

[2024] PBRA 187

**Application for Reconsideration by the Secretary of State for Justice  
in the case of Okwuosa****Application**

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision of an oral hearing panel to direct the release of Okwuosa (the Respondent).
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) dated 12 August 2024.
  - The Application for Reconsideration dated 2 September 2024 (the Application).
  - The Dossier, which now consists of 440 numbered pages, ending with the DL.
  - A Response on behalf of the Respondent by way of an email from his solicitor dated 9 September 2024 (the Response).

**Request for Reconsideration**

4. The grounds for seeking a reconsideration are as follows:

**Irrationality**

- (1) The panel provided no or insufficient reasons as to why it found the circumstances leading to the Respondent's recall and his behaviour thereafter are not linked to risk. The panel failed to take proper account of the Respondent's "deceitful" responses to questions in two polygraph tests, referring to them as "inconclusive".
- (2) The panel failed to provide sufficient reasoning as to why it found that the Risk Management Plan (RMP) would be sufficient to manage the Respondent's risks on release. The panel does not provide a rationale for considering his risk has reduced since recall.



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## Background

5. The Respondent is now 47 years old. In 2015, when he was 37, he received an extended determinate sentence comprising a 7 year custodial term and a 4 year licence extension. The index offences were sexual offences, including one of rape, committed in 2013 against 2 separate women, whom he had persuaded to come to his flat to lodge there. He pleaded not guilty to all three offences, but a jury convicted him. He had previous convictions for being drunk and disorderly, common assault, battery, and failing to comply with a community order. The Sentence Expiry Date (SED) is in November 2024. The Respondent was first released on licence on 16 November 2020 and recalled on 7 January 2021. He had tested positive on an initial test for amphetamine, though a subsequent test after recall was negative. Reports spoke about him seeking to manipulate his licence conditions.
6. The Respondent was re-released on 3 May 2022 following a decision of an oral hearing panel of the Parole Board. On 19 September 2023 the Respondent was recalled, and he returned to custody on 21 September 2023. The history following that second release is as follows.
7. The Respondent's sex offender registration required him to notify to the police details of passport, credit card and bank account details within three days of any change. At an annual review by the police in August 2023 the Respondent declined to produce his bank details, passport and national insurance number. He told the panel that the police officer told him he need not do so: the panel thought this was unlikely.
8. Two days later the Respondent's police offender manager phoned him to request the details and ask why he had declined to give them. The officer told him if he did not produce them that day he was likely to be breached. He confirmed he had three bank accounts. He said he did not have a passport. He said he had no other financial accounts or cards. Later that day he went to the police station and registered his passport. The police searched the internet and found that the Respondent had three active credit cards, and on his arrest on 20 September 2023 he was found to be in possession of two debit cards which had not been registered. He argued that he did not know he had to register credit cards: the panel did not find that credible, in the light of the warnings the police had given him and how illogical it would be.
9. The Respondent is due to appear at the Crown Court on 16 October 2024 to stand trial on 5 separate charges of failing to comply with notification requirements under the sex offender registration provisions; the matters, as the DL describes them, that led to his recall.
10. One of the Respondent's licence conditions required him to undertake polygraph sessions and comply with the instructions of the tester. The DL records that polygraph testing proved inconclusive on two occasions, and a failure to attend on one. The DL goes on to say that in two tests, one in May and the other in August 2023, the Respondent produced a significant response to three questions posed, questions about his work, his use of internet enabled devices and sexual contacts.
11. In custody after recall the Respondent was the subject of complaints about his becoming fixated on a particular female prison officer. He was warned to keep away



from her, but did not heed the warning. As a result, he was sent to the segregation unit. He continued to be inappropriate towards female staff, giving rise to a lot of complaints from them. He was raised to Category B and transferred to another prison, where there were further complaints from female staff. He had 10 adjudications at his first prison after recall, but none in his short time at the second prison. He was referred to the neurodiversity team at his new prison.

