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**[2024] PBRA 87**

# Application for Reconsideration by Dixon

## Application

1. This is an application by Dixon (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 21 March 2024 not to direct the release of the Applicant or recommend his transfer to open conditions following an oral hearing dated 20 March 2024.

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 application for reconsideration and the dossier.

## Background

4. The Applicant was sentenced on 29 August 2012 to imprisonment for public protection for two offences of rape which occurred a number of years before. He was ordered to serve a minimum period before he could be considered for parole of 5 years 213 days. He was released on licence on 16 December 2019 and recalled on 3 September 2020. He was re-released on 19 July 2021 and his licence was revoked on 13 December 2022.

## Request for Reconsideration

5. The application for reconsideration is dated 10 April 2024.

6. The grounds for seeking a reconsideration are that the decision was irrational and that there has been procedural unfairness in the making of this decision. It is also submitted that the panel have made a mistake of fact.

## Current parole review

7. This was the first review conducted by the Parole Board following recall.

8. The oral hearing took place on 20 March 2024 and the panel heard from the Prison Offender Manager (POM) as well as the present and the previous Community Offender Manager (COM).

**The Relevant Law**

9. The panel correctly sets out in its decision letter dated 21 March 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

*Parole Board Rules 2019 (as amended)*

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)). The decision not to release the Applicant was eligible for reconsideration.

11. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

*Irrationality*

12. 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."*

13. 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.

14. Both decisions are based on the Wednesbury unreasonableness test which is that no reasonable tribunal could have reached the decision reached by this tribunal on the evidence it heard.

*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.

18. 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.

19. 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 Respondent**

20. The Respondent has made no submissions in response to this application.

**Discussion**

21. In considering this application for release the panel had to do two things. It had to decide whether the recall was justified in the light of the evidence that they had heard. That is not the same as deciding whether the decision to recall was correct at the time it was made. Then, whatever their decision on that, the

panel had to decide whether the Applicant met the test for release. The panel's decision on the first issue would have to be taken into consideration when making the second decision.

22. The Respondent's reasons for recall are set out at p.63 of the dossier. They are that: "*It is alleged you have committed a further offence of assault against your partner and have made threats towards her. It is also alleged you have demanded your partner to hand her phone over to you and you did not return the phone to her. Following a search at your address, officer found cannabis at your address".* For those reasons the Applicant is said to have breached his good behaviour condition and the condition that he shall not commit any offence.

23. By the time of the parole hearing, the police had decided not to proceed with any charge against the Applicant and no evidence was put before the panel to prove that he had committed any offence. The Part A report also makes it clear that the reason for the recall was the arrest for offences.

24. The panel did consider the appropriateness of the recall decision and concluded at 2.17. It said: "*The panel has a duty to consider the appropriateness of the recall decision in this case. On all the evidence available to it, the panel has found that the recall was appropriate. This is because there were tenable grounds for believing that [the Applicant's] risk was escalating*."

25. While there was some evidence that the Applicant's risk was increasing that was not the reason for the recall as is evident from the reason for recall given by the Respondent and in the Part A report.

26. An Applicant is entitled to know the reasons for the decisions made by the panel. They do not have to be given in great detail but enough detail so that the Applicant knows why he is being kept in custody. Did the panel take any account of the re-arrest in making their decision that the recall was justified and in deciding that he did not meet the release test? That is an important question and it is impossible in my judgment to find an answer to that in the decision. The decision on whether the recall was justified may be an important factor in deciding whether the release test is met.

27. As a matter of common law procedural fairness, an Applicant is entitled to know why he is going to remain in custody.

28. Without knowing the reasons why he did not meet the release test and what matters were taken into account, it is impossible for the Applicant to properly challenge the decision. If the panel did take the facts of the arrest into account in reaching either or both of the two decisions it was required to make, it is possible that that would have been an error of law. In summary, the Applicant must be in a position to challenge the decision and for that he needs to know the reasons for it.

29. I make it clear that I am not making a finding that the decision was irrational. I have reached the decision, not without some hesitation, that this decision

needs to be reconsidered as a matter of procedural fairness so that the Applicant can be fully apprised of the reasons for any decision.

30. I do consider that there was a mistake of fact in the decision namely whether the Applicant's partner had a daughter. That is a misreading of the information to be found at pp.178/179 of the dossier. That mistake of fact did not affect the ultimate decision and accordingly cannot be the basis for an application for reconsideration.

**Decision**

31. Accordingly, for those reasons I grant the application for reconsideration; quash the decision and direct that the referral is re-heard. I am satisfied that the lack of reasons given amounts in this case to a procedural irregularity.

**John Saunders**
**01 May 2024**