

[2025] PBRA 14**Application for Reconsideration by Theophane****Application**

1. This is an application by Theophane (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 11 December 2024. The decision of the panel was not to direct release or to recommend a transfer to an open prison.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 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 dossier now consisting of 672 pages, the decision letter of the panel dated 11 December 2024, the application for reconsideration drafted by the Applicant's legal adviser and the response of the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 3 January 2025.
5. The grounds for seeking a reconsideration are set out below:

Background

6. The Applicant was sentenced to imprisonment for public protection (IPP) with a minimum tariff of two years and six months (less time served on remand). The index offences were the rape of a female in a domestic situation. There was also a conviction for criminal damage. The Applicant returned to the victim's home the following day and damaged a door in an attempt to enter. The facts of the offence were that the Applicant forced himself upon the victim in her home. The victim made it clear that she was not consenting to sexual intercourse. The Applicant then committed the offence of rape using physical force. The Applicant was 30 years old at the time of sentencing.

Current parole review

7. The oral hearing (OH) was the seventh review of the Applicant's (IPP) sentence. The Respondent's referral requested that the Parole Board consider whether the Applicant should be directed for release or alternatively recommended for a transfer to an open prison. The Applicant was aged 47 at the time of the OH. The final hearing had been delayed, the initial referral being in October 2023. The reason for the delay was set out in the decision letter and related, in the main, to difficulties with the preparation of a risk management plan and the resignation of a current probation officer.
8. The panel hearing took place in December 2024. The panel consisted of two independent members, including an independent chair. There was also a third psychologist member of the Parole Board. Evidence was received from a prison offender manager (POM), a community offender manager (COM) and a prison instructed forensic psychologist. The Applicant was legally represented. The Applicant gave evidence at the hearing.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 11 December 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

10. 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)).
11. 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)).
12. 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

13. 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.



14. 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."
15. 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)**.
16. 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.
17. 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.
18. 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

19. 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.
20. 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.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.



Error of law

22. 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.

23. 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.

Failure to give sufficient reasons

24. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

25. The reason for requiring adequate reasons had been explained in a number of decisions including:

- **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
- **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
- **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
- **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

26. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

Other

27. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, and **R (Hutt) v Parole Board [2018] EWHC 1041**



(Admin). The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release;
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

28. 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."

Reconsideration as a discretionary remedy

29. 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

30. The Respondent offered no representations.

Grounds and Discussion

Ground 1

31. The Applicant's legal adviser submits that "*It is well established in caselaw that what the public is being protected from in this test (the statutory test for release) is the risk of serious harm to 'life and limb'* **Sturnham [2013] UKSC 47 (para 45)**". By inference it is submitted by the Applicant's legal adviser that the panel failed to take account of the fact that they were limited to the "*life and limb*" test.

Discussion

32. The issue as to whether the test to be applied is "*life and limb*", has been comprehensively analysed in a recently published decision relating to an application for set aside **Jones [2023] PBSA 20**. The determination in that decision was as follows: "*In order to direct release, panels must look to the possibility of serious harm, either physical or psychological, being caused to the public. There must be more than minimal risk to the physical or psychological health of the public (including*



victims). However, the Parole Board now refers to the risk of serious harm rather than 'life and limb' to ensure that psychological harm is captured and given equal weight with physical risk to life or limb."

33. This decision has not been subject to any appeal. In my determination it reflects the correct legal position. I therefore reject the contention that the test is simply "life and limb", as suggested by the Applicant's legal adviser. In the light of the index offence and the issues relating to the Applicant's relational difficulties, psychological harm was a relevant and important consideration in assessing risk in this case.

Ground 2

34. It is submitted that the evidence within the hearing did not support the contention that the Applicant did not meet the test for release, and therefore the conclusion that it was necessary for the protection of the public for the Applicant to remain in custody.

Discussion

35. I have considered whether there was evidence supporting the decision of the panel that the Applicant did not meet the test for release. The panel noted that the index offences committed by the Applicant were serious. They determined that the index offences had demonstrated entitlement thinking and an assault upon the victim for personal sexual gratification. The panel also noted that the Applicant, prior to committing the index offence, had a history of violent offending, which involved assaulting strangers, authority figures, and those known to him. The offences had been committed on occasion when under the influence of substances. The panel also expressed concern about whether the Applicant had indeed accepted and understood the seriousness of his offending. He had on some occasions admitted the index offence, and on other occasions appeared to be ambiguous about the admission. The panel also noted that during the Applicant's prison sentence, there had been concerns about inappropriate behaviour and comments particularly addressed towards female staff. The panel also noted evidence of adjudications for fighting, threatening behaviour and failing to follow rules. Although it was noted that the last adjudication had been in 2013. Between paragraphs 2.14 and 2.24 of the decision, the panel listed a number of negative issues which had arisen in the prison. The issues included looking inappropriately at a female member of staff, touching a staff member inappropriately and being inappropriately naked in a cell.

36. The panel's decision makes it clear that it accepted the views of the prison instructed psychologist that there were concerns about the Applicant's internal (self management) skills and his potential confusion in relational situations. These issues raised concerns relating to a potential risk of sexual harm or conflict generally. The panel's view was reinforced by the evidence of inappropriate behaviour when in the presence of female members of staff.

37. I have carefully considered the decision in this case. The decision was extremely lengthy and comprehensive. The panel were under an obligation to give adequate reasons for the decision, and to demonstrate that the decision that they had reached was based upon credible evidence. As noted above, I am satisfied that the panel in



this case identified credible evidence and clearly set out the reasons why they had come to the conclusion that the Applicant did not meet the test for release. The panel's decision was reinforced by the fact that all professionals also took the view that the Applicant's risk could not be safely managed in the community. For this reason, I am not persuaded that this is a case of inadequate reasons as set out in the ground above.

Ground 3

38. It is further submitted by the Applicant's legal adviser that the Panel's decision was irrational as it did not fully take into account cognitive issues which affect the Applicant's presentation and that as a result the panel attached a lot of weight to his presentation when making their decision.

Discussion

39. It was clear in this case that the Applicant had difficulties in terms of his relational abilities and his internal understanding of boundaries. The panel set out in some detail the findings of various professionals relating to the Applicant's cognitive difficulties and his personality difficulties. The panel were therefore fully cognisant of the difficulties identified by professionals relating to personality and learning. The panel also noted that the reporting psychologist had taken the view that the Applicant found it difficult to understand boundaries when dealing with professionals and that the Applicant also needed to work on his approach in everyday relationship situations.

40. The psychologist also considered that there was a potential of risk in relation to scenarios of rejection in relationships and therefore took the view that further work was required in relation to healthy relationships.

41. It was clear therefore that the panel fully understood the Applicant's personality challenges. It was also clear that the Applicant's risk was inextricably associated with some of those challenges. The panel's duty was towards the public and the panel were obliged to apply the statutory test taking into account the risk of serious harm to the public. I am not persuaded that the panel failed to fulfil this obligation. I do not, therefore, find that their approach was irrational in the sense set out above.

Decision

42. For the reasons I have given, I do not determine that the decision was irrational and accordingly the application for reconsideration is refused.

HH Stephen Dawson
17 January 2025

