

[2024] PBRA 256

Application for Reconsideration by Marsden

Application

1. This is an application by Marsden (the Applicant) for reconsideration of a decision of the Parole Board following an oral hearing on 1 November 2024 not to direct his 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:
 - a. The dossier now comprising 421 pages including the decision letter (DL), the subject of this application.
 - b. An unsigned application dated 25 November 2024 submitted by or on behalf of the Applicant.

Background

4. The Applicant is now 40 years old. In November 2013 he was sentenced to an extended sentence of 12 years with an extension period of 8 years on licence for 9 sexual offences over a five year period against a child who was between 5 and 10 years old. He was (automatically) released on licence on 11 January 2022 and recalled to prison on 5 October 2022. In November 2022 he was sentenced to 14 months imprisonment by the Crown Court for the breach of his Sexual Offences Protection Order (SOPO) which had triggered the recall. On 7 February 2023 a Parole Board panel declined to order his release. Following an oral hearing on 1 November 2024 a Parole Board panel at an oral hearing again declined to order his release. His Conditional Release Date is in July 2025. His Sentence Expiry Date is in July 2033.

Request for Reconsideration

5. The application for reconsideration is dated 25 November 2024.
6. The grounds for seeking a reconsideration of the case are set out below in full.



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1. *This is an application for reconsideration under Rule 28 (1) of the Parole Board Rules 2019 following the decision dated 5th November 2024. The decision was for [The Applicant] to remain in closed conditions, refusing release into the community.*
2. *We seek to request a reconsideration of this decision on the basis that we find it irrational and procedurally unfair to [The Applicant].*
3. *Whilst it was clearly open to the panel to come to a conclusion as to [The Applicant's] risk, the panel needed to do so in a rational and procedurally fair way. We submit they did not do so.*
4. *We submit that this decision is Irrational and Procedurally unfair for a number of reasons, which are detailed below. We submit that the panel could not have made an accurate risk assessment on suitability for release as it is clear evidence given in the hearing has been ignored and/or misinterpreted. Instructed solicitors will make reference below to evidence heard at the hearing taken from a detailed record of the evidence heard. There will also of course be the recording of the hearing.*
 - a. *The panel felt that [The Applicant's] evidence contained elements of both minimisation and lack of insight into his risk factors. Instructed solicitors disagree with this and found [The Applicant] to answer the questions the best he could. He tried really hard to be open and honest. His nerves regarding the hearing and speaking in front of so many people was interpreted by the panel as him minimizing or avoiding the questions. [The Applicant] feels immense shame and remorse for his previous offending which added to his nerves on the day of the hearing.*
 - b. *Point 2.1 in the decision letter details that he spoke about his offending and his understanding of risk factors, as well as coping strategies. All of what he recognises is listed in point 2.1 of the panel decision letter.*
 - c. *The Prison offender manager gave evidence at the hearing and informed the panel that [The Applicant] has not shown any offence-paralleling interests or behaviour – including any sexual interest in children, sexual preoccupation or drug use. This evidences his use of coping strategies.*
 - d. *Professionals referenced that he completed core risk reduction work, and no specific further core work has been identified. His Com has stated that he is unlikely to meet the criteria for further work. Therefore, this suggests that there is nothing more that [The Applicant] can do by remaining in closed conditions.*
 - e. *Ms Blenheim also stated that he has had a chance to refresh on his coping skills.*
 - f. *The evidence from his COM was taken and it was unclear to understand what support he had in the community when he was previously released. The decision letter states that he struggled to seek support in the community when he was struggling but [The Applicant] maintains that he asked for support at all times. On two occasions he contacted probation to advise them he was struggling and they arranged for an ambulance to attend on him.*



g. *He admits his struggles in the community and it was evidence through the reports and hearing that he was moved around from one accommodation to another which destabilised his mental health. He stated he sought help for his mental health which the Job Centre was willing to fund but was not authorised by probation – therefore limiting him access to implement his coping strategies.*

In relation to the terms of the SOPO, he maintains that he never saw a copy and the full terms were never explained to him.

7. *We believe the decision to keep [The Applicant] in closed conditions is Irrational without substantiated evidence. None of the professionals managing [The Applicant] stated there was outstanding core risk work to complete in custody and no one raised any concerns regarding risk increasing. The decision is completely irrational for all of the above stated reasons. The risk management plan proposed by his COM is robust enough to manage him in the community. With that being said, it suggests that [The Applicant's] risk can be managed in the community.*
8. *[The Applicant] is in the position now where he will sit in closed conditions until he could be released into the community and start building a positive life and future for himself.*
9. *It is submitted that the decision to recommend [The Applicant] remain in closed conditions is irrational (and unlawful for the reasons given above). Key evidence has not been properly considered when making their decision.*
10. *We submit that the panel could not have made an accurate risk assessment or suitability for release without properly considering the evidence presented to them and the decision reflects that they did not. It is concerning that evidence given at the hearing has been ignored and therefore renders the proceedings unfair.*
11. *An applicant seeking to complain of procedural unfairness under rule 28 must satisfy 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; and/or*
 - (e) *the panel was not impartial.*

For the aforementioned reasons we submit that this case has satisfied these guidelines. It is clear that evidence was heard of the issues in the decision (as confirmed above) but these have not been taken into account. It cannot be said that this case has been dealt with justly.



