation down, and thereafter ensured that, with her assistance, the Applicant had every opportunity to say what he wanted to. He took the opportunity. The Applicant continued and completed his evidence.

33. Whatever criticisms might be made of the panel member's approach to questioning the Applicant, as to which it is not necessary for me to make any finding, I am satisfied that overall the Applicant had a fair hearing, in the course of which he was able fully to explain himself in answer to the panel and to his own representative.

34. Questioning of other witnesses was, in some instances, robust. It is not suggested how this resulted in any unfairness to the Applicant, and there is nothing wrong with robust questioning of itself.

35. The Application asserts that *"the panel came into the hearing with a pre-defined view and were intent on challenging all report writers who had a view they did not agree with."* A panel of the Parole Board is perfectly entitled to form a preliminary view of the case. Certainly a panel must go into a hearing with a view as to what areas of the evidence need to be explored. It is a panel's duty to test the evidence



of the witnesses, including (if appropriate) by investigation of the experience of a witness who gives a recommendation, so that proper weight can be attached to the professional opinion. I have listened to the recording. I cannot find any procedural unfairness in the panel's questioning of witnesses. I deprecate the assertion in the Application that "*The POM and COM both complained as to the way they were questioned by the Board during the course of the hearing.*" This looks like an attempt to bring in fresh evidence. In any event, the witnesses stood up to the questioning firmly, and there is no indication that their evidence was adversely affected in any way.

36. The panel was satisfied that the psychiatrist's email after the hearing was sufficient for its understanding of his position. The psychiatrist had fully explained himself in the hearing, and was perfectly entitled to say that fresh material did not change his view. The panel did not require more from him.
37. The complaint about the panel allowing lengthy adjournments after the hearing makes no sense of itself, in that the representative consented to the adjournments. As I have said, the only way I can interpret this as a complaint about procedural unfairness is by assuming that it amounts to a suggestion that the panel, by allowing adjournments for the Applicant to make a start on further work, was raising an expectation in him that if he did the work he would be released, and that it is procedurally unfair not to fulfil such an expectation once raised. I doubt very much if the notion of raised expectations has any place in the work of the Parole Board: the sole question for the Parole Board is whether a prisoner needs to remain in custody for the protection of the public, and the addition of other considerations, which might diminish focus on that question, is undesirable, probably impermissible. In any event, I do not consider that in granting applications for adjournments in this case the Parole Board was making any promises: it was simply giving the Applicant the opportunity to present his best case in response to the concerns the panel expressed at and after the hearing.

(2) Irrationality

38. Insofar as the complaints under this heading amount to disagreements with the weight the panel gave to the evidence it heard, and the conclusions the panel came to, provided they were based on the evidence and properly explained, they do not satisfy the definition of irrationality set out above. The Application itself acknowledges that to be the law. The panel was entitled to disagree with the witnesses' recommendations.
39. One of the complaints here, it seems, is that the panel adopted in questioning a different approach to the index offence to that of the majority of the witnesses. The panel explored during the hearing whether that the index offence "*should be seen through the lens of IVP*", and that therefore any risk assessment of the Applicant, and treatment aimed at reducing his risk, should start from, or at least take into account, that premise. In thus approaching the issues, the panel was not irrational or unfair.
40. The panel acknowledged the progress the Applicant has made, including the absence of physical violence in custody. It found evidence of verbal aggression when



he considers there has been an injustice, which the panel thought was linked to the risk of reoffending and serious harm. There was still evidence of a low tolerance to frustration and poor impulse control. The panel considered that further work is required for the Applicant to understand his personality traits. The panel noted that the Applicant struggled in conditions of lower security (open conditions), starting to become aggressive and to self-sabotage. The panel considered that it could not be confident that that the Applicant could consistently self-manage risk in the community on release on licence, even with the external management measures proposed.

41. These were evidence-based conclusions, properly explained. The panel took account of all relevant matters. Complaints about the weight the panel attached to various factors do not demonstrate irrationality.

42. The panel's decision not to direct release was neither based on procedural unfairness, nor was it irrational.

Decision

43. 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.

HH Patrick Thomas KC
27 August 2024