

[2024] PBRA 257

Application for Reconsideration by Ford

Application

1. This is an application by Ford (the Applicant) for reconsideration of a decision of an oral hearing dated 4 November 2024 not to direct release.
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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier consisting of 591 pages and the application for reconsideration. I have also had access to the audio recording of the hearing.

Request for Reconsideration

4. The application for reconsideration is dated 27 November 2024. It has been drafted by legal representatives on behalf of the Applicant. The Applicant submits that he was prevented from putting his case fully and in consequence was not given a fair hearing. The Applicant further submits that several of the findings in the decision were irrational.
5. This submission is supplemented by written arguments to which reference will be made in the Discussion section below.

Background

6. The Applicant received an extended sentence of 7 years and 8 months in custody with an extended licence period of 5 years for offences of wounding and false imprisonment. On the same occasion he was sentenced to a further 6 months to be served consecutively in respect of the activation of a suspended sentence order previously imposed. His total sentence was therefore 8 years and 2 months imprisonment with an extended licence of 5 years.
7. The Applicant was 25 years old at the time of sentencing and is now 31 years old.

Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State on 22 March 2023 to consider whether or not it would be appropriate to direct his release.
9. The case proceeded to an oral hearing via videoconference on 22 October 2024. The panel consisted of three members including a psychologist member. It heard oral evidence from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM) and an HMPPS senior forensic psychologist who had provided a report. The Applicant had legal representation throughout the hearing.
10. The panel did not direct the Applicant's release.

The Relevant Law

11. The panel correctly sets out in its decision letter of 4 November 2024 the test for release.

Parole Board Rules 2019 (as amended)

12. 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)).
13. 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)).
14. 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

15. 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.
16. 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."

17. 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).
18. 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.
19. 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.
20. 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

21. 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.
22. 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.
23. The overriding objective is to ensure that the Applicant's case was dealt with justly.
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 Secretary of State (the Respondent)

25. The Respondent has submitted no representations in response to this application.

Discussion

26. Procedural unfairness – the application raises concerns under this ground relating to the comment of a panel member, the curtailment of his answers in evidence and interpretation of his attempts to answer questions as an attempt to control the hearing. I have therefore listened carefully to the full audio recording of the hearing and come to the following conclusions.

27. In her final questions of the COM, the psychologist panel member asks of him why a woman in full knowledge of the kind of offences the Applicant has committed would want to have anything to do with a man like the Applicant, let alone form a relationship with him. I agree with the Applicant that the question was inappropriate and irrelevant. The Applicant further submits that the question demonstrates bias and prejudgment. I agree that the question gives the appearance of prejudgment. I have given anxious consideration to whether this question either alone or in combination with the manner of questioning (dealt with below) prevented the Applicant from having a fair hearing. I have concluded that it did not for three reasons.

28. Firstly, whilst there may be an appearance of prejudgment or bias I am not satisfied that there was actual bias or prejudgment on the part of this experienced panel member. The question may have displayed a misplaced endeavour to express concern for the Applicant's present or future partners or may have been a clumsily expressed attempt to question the robustness of the risk management plan. As the COM noted, the victim had been in the Applicant's wider circle of friends and she may have seen a positive side to his character or may have thought that he would not behave with violence towards her or may have thought that she could change him. In other words the COM was able to provide an answer to indicate that there are many valid and positive reasons why someone may wish to be in a relationship with the Applicant despite his history in previous relationships. In addition, the COM presented his risk management plan as being robust enough to protect any potential victim. The second reason for my conclusion is that the panel member was one on a panel of three, the situation may have been different had this been a single member panel in which the question was posed. The third reason is that I have carefully considered the decision letter which is full and thorough in its consideration of the issues and sound in the reasons and conclusions it draws from its considerations. There is no appearance of bias on the face of the decision which gives clear sustainable reasons for its conclusions which another panel could also reach.

29. With regard to the questioning of the Applicant, I have had careful regard to the part of the recording where he is answering questions. On two occasions the Panel Chair interrupts him whilst he is answering questions of a panel member in an effort to avoid unnecessary detail, keep the Applicant focused on the question and have a mind to the length of the hearing. On several occasions whilst answering the questions of the psychologist panel member that panel member asked him, in the light of the questions she had asked, to limit his answers to a simple affirmation or denial without giving a detailed response. Whilst that approach appeared robust and abrupt I cannot conclude that that prevented the Applicant from putting his case properly or undermined the fairness of the hearing. She was one of a number of questioners including the Applicant's own representative and so any curtailing of his answers could have been remedied by others asking him in subsequent questioning to provide more details.
30. The Applicant's representative did not raise any concerns about the manner of questioning or the conduct of the hearing while it was taking place or in his written submissions after the hearing. No objection was raised during the hearing by the representative about concerns for the Applicant's ability to give evidence. The legal representative, whose questioning came after that of the panel members, could have asked further questions of the Applicant to deal with any matters that the Applicant had not had the chance to put forward. As a general principle, it is not open to a party to cry foul after missing an opportunity to object at the time of an alleged irregularity. In addition, in this case the Applicant and his representative had an opportunity to address any concerns by further questioning. Further the application does not identify what further evidence may have been presented which would have made a difference to the decision. I am not satisfied that any unfairness arose which could lend itself to the decision having to be reconsidered.
31. The Applicant raises further concerns about the panel's conclusion that his attempts to answer fully were interpreted as an attempt to control the hearing. The panel arrived at this conclusion exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the Applicant. In those circumstances it would be inappropriate for me to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel and there are not in this case.
32. Irrationality – the application takes issue with the panel's analysis and conclusions in respect of some aspects of the Applicant's account. I can understand the disappointment of the Applicant that his application for release was not successful, that disappointment aggravated by his concerns at the manner in which he felt he was questioned. However, the matters he raises were raised before the panel and the reconsideration process is not an opportunity to re-argue matters already considered or for the reconsideration member to substitute their view for that of the panel.
33. The Applicant is clearly making good progress with engagement, undertaking courses requested of him and having the strong support of his COM. The panel in a thorough decision letter, has set out its reasons for its conclusions. There was plainly material before the panel to justify those conclusions. It was not irrational according to the test outlined above, nor was there unfairness in the process, and accordingly there is no basis for reconsideration.



Decision

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

Barbara Mensah
30 December 2024