

[2024] PBRA 183

Application for Reconsideration by Chatterton

Application

1. This is an application by Chatterton (the Applicant) for reconsideration of a decision of an oral hearing dated 1 August 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 (DL).
 - The application, dated 23 August 2024 and signed by the Applicant's solicitors.
 - The dossier, which now runs to 500 numbered pages, the last document being the DL.
 - Representations from the Secretary of State (the Respondent) dated 9 September 2024, accepting that the Respondent's referral incorrectly stated that the Applicant received an Extended Determinate Sentence.

Request for Reconsideration

4. The grounds for seeking a reconsideration are as follows:
 - (1) Error of law – the DL consistently refers to the sentence as being an extended sentence, whereas the Sentencing Judge specifically found that the criteria for a finding of dangerousness were not met, and therefore passed a Sentence of Particular Concern of 13 years, with a custodial term of 12 years and an extension period of 1 year.
 - (2) Irrationality –
 - (a) When the panel stated that whereas denial of the offences was not a bar to release, "*any panel would need to be satisfied that suitable offending behaviour work has been completed*", it applied the wrong test for release.
 - (b) The panel noted the non-accredited programmes the Applicant had completed, but did not consider how those addressed risk.



- (c) The Applicant cannot access further programmes in custody. Therefore a decision that he should remain in custody to complete targets which are not achievable is irrational. This is particularly the case where the proposed terms of his licence would prevent a recurrence of relevant offending.
- (d) The panel was not satisfied with the Risk Management Plan (RMP), particularly the absence of available hostel accommodation. The panel could have imposed such accommodation as an additional licence condition.
- (e) The panel was concerned that any warning signs preceding re-offending might not be detected. It is not the Applicant's fault that his Prison Offender Manager (POM) and Community Offender Manager (COM) had had limited contact with him. It was unfair for the panel not to take more account of the Applicant's effective engagement with assessments and available risk reduction work, his compliance, and his understanding of his position.

Background

5. The Applicant is now 55 years old. In 2017, when he was 48, he pleaded guilty to a number of sexual offences against a child household member. He now denies the offences, saying he only pleaded guilty in order to avoid the child having to give evidence. He received a Sentence of Particular Concern, as set out above: 12 years as the custodial period, with a licence extension of 12 months. The Applicant had some irrelevant previous convictions. The Parole Eligibility Date was 18 July 2023. The Conditional Release Date is July 2029. The Sentence Expiry Date is July 2030.

Current parole review

6. This was the first review of the Applicant's sentence. The Respondent asked the Parole Board to consider directing release. The panel first met (remotely) on 2 April 2024, but adjourned because the prison-based psychologist was unable to attend for the whole hearing. The panel also wanted further enquiries to be made as to the availability of a particular programme in custody and in the community, and whether the Applicant met the criteria for that programme. The panel also wanted the Applicant to be re-referred for hostel accommodation.
7. The panel heard the case, again remotely, on 30 July 2024. The panel consisted of three members of the Parole Board: a judicial chair, a psychologist member and an independent member. The panel heard evidence from the prison-based psychologist, the POM, the COM and the Applicant himself. The Applicant was legally represented throughout. There were two observers, both members of the Parole Board staff. The Respondent was not represented, nor did she make any representations. The dossier at that stage consisted of 481 pages, to which were later added the closing representations on behalf of the Applicant.

The Relevant Law

8. The panel correctly sets out in its decision letter the test for release: the Parole Board will direct release if it satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.



Parole Board Rules 2019 (as amended)

9. This sentence is of a type eligible for reconsideration. So is this decision not to release.

Irrationality

10. 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.
11. 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."*
12. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** 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)**.
13. 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.
14. 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.
15. 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

16. It is not suggested that there was any element of procedural unfairness in this case.

Error of law

17. An administrative decision is unlawful under the broad heading of illegality if the panel:
- misinterprets a legal instrument relevant to the function being performed;
 - has no legal authority to make the decision;
 - fails to fulfil a legal duty;
 - exercises discretionary power for an extraneous purpose;
 - takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - 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.

Other

19. 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 uncontroversial 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.

The reply on behalf of the Respondent.

20. The Respondent has made representations on 9 September 2024, as set out above. It is accepted that the sentence was misdescribed in the original referral.

Discussion

21. The DL does describe the sentence incorrectly. This cannot be categorised as an error of law, as defined above. It is simply a slip, a misdescription, arising no doubt from the Respondent's error, which makes no difference to the question the panel had to decide. The application hints that the panel may have been misled by this slip into thinking that the sentencing judge had made a finding of dangerousness. There is no suggestion in the DL of any such misapprehension, nor of the misdescription of the sentence passed having any bearing on the panel's decision not to release.
22. The panel's comment that *"any panel would need to be satisfied that suitable offending work has been completed"* does not amount to the application of a different test for release than the statutory one, which was accurately stated and



applied by the panel. The panel can only speak for itself, not for any other (hypothetical) panel. The panel went on to say further in the cited sentence that both the Applicant and professionals would need to have a better understanding of why he offended; his insight; his risk factors; and the risk he posed in the future. The panel's finding was that the Applicant clearly needs to gain a much better insight into his approach to all relationships, the impact of his emotional attachment on his risk and in particular in relation to female children with whom he is in contact who clearly remain at risk. The panel considered that a particular programme or its successor should be completed in custody. The Parole Board does not carry out sentence planning, but that does not mean that the panel's analysis, that further risk reduction work was necessary before release, was incorrect. It was based on the evidence and properly explained.

23. The panel's assessment set out in the preceding paragraph took full account of the evidence, and in particular of the emotional detachment the Applicant showed in his evidence. The panel discussed and took full account of the non-accredited programmes which the Applicant had undertaken.
24. It was not irrational for the panel to find that further work needs to be done before release. The availability or otherwise of suitable programmes is not a matter for the Parole Board.
25. The argument is raised that since the index offences took place in particular circumstances (this, presumably, means within the home), his personal circumstances and the terms of the RMP and Sexual Harm Prevention Order imposed at sentence means that the Applicant will not have an opportunity to re-offend in this way. This suggestion takes no account of the Applicant's denial of his offending, which is not, of course, as the panel pointed out, a bar to release, but does mean that neither he nor anyone managing him can have a proper idea of what his risk factors are, and therefore in what circumstances his risk may recur or what the warning signs might be.
26. The panel considered that residence in a supervised hostel would be a necessary part of any effective RMP. The evidence before it was that no such hostel placement was or would be available. A finding that the RMP was therefore inadequate to manage risk is not irrational. A licence condition for residence in such a hostel would not create a placement.
27. Neither separately nor together do the issues raised in the application for reconsideration amount to irrationality as defined above.

Decision

28. For the reasons I have given, I do not consider that the decision was irrational or based on an error of law, and accordingly the application for reconsideration is refused.



Patrick Thomas KC
19 September 2024