

[2024] PBRA 84

## Application for Reconsideration by Houghton

### Application

1. This is an application by Houghton (the Applicant) for reconsideration of “*the decision from the Parole Board dated 27/03/2024 refusing to grant an oral hearing*”.
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 paper decision which made no direction for release (dated 8 February 2024), the dossier (consisting of 370 pages), and the application for reconsideration (dated 11 April 2024). The dossier contained the application for an oral hearing (dated 1 March 2024) and the decision of a duty member (dated 27 March 2024) refusing the application for an oral hearing.

### Background

4. The Applicant received a sentence of imprisonment for public protection on 7 April 2006 following conviction for rape. His tariff was set at four years (together with 300 days outstanding on a previous sentence for indecent assault) and expired in June 2010.
5. The Applicant was 41 years old at the time of sentencing and is now 59 years old.
6. He was released on licence in December 2016 after an oral hearing but recalled to custody in February 2019. This is his first recall on this sentence and his third parole review since recall.

### Request for Reconsideration

7. The application for reconsideration has been submitted by solicitors acting for the Applicant.
8. It argues that the decision to refuse the Applicant an oral hearing was irrational.
9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.



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## Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in September 2023 to consider whether or not it would be appropriate 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.
11. The case was considered on the papers by a single-member Member Case Assessment (**MCA**) panel on 8 February 2024. The MCA panel did not direct release (nor make a recommendation for open conditions).
12. On 1 March 2024, solicitors requested an oral hearing on behalf of the Applicant.
13. On 27 March 2024, a duty member refused the application for an oral hearing.

## The Relevant Law

14. 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*

15. 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)).
16. 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)).
17. 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*

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 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**

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

### **Discussion**

22. Two decisions were made during this review. The first was made by the MCA panel which made no direction for release. The second was made by a duty member who refused to grant an oral hearing.

23. The procedure for consideration on the papers is set out in rule 19.

24. Rule 19(1) provides that where a panel is appointed (under rule 5(1) to consider the release of a prisoner on the papers) that panel must decide on the papers either that (a) the prisoner is suitable for release; (b) the prisoner is unsuitable for release, or (c) the case should be directed to an oral hearing.

25. Therefore, the decision that the Applicant was unsuitable for release was made under rule 19(1)(b).

26. By operation of rule 19(6), any decision made under rule 19(1)(b) is provisional.

27. The procedure after a provisional decision has been made on the papers is set out in rule 20.

28. Rule 20(1) provides that where a panel has made no direction for release under rule 19(1)(b), then the prisoner may apply in writing for a panel at an oral hearing to determine the case.

29. Further to rule 20(1), any such application must be served within 28 days of receipt of the rule 19(1)(b) decision. The application for an oral hearing was therefore made in time.

30. Under rule 20(5), applications for an oral hearing must be determined by a duty member who was not involved in the making of the provisional decision not to direct release.

31. The decision not to direct an oral hearing (the second decision) was therefore made on 27 March 2024 under rule 20(5).
32. Rule 20(6) provides that, if the decision taken under rule 20(5) is not to direct an oral hearing, then **a provisional decision under rule 19(1)(b)** (my emphasis) remains provisional if it is eligible for reconsideration under rule 28 and becomes final if no application for reconsideration is received within the period specified by rule 28 (that is, 21 days).
33. This application could not make it any clearer that it seeks to challenge the decision dated 27 March 2024 refusing to grant an oral hearing. As set out above, this decision was made under rule 20(5).
34. Rule 28(1) sets out the decisions which may be reconsidered. A decision made under rule 20(5) may not be reconsidered. Therefore, this application must fail.
35. I do, however, consider that the decision of the duty member contains is unclear as to which decision remains open for reconsideration. It would have been more helpful if the penultimate paragraph of the refusal of an oral hearing had begun with words to the effect of '*The provisional MCA decision remains provisional for a further 21 days...*'. Any such ambiguity does not, however, override the statutory rules. Neither does this ambiguity grant me any form of discretionary power to use rule 28 to reconsider the decision not to grant an oral hearing.
36. Since the application falls outside rule 28, that is the end of the matter, and no arguments about the purported irrationality of the refusal to grant an oral hearing have any effect.

## Decision

37. For the reasons I have given, the application for reconsideration is refused.

**Stefan Fafinski**  
**25 April 2024**