

[2024] PBRA 235

Application for Reconsideration by Mullings

Application

1. This is an application by Mullings (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 16 October 2024 making no direction for release and no recommendation for 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, 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 29 October 2024.
5. The grounds for seeking a reconsideration are as follows:
 - (i) There was an error in law in that the panel relied on an adjudication made in breach of Articles 5 and 6 of the European Convention on Human Rights.
 - (ii) The process was unfair in that weight was attached to the report of the prison psychologist and not the report of the independent psychologist.
 - (iii) The decision of the panel was irrational in that it preferred the account given by the prison guard which led to the adjudication rather than the Applicant's account. Further the decision was irrational in that the panel relied on the expert evidence of the prison psychologist who has now been 'fired' rather than the independent psychologist.

Background

6. The Applicant was sentenced to imprisonment for public protection on 12 December 2008 for offences of rape, attempted rape and possession of a firearm in a public place. The minimum period the Applicant had to serve before he could be considered for parole was 5 years. The Applicant was 23 at the time of sentence. The Applicant



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was released on licence on 28 June 2019 and recalled on 27 April 2020. He was again released on licence on 10 March 2021 and recalled on 12 July 2021.

Current parole review

7. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in January 2023. The case was deferred on 19 March 2024 to allow the Applicant to instruct a psychologist to prepare an independent report.
8. The oral hearing took place on 4 October 2024 and the panel heard evidence from the Applicant, the Prison Offender Manager (POM), two Community Offender Managers (COM) and two psychologists one commissioned by the prison and one by the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 16 October 2024 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)

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) 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.

Error of law

22. An administrative decision is unlawful under the broad heading of illegality if the panel:



- a) misinterprets a legal instrument relevant to the function being performed;
- b) has no legal authority to make the decision;
- c) fails to fulfil a legal duty;
- d) exercises discretionary power for an extraneous purpose;
- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

23. 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

24. 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.

The reply on behalf of the Secretary of State

25. By letter dated 15 November 2024 the Respondent clarified in a letter the position of the prison psychologist who had taken a career break.

Discussion

26. The Applicant sets out in detail concerns about the competence of the prison psychologist because she has taken a break from work to go on 'Big Brother'. While this might be a surprising choice for a psychologist, it doesn't reflect on her professional abilities. The Applicant states that the psychologist has been dismissed by the prison service. That has been corrected by the Respondent as the position is that her work has had to be taken over by others while she is away.

27. The Applicant complains that there was an error of law in the way that the adjudication arising out of the alleged behaviour by the Applicant in May 2024 was dealt with by the panel. The Applicant claims that his behaviour which led to the



adjudication was unsubstantiated and the decision was reached in breach of his rights under Articles 5 and 6.

28. At the time of the parole hearing the Applicant had commenced a judicial review of his adjudication. The panel asked whether the Applicant wanted the hearing adjourned to await the outcome of the judicial review and were told that he didn't. While that was understandable as it was likely to take some time, when the oral hearing took place the adjudication had not been quashed and remained in place.
29. I have considered whether there was any error in the procedure and conclusions reached by the panel as to the subject matter of the adjudication. Although they didn't hear from the staff member who complained about the Applicant's behaviour but did hear from the Applicant, they were entitled to reach the conclusion that they preferred the account given by the member of staff to the Applicant's. They found it more likely to be true. There was no error of law.
30. The Applicant's second ground is that the process was unfair in that the panel preferred the evidence of the prison psychologist to the psychologist commissioned by the Applicant. The panel were entitled to. The panel heard the evidence of both psychologists and one of the panel was a psychologist. The panel gave reasons why they preferred the evidence of the prison psychologist. They were entitled to take the view that they did on the evidence.
31. The Applicant's final ground is that the decision was irrational. His basis for that is the panel were wrong to find that the adjudication was correct and also the panel was wrong to prefer the evidence of the prison psychologist who was 'fired' over the other psychologist. I have already dealt with these arguments and the prison psychologist had not at that time gone onto a reality TV programme so that was unknown to the panel. As set out by the Respondent, the psychologist was not 'fired' but has taken a career break. That does not affect her ability as a psychologist.
32. The Applicant is a long time over tariff and it is easy to understand his frustration with the decision not to release him. But reconsideration will not be granted unless one of the grounds is made out. None of them have been made out in this case.

Decision

33. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and there was no error of law. Accordingly, the application for reconsideration is refused.

John Saunders
2 December 2024