### Current parole review

12. The Applicant referred the Respondent's case to the Parole Board for consideration of release.
13. The oral hearing took place remotely on 29 July 2024. The panel consisted of a judicial member of the Parole Board and an independent member. The panel considered a dossier which then consisted of 422 pages. A Prison Offender Manager (POM) from the Respondent's first prison after recall, the POM from his second prison, his Community Offender Manager (COM) and the Respondent himself gave evidence. The Respondent was legally represented throughout. The Applicant was not represented and made no submissions to the panel.

### The Relevant Law

14. 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)*

15. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. This is an eligible decision and an eligible sentence for reconsideration.

#### *Irrationality*

16. 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.
17. 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.*"
18. 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).

19. 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.
20. 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.
21. 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.

#### Other

22. 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 uncontentious 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.
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. By an email dated 9 September 2024 the Respondent's legal representative argues as follows:

- (1) The criminal offences alleged did not go to the Respondent's risk of serious harm, or any physical or psychological harm. He has been bailed throughout the new criminal proceedings.
- (2) The polygraph results do not amount to non-compliance or a breach of licence conditions.
- (3) The RMP is sufficient. It is more robust than the one on which he was previously released.
- (4) He has not been charged with any offences arising from his conduct in custody since recall.
- (5) He only has a short period before his SED, which would not allow for a further hearing if reconsideration were granted. *"This is wholly unfair in the circumstances."*

### Discussion

26. The first question is whether the panel's conclusion that the circumstances of the Respondent's recall were not linked to risk (DL 4.8.) is irrational. The panel accepted that (on the balance of probabilities) there was substance to the allegation that he had breached the terms of his sex offender registration. Was it irrational, following that finding, not to regard it as relevant to the Respondent's risk? I cannot see that it was. Nor, interestingly, does the Applicant assert in the Application that it was: she confines herself to saying that the panel did not provide any or sufficient reasons for the finding. The proposition advanced by the Applicant is that failure to comply with the terms of the registration links directly with the risk factors to be found in the index offence. It is offence-paralleling behaviour. It shows poor consequential thinking and poor compliance. The panel having found, the Applicant asserts, that the Respondent's explanation was not true, this suggests a willingness to offend. And *"The panel has not clearly set out why it assesses non-compliance with registration as not relevant to risk."*

27. Risk is not some generic, one-size-fits-all, concept. The risk with which the panel was concerned was the risk of sexual harm to women. The panel was entitled to take the view that the Respondent's failures with regard to reporting his bank cards were not relevant to his risk of sexual offending. The panel was aware of the circumstances of the original offence, and evaluated the significance of the Respondent's behaviour towards female staff members after his return, about which, again, it was fully informed. The panel considered there to be an element of



offence-parallel behaviour in custody, indicating an ongoing attitude towards women and a lack of understanding of the effect of his behaviour on them. The panel concluded that these matters were outweighed by a number of factors: the short time (4 months) before the Respondent's SED; the fact that no offending work would be undertaken with him before then; the fact that the circumstances of the recall were not linked to risk; that the Respondent will be in hostel accommodation from release until his SED; that he was in the community for 16 months without complaint from women in the building where he lived or anyone else; and that he will be supervised in the community at a high level.

