

[2024] PBRA 48**Application for Reconsideration by Anderson****Application**

1. This is an application by Anderson (the Applicant) for reconsideration of a decision of an oral hearing panel dated 5 February 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.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 476 pages), and the application for reconsideration (dated 14 February 2024).

Background

4. The Applicant received a sentence of imprisonment for public protection on 28 August 2008 following conviction after trial for wounding with intent to do grievous bodily harm. His tariff was set at four years less time spent on remand and expired in October 2011.
5. He was released on licence on 3 April 2019 following an oral hearing. His licence was revoked on 1 May 2019. It is reported that, following his release, the Applicant harassed a former partner by sending her threatening and abusive messages and making phone calls. He was later convicted of harassment and sentenced on 23 January 2020 to imprisonment for eight weeks (now served).
6. The Applicant was 29 years old at the time of sentencing and is now 44 years old.

Request for Reconsideration

7. The application for reconsideration has been written by the Applicant. It sets out his reasons as to why he believes the decision not to release him was irrational. I will refer to these reasons 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 July 2022 to consider whether or not it would be appropriate to direct his release. If the Board did not direct release, it was invited to advise the



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Respondent whether the Applicant should be transferred to open conditions. This is the Applicant's third parole review since his recall.

9. The case proceeded to an oral hearing on 16 January 2024. The panel consisted of three members including a psychologist specialist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**), and an 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 (nor 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.

Irrationality

15. 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."

16. 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.
17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

The reply on behalf of the Respondent

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

Discussion

19. Although the Applicant was legally represented at the hearing, the letters which form the basis of his application were written personally. Since the Applicant did not have the benefit of legal assistance when writing these letters, it is not surprising that they do not set out grounds for reconsideration in a precise or legalistic way. In fairness to the Applicant, I have read his application very carefully to see if I can discern anything within them that could potentially form a basis for reconsideration on any of the three grounds set out above (even though the Applicant has only pleaded irrationality).
20. The first part of the application sets out much of the factual basis of the index offence and recall. It also refers to the Applicant's parole hearing in 2020. It is only the present decision that is open to challenge.
21. The application goes on to mention the allegations made by the Applicant that a prison psychologist had made sexual advances towards him. He says that this is mentioned in the dossier but without proof.
22. A report of 28 July 2022 from the psychologist notes as follows:
- "[The Applicant] appeared to remain fixated on me for the following two weeks, persistently speaking about me to different members of staff, again describing me in inappropriate and degrading terms. During this period, he was also confronted by another resident in my presence, who accused him of speaking about me in a sexually inappropriate manner to other residents and telling other residents that I had made unwanted advances towards him – [the Applicant] has denied this."*
23. This account suggests that the matter of sexual advances was raised by another prisoner. In any event, the panel has not made any finding of fact on this matter. It does however note that if these allegations were credible, then the consequences for the psychologist would have been severe. This is not an unreasonable statement. In any event, it is not the sole reason for the panel's overall conclusion that the Applicant did not meet the test for release.

- 24.The application further notes that the Applicant had “*seen a psychologist for the Parole Board to do a report, and her report says that no further work is needed*”.
- 25.The psychological report within the dossier (dated 10 May 2023) concludes that “*[the Applicant] has completed core work; however, I do not assess him to be suitable for release at this stage as it is my view that he needs further opportunity to demonstrate he has internalised his learning*”. It is not irrational for the panel to agree with this professional opinion.
- 26.The remainder of the application is primarily concerned with what work, if any, the Applicant should do. The terms of the referral from the Respondent specifically remind the panel that it is not being asked to comment on or make any recommendation about any specific treatment needs or offending behaviour work required.
- 27.The panel’s decision is thorough, based on evidence and gives very thorough reasons. The legal test for irrationality sets a very high bar which this case does not meet. There is nothing in the application that persuades me otherwise.

Decision

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

Stefan Fafinski
01 March 2024