

[2024] PBRA 27

## Application for Reconsideration by Grantham

### Application

1. This is an application by Grantham (the Applicant) for reconsideration of a decision of an oral hearing panel dated 22 December 2023 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.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 564 pages), and the application for reconsideration.

### Background

4. The Applicant received a sentence of imprisonment for public protection on 25 June 2012 following conviction after trial for wounding/inflicting grievous bodily harm with intent. His tariff was set at eight years less time spent on remand and expired in September 2019.
5. The Applicant was 32 years old at the time of sentencing and is now 44 years old.

### Request for Reconsideration

6. The application for reconsideration is dated 10 January 2024. It has been drafted by solicitors acting on behalf of the Applicant. It submits that there was an error of law, and that the decision was procedurally unfair. No submissions were made on the ground of irrationality.
7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.


### Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in February 2022. The referral within the dossier asked the Parole Board to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

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9. The case proceeded to an oral hearing on 19 December 2023. The panel consisted of three members including a psychiatrist specialist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**), and a HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The panel did not direct the Applicant's release but did make a recommendation for open conditions. It is only the decision not to release the Applicant that is open for reconsideration.

## The Relevant Law

11. 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*

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.

### *Procedural unfairness*

15. 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.
16. 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.

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

#### *Error of law*

18. 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.

19. 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.

### **The reply on behalf of the Respondent**

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

### **Discussion**

#### *Error of law*

21. It is submitted that the panel applied the wrong test in this case.

22. The applicant notes that, since the decision was made, the Respondent provided additional information which was not considered at the time of the review. This withdrew the power of the panel to consider the test for open conditions. In other words, the referral to the Parole Board was incorrect.

23. The first consideration of every panel (other than in a pre-tariff review) is to consider whether the prisoner meets the statutory test for release. In the Applicant's case, this is the test set out in section 28(6)(b) of the Crime (Sentences) Act 1997: the Parole Board shall not give a direction for release unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

24. This test is set out in the cover sheet to the panel's decision and reiterated in paragraph 4.2. The decision then goes on to explain why the panel did not conclude that the Applicant met the public protection test (and therefore why it did not direct his release).

25.It was only then that the panel went on to consider the question of open conditions.

26.Insofar as the test for release is concerned, any purported error in the initial referral from the Respondent pertaining to open conditions would have no effect. The panel has applied the correct test for release and there has been no error of law.

### *Procedural unfairness*

27.It is also submitted that the decision was procedurally unfair since, had the panel known that it could not make a recommendation for open conditions, it may have taken different evidence from witnesses at the hearing which would have had an impact on the decision not to release the Applicant.

28.As set out above, the panel's first consideration was whether the Applicant met the test for release. It took as much evidence as it needed to determine that he did not. I do not consider that the panel would (as appears to be implied in the application) somehow have tried harder to adduce evidence in favour of releasing the Applicant if it had known that open conditions was not a viable option. The two decisions are separate and distinct, and the panel correctly treated them as such.

29.As an example, it is argued that the panel did not explore the availability of certain release accommodation at the hearing. The decision is clear that this was not the only factor behind its decision: indeed, it is clear that the panel's concerns of risk were set in the medium to long term once the Applicant had moved on from any designated release accommodation. The panel did not feel it needed concrete detail on availability to make its decision. If the Applicant's legal representative felt otherwise, it was open for them to seek an adjournment for that information to be provided. There is no procedural unfairness.

### **Decision**

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

31.The Respondent has since confirmed that the panel was, in fact, permitted to consider open conditions and that the additional information which was not considered at the time of the review (upon which this application for reconsideration was primarily founded) was incorrect.

**Stefan Fafinski**  
**26 January 2024**