28. The Applicant further suggests that the panel has not explained how it reached the conclusion that the Respondent was motivated to comply with the RMP. This suggestion is set out more than once in the Application. The panel, of course, had the advantage over the Applicant (and me), in that it heard and saw the Respondent give evidence, and tested him in questions. The panel said in terms that it considered the Respondent to be genuine in his evidence about engaging with professionals on release. The panel was not reliant, as the Respondent in argument is, on the written material. The panel was entitled to come to the conclusion it did, and explained itself adequately.
29. The complaints about the alleged failure to take proper account of the polygraph tests call for some analysis. The panel was perfectly correct in saying that the polygraph results played no part in the recall decision. I agree that that is not a reason for attaching less weight to those results. The panel did not say it was. The panel set out (at DL 2.9.) the evidence with regard to the polygraph tests, summarising them as proving inconclusive on two occasions and a failure to attend on one, but going into more detail. *"In the polygraph tests on 4 May 2023 and 14 August 2023 [the Respondent] was reported to have produced a 'significant response' to the three questions posed which were; 'Since your last exam, have you undertaken any work that you have not disclosed? Since your last exam, have you accessed any internet enabled device that you have not told me about? Since May 2023, have you had sexual contact with anyone you have not told me about?' The [Respondent] answered 'No' to each question."*
30. The COM's initial recall report described the results as inconclusive. In a later report he said that was an error, in that the answers were concluded as *"Significant Response (deceitful)"*.
31. The results of two polygraph tests are set out in the dossier. The first examination (incorrectly dated throughout as August 2023; it was presumably 2022) was not one of those, though details of it are supplied. It investigated compliance with licence conditions requiring the Respondent to disclose developing personal relationships with women, including developing friendships and casual sexual encounters, prohibiting use of dating websites or services, prohibiting placements of adverts relating to flat sharing, and not to undertake employment without approval. The outcome was *"Significant Response (assessed as being untruthful)"*. The result was a Licence Compliance letter and a home visit by his COM together with Jigsaw police officers.
32. In May 2023 the examiner found no evidence of heart arrhythmia. The only relevant question he was asked (repeated several times) was *"Since your last polygraph,*



*have you developed a personal relationship with a woman?"* His answer was "No". The examiner recorded a Significant Response, which he assessed as untruthful. The examiner suggested that adjustments to the Respondent's RMP be considered, including a return to supervised accommodation.

33. The (correctly dated) August 2023 examination focused on licence conditions relating to working without approval, accessing undisclosed internet devices and undisclosed sexual contact. The Respondent was vague when discussing employment. He said he was starting his own business. He said he was socially isolated. He denied using any internet devices other than those he was allowed. His answer to each of the three questions set out above was "No". The examiner assessed the outcome to be a "Significant Response", that is, likely to be untruthful.
34. The panel's summary of the polygraph evidence was therefore incomplete. The Applicant argues that *"this further highlights issues with non-compliance with supervision"*, and that failure to take this evidence into account *"has resulted in an incomplete assessment of risk"*.
35. The Applicant suggests that the panel's explanation of why it was satisfied that the Respondent could be managed on licence is inadequate. I have set out the relevant passage above (paragraph 27). The panel pointed out that the Respondent will be in a supervised hostel for the short period between his release and his SED, with the support of a key worker, curfew, daily signing, and drug and alcohol testing. He will be assisted to source follow-on accommodation. He will be seen weekly by his COM, and referred to drug and alcohol services and mental health services. I do not think that the panel's explanation is, in the circumstances, insufficient.
36. This means that the only live issue for me, after the foregoing analysis, is whether the panel's assessment of risk is sufficiently flawed by the lack of detail with regard to the polygraph testing to be described as irrational, as defined above.
37. I do not consider that the panel's approach to the polygraph evidence was so wrong that it vitiates the panel's overall assessment of risk. The panel noted the finding of a *"significant response"*. It did not include in the DL the more detailed assessment of untruthfulness. Bearing in mind the panel's finding that the Respondent gave an untruthful explanation of his failure to inform the police about three bank cards, the polygraph evidence added little to the overall picture. There is no actual evidence of breach of conditions of licence. The Respondent will be under greater supervision than he was before. The lack of a full analysis of the polygraph evidence is not sufficient to make the panel's decision irrational as defined above.
38. Had I come to the conclusion that the release decision was irrational, I would then have had to consider whether I should in the circumstances have exercised my discretion not to direct reconsideration. Given the proximity of the end of the sentence, there would, perhaps, have been arguments pointing to such an outcome. The situation does not, however, arise.
39. Incidentally, the panel is not required to find that the Respondent's risk has decreased since recall. The panel is required to apply the release test set out, which it did.



## Decision

40. For the reasons I have given, I do not consider that the decision was irrational, and accordingly the application for reconsideration is refused.

**Patrick Thomas KC**  
**23 September 2024**