12. *We submit the decision to keep [The Applicant] in closed conditions was irrational. We made an application for release, had all of the above been addressed, the evidence considered properly, then we believe a decision for release could have been made.*
13. *We ask that the decision be quashed, and an oral hearing granted to a fresh panel so our application for release can be adequately considered.*

Current parole review

14. This case was first referred to the Parole Board in January 2024.

The Relevant Law

15. The panel correctly sets out in its DL the test for release.

Parole Board Rules 2019 (as amended)

16. 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)).
17. 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)). This is an eligible sentence.

Irrationality

18. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said 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."

19. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing "irrationality". The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.
20. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin)**



(the Johnson case) adopted a "more modern" test set out by Saini J in **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

21. In the **Wells** case Saini J set out "a more nuanced approach" at paragraph 32 of his judgment when he said:

"A more nuanced approach in modern public law is 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".

22. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that "this approach is simply another way of applying" the Wednesbury irrationality test.

23. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a judge dealing with a judicial review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

24. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

25. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

26. The giving of reasons by a decision maker is "one of the fundamentals of good administration" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

27. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".



28. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

29. 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.

30. 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; and/or
- (e) the panel was not impartial.

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

Other

32. 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.

33. 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."

The reply on behalf of the Secretary of State (the Respondent)

34. The Respondent has offered no representations in respect of this application.

Discussion

35. In reality the grounds submitted – save possibly that summarised at paragraph 6a above – allege irrationality rather than procedural unfairness. In view of the nature of some of the grounds I listened to the 3.5 hours long recording of the hearing and read the helpful written submissions submitted by the Applicant's legal representative following the hearing.

36. The contention that a decision not to release a prisoner is irrational when the only witness who supported release was the prisoner himself is clearly itself an irrational contention. In particular

- a. The Prisoner Offender Manager (POM) – albeit accepting that she had only had limited time to work with and assess the Applicant – was unable to support release.
- b. The Community Offender Manager (COM) did not support release.
- c. The psychologist called to give evidence did not recommend release.

37. As to the individual Grounds.

- a. 4 a. The panel did not use the word '*minimisation*' or the phrase '*lack of insight*' or any synonym of those terms in the Decision Letter (DL) save – in the latter case - when accurately quoting from evidence given at the hearing or within the dossier. The DL noted and made allowances for the difficulties the Applicant had during the hearing and commended him (DL 4.10) "*The panel were heartened by the effort [The Applicant] made to engage with us in giving his evidence, articulately and clearly notwithstanding the inevitable stress of the occasion.*"
- b. 4b. This is not a ground of appeal but a summary of Paragraph 2.1 of the DL.
- c. 4c. This contention, while accurate, fails to acknowledge that the POM was – both in writing and at the hearing - opposed to the Applicant's release.
- d. 4d. The DL accurately summarised the evidence of the COM at the hearing to the effect that "*he needs to undertake further risk reduction work in custody and should be assessed.....only in custody.*"
- e. 4e. This statement, while accurate, does not indicate any irrationality.
- f. 4f. This statement is merely a repetition of evidence given at the hearing and ignores the fact that the COM did not recommend the Applicant's release.



- g. 4g. This is merely information given by the Applicant and has no bearing on the rationality or otherwise of the decision.
- h. 4h. Likewise. (Convicted persons' must acquaint themselves with the terms of their sentence – including orders such as disqualifications or Sexual Offences Prevention Orders.)
- i. 7. (There appear to be no grounds 5 or 6.) The reasons why the professionals were unanimous in their recommendations that the Applicant should not be released were clearly set out in their reports and at the hearing. No submission was made by the Legal Representative at the hearing or in the representations submitted by her after the hearing that that had not the case.
- j. 8. This is not a ground of appeal but a statement of fact.
- k. 9. This merely summarises the complaints listed above.
- l. 10. This ground alleges that the panel ignored certain evidence when making its decision. No indication is given of what that evidence was. My review of the recording of the hearing revealed no important evidence which was not referred to or summarised by the panel in the DL.
- m. 11. This is not a ground of appeal but an (accurate) summary of the law set out above at paragraphs 18-33 above.
- n. 12. There is no merit in this ground. The three professional witnesses were unanimous in recommending that the Applicant remain in custody, and the DL clearly summarises their evidence and explains why it decided not to recommend the Applicant's release.

38. Accordingly, this application is refused.

Sir David Calvert-Smith
20 December 2024

