

[2024] PBRA 241

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

1. This is an application by the Secretary of State (the Applicant) for reconsideration of the decision to direct the release of Owen (the Respondent). The decision (dated 16 October 2024) was made by a panel after an oral hearing.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022, 2023 and 2024) (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.
3. I have considered the application on the papers. These are the decision, the dossier (consisting of 472 numbered pages), and the application for reconsideration, dated 7 November 2024. I have also listened to the audio recording of the hearing (supplied as two files).

Background

4. On 25 July 2011, the Applicant received a sentence of imprisonment for public protection (IPP) following conviction on two counts of committing arson recklessly and one count of damaging property recklessly. His tariff was set at 28 months and expired in July 2013.
5. The Applicant was 18 years old at the time of sentencing and is now 31 years old.
6. The Applicant has been released and recalled twice on this sentence, each time after an oral hearing before the Parole Board. He was most recently released on 16 March 2023. His licence was revoked on 12 April 2023, and he was returned to custody on 14 April 2023.

Request for Reconsideration

7. The application for reconsideration has been submitted by the Public Protection Casework Section (PPCS) Reconsideration Team on behalf of the Applicant. It submits that the panel's decision was irrational.
8. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.



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Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Applicant on 12 May 2023 to consider whether to direct his release. If release was not directed, the Parole Board was invited to advise the Respondent whether the Applicant should be transferred to open conditions. This is the Applicant's first parole review since his second recall.
10. The current review proceeded to an oral hearing on 12 August 2024, before a three-member panel, including a psychologist specialist member. The panel heard evidence from the Respondent, his Prison Offender Manager (POM), and a Community Offender Manager (COM) who had been co-working the Respondent's case (but would not be responsible for his supervision in the community in the event of a release direction). The Respondent was legally represented throughout proceedings; the Applicant was not legally represented.
11. The panel took full oral evidence from the Respondent and the witnesses. Having done so, the panel adjourned for updated reports, namely:
 - a) An 'Ongoing Reviews – Release and Risk Management Plan' (Part C) report from the substantive COM who would be managing the Respondent in the community if he was re-released; and
 - b) A report from the prison Mental Health Inreach Team (MHIT) including plans for the transition of the Respondent's care into the community if he was re-released.
12. Final written submissions were also invited.
13. In adjourning the case, the panel noted that the case would be considered on the papers on 14 October 2024, while reserving the right to reconvene a further oral hearing if it considered one to be necessary.
14. The directed Part C report (dated 17 September 2024) noted that, in the professional opinion of the (new) COM, the Respondent was suitable for release. The panel directed the Respondent's release.
15. The directed MHIT reports (two, undated) gave a diagnosis, noted that the Respondent was in possession of his medication and was managing well, and, if released, an aftercare referral would be made to his local Community Mental Health Team. It confirmed that the Respondent was entitled to aftercare.
16. Comprehensive written legal submissions on behalf of the Respondent (dated 3 October 2024) were submitted, seeking a direction for release, or, in the alternative, a recommendation for open conditions.
17. No legal submissions were submitted on behalf of the Applicant.
18. The panel directed the Respondent's release.

The Relevant Law

19. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

20. 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)).

21. 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)).

22. 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

23. 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 (CA) 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.

24. In *R(DSD and others) v Parole Board* [2018] EWHC 694 (Admin) the Divisional Court applied this test to Parole Board hearings in these words (at [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.*"

25. In *R(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 the Divisional Court in *R(Secretary of State for Justice) v Parole Board* [2022] EWHC 1282 (Admin).

26. As was made clear by Saini J in *Wells*, 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.

27. 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.

28. 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.

The reply on behalf of the Respondent

29. The Respondent has submitted representations in response to this application which will be referenced in the **Discussion** section below.

Discussion

30. The Applicant's points can essentially be broken down under two headings:

- a) The panel failed to provide sufficient reasons for its decision (including the extent to which it considered the evidence before it); and
- b) The panel failed to give sufficient weight to certain parts of the evidence.

