

**[2024] PBRA 185****Application for Reconsideration by Thorpe****Application**

1. This is an application by Thorpe (the Applicant) for reconsideration of a decision of an MCA panel dated 16 July 2024 not to release the Applicant or recommend a transfer to open conditions.
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. The application was made in time.
3. I have considered the application on the papers. These are the application for reconsideration, the decision and the dossier.

**Request for Reconsideration**

4. The application for reconsideration is dated 4 September 2024.
5. The grounds for seeking a reconsideration are that the MCA member should have directed an oral hearing to examine the recommendation to transfer the Applicant to an open prison and to hold an oral hearing in fairness to the Applicant so as to allow him to participate in discussions around his prison sentence in accordance with the decision in Osborn (see below). It is said that the decision was irrational and the procedure adopted by the panel was unfair.

**Background**

6. The Applicant was sentenced on 21 July 2008 to a sentence of imprisonment for public protection for an offence of armed robbery. The minimum period that he was ordered to serve before he was eligible for parole was 5 years, 6 months less time spent on remand. He was released on licence on 31 October 2019 and was recalled on 27 September 2023 after he had been arrested for an offence of conspiracy to steal.

**Current parole review**

7. The case was referred to the Parole Board on 19 October 2023. The MCA hearing was adjourned on several occasions to await the outcome of his trial for the matter



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which led to recall. On 11 June 2024 the Applicant, having pleaded guilty part way through his trial, was sentenced to 6 years imprisonment.

8. The panel considered the contents of the dossier in reaching its decision on 16 July 2024.

### The Relevant Law

9. The panel correctly sets out in its decision letter dated 16 July 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. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

#### *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) 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.

### *Procedural unfairness*

17.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.

18.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.

19.The overriding objective is to ensure that the Applicant's case was dealt with justly.

### *Other*

20.In the case 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.

21.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), and 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.

22. 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.**

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

### **Discussion**

24. The Applicant had just started a 6 year sentence of imprisonment for the offence which led to his recall. As the MCA panel said it was not possible in those circumstances to order his release. The only issue therefore is whether the panel was correct to refuse to recommend the transfer of the Applicant to open conditions or to at least hold an oral hearing to consider it.

25. While it is correct that open conditions were recommended by the Community Offender Manager in a report, the panel was entitled to regard that as unrealistic in the light of the Applicant's history and the recent sentence of imprisonment.

26. While I accept that the Supreme Court in *Osborn* set out a broad test for when an oral hearing was required, again the panel was entitled to consider that that test was not met in the light of the recent sentence of imprisonment.

27. As I have already indicated and as is clear in the application for reconsideration a direction for release could not have been made. It follows that this application in essence is an application for reconsideration of a refusal to recommend a transfer to open conditions. There is no power to reconsider a failure to recommend a transfer to open conditions (see para 12 above). Further, in exercise of my discretion I do not regard this as a suitable case for a reconsideration because in my judgment the same result would inevitably be reached even if an oral hearing was held.

### **Decision**



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28. For the reasons I have given, I do not consider that it is sensibly arguable that the decision was irrational or procedurally unfair and the application for reconsideration is refused.

**John Saunders**  
**27 September 2024**