31. Within the application, the Applicant fails to acknowledge that there was an oral hearing in this case. While this may be a simple error on the Applicant's part, it is nonetheless significant, since there is no recognition that the panel may have robustly explored many, if not all, the issues raised by the Applicant during the course of the oral hearing.

32. I have listened very carefully to the entire recording of the hearing, and it is very clear to me that the panel carefully and diligently explored and tested all the evidence put before it, in a hearing that lasted almost three and a half hours.

33. Moreover, the comprehensive Part C report set out comprehensive and cogent reasons why the COM considers that the test for release is met. It also noted there were no concerns regarding negative custodial behaviour. It was countersigned and endorsed by a Probation Service Senior Manager. While this is not an overarching view expressed by the Applicant, it is nonetheless a substantial piece of evidence in favour of the Respondent's release.

34. On the face of the evidence before me, there was clear professional support for release from the Probation Service and this support was followed by the panel.

35. Of course, the fact that the panel followed the professional opinion of the new COM does not obviate its duty under *Wells* to give reasons for its decision. This is the essence of the Applicant's first argument in favour of reconsideration.

36. The question for me then becomes whether the panel's reasoning is evident from its decision. I find that it is. While the written decision is brief, it nonetheless sets out the panel's view the risk management plan is developed and in place. It notes that there is aftercare available if necessary. It notes that the Respondent would be

released to specialist designated accommodation. It notes the positive engagement with the new COM and their professional opinion in support of release. It balances risk factors and protective factors. It states that the panel considered the case “*most carefully*”.

37. The written decision is not a vehicle within which every piece of evidence must be recited or analysed. It would become unwieldy and unnecessarily lengthy if it was. The decision sets out a comprehensive summary of the evidence that the panel found important to weigh in making its decision.
38. Turning to the second argument advanced by the Applicant, the weight attributed to each piece of evidence is a matter for the panel, who heard and/or read that evidence. It is difficult to see how the Applicant can quibble with that weighting having not been represented at the oral hearing (or even acknowledging that an oral hearing ever actually took place). The panel’s decision would run the risk of being irrational if it weighed evidence in such a way that was manifestly wrong, but that is not the case here. While the Applicant may disagree with the panel’s weighing, that, of itself, is not a reason for me to interfere with it.
39. Submissions on behalf of the Respondent reiterate that the threshold for establishing irrationality is ‘very high’, relying on *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778. However, *Johnson* also goes on to say that the threshold is ‘not insuperable’ (para. 107), as shown by the finding of irrationality made in that particular case.
40. The Respondent also notes that, following *R (Ahmad) v Newham LBC* [2009] UKHL 14, 3 All ER 755, courts should be ‘slow’ to interfere on the ground of alleged irrationality (para. 55). However, the House of Lords made this statement in the context of a decision that was compliant with statutory requirements and therefore one which had already been judged lawful from a statutory viewpoint.
41. Notwithstanding the nuances of the cases advanced on behalf of the Respondent, it is clear that a finding of irrationality requires a manifestly fatal error of logic on behalf of the panel and that I should only interfere with the decision if it is so wrong that it absolutely necessary for me to do so.
42. Having already found that the panel has adequately discharged its common law duty to give reasons, its decision can only therefore be irrational if I am persuaded that – turning the *DSD* test on its head – all other panels would have reached a different conclusion. This is a self-evident example of the very high threshold set out in *Johnson*.
43. I do not find the panel’s decision to be irrational in the legal sense. Simply taking the professional opinion of the COM (endorsed by a Senior Manager) into account, which is thoughtful, considered and evidence-based, there is every chance that at least one other panel would have directed the Respondent’s release. On that basis alone, the decision to direct the Respondent’s release cannot be irrational and the application must fail.

Decision

44. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
09 November 2024