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**[2025] PBRA 2**

**Application for Reconsideration by Caswell**

## Application

1. This is an application by Caswell (the Applicant) for reconsideration of the decision of the Parole Board, following an oral hearing on 12 September 2024 not to direct his release.

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:

    a. The dossier now comprising 815 pages, including the decision letter (DL) the subject of this application.

    b. The application dated 12 December 2024 submitted on behalf of the Applicant.

## Background

4. The Applicant is now 53 years old. In December 2002, following conviction and sentence at the Crown Court, he was sentenced to life imprisonment for murder and to 5 years imprisonment concurrent for causing grievous bodily harm. He was released on licence in November 2020 and recalled to prison on 4 May 2021 following breaches of his licence. He was released again in July 2022 and recalled for the same reason in January 2023.

## Request for Reconsideration

5. The application for reconsideration is dated 12 December 2024.

6. The grounds for seeking a reconsideration of the case are set out in full below:

***Ground One: Irrationality***

*"Two psychologists in this case both assessed [the Applicant]. They both agreed risk could be managed in the community. The evidence of both were clear and robust. They also both submitted that open conditions was not the correct route for [the Applicant].*

*"They both raised concerns about the viability of open conditions due to [the Applicant's] ASD; that due to the resources and remit within the open prison estate that this was not suitable for him, nor a move that was supported. "However, there are fewer staff in open conditions, meaning that [the Applicant] would have to navigate the behaviour of other prisoners with less professional support. Because of [the Applicant's] difficulties, he presents as an individual who is vulnerable to the behaviour of others, which is likely to be heightened with less staff. Once released, it is likely that [the Applicant] would still require the same level of support and therefore, it is unlikely that open conditions would provide significant benefit at this time".*

*"They agreed Risk is not imminent and could be managed via the robust risk management plan in place. [The prison psychologist] and [the prisoner commissioned psychologist] both also echoed that [the Applicant's] ASD should not be interpreted as risk, whilst it could be linked behaviours that the COM was concerned about were linked to ASD and unlikely to change.*

*"The POM in his evidence made it very clear that she believed the work completed was significant in terms of risk and reconviction. He stated that he believed that open conditions held little value.*

*"We say the Panel decision is arbitrary, disregards core work completed since recall and how ASD impacts his presentation.*

*"The recommendations of the psychologists are disregarded with no real justification. No one at this hearing supported open conditions as a viable or useful step.*

*"In Osborne, R (On the Application Of) v Parole Board for England & Wales England and Wales High Court (Administrative Court) The court accepted that the panel was not bound by the professional evidence, but it considered there to be a heightened duty to give reasons where it rejects that evidence, and the court found the panel to have fallen short of that elevated standard.*

*"The court also found that the panel's decision was not consistent with operative assumptions or inferences which are not visibly tested, articulated or explained, and which may or may not be misconceived.*

*"Therefore, the court did not think this decision could be safely upheld.*

*"We submit that this case applied to the current situation for [the Applicant]. The Board failed to give adequate reasons for its conclusions and in particular for disagreeing with unanimous professional opinion that open conditions was not appropriate in this case.*

*"This was procedurally unfair and/or irrational.*

*"The Parole Board was not bound to accept the professionals' recommendations, but it was incumbent on them to set out clearly its reasons for doing so. We submit that whilst the views of the professionals were sought on these issues, they have*

*not been recorded fully. This means that the decision is not well founded in substance, fairly reached or fully articulated.*

*"Nevertheless, in turning to set out its reasons for not directing release or accepting the evidence of change, The Parole Board failed to explain why it was departing from the recommendations of several specialists."*

***Failure to adjourn***
***Failure to ensure that all information was available to make a fair decision.***

*"The Parole Board MCA Guidance states at paragraph 3.6, "Where a member requires additional information, the focus must be on what is essential to determine or progress the case. A formulaic approach to requesting additional information must be avoided. Every case referred to the Parole Board is different and should be treated as such. This means avoiding generalised responses such as always calling for post-programme review reports, or the previous dossier seen by an earlier panel. Requests for information should be proportionate, reflecting their relevance to the decision to be made and the need to follow a fair process. The baseline should be whether the existing dossier is adequate to allow a fair, effective, and timely decision to be made.*

*"3.7 As a first step, where required material is missing, the MCA panel should adjourn or defer (an adjournment should always be considered before a deferral)"*

*"Whist these are Parole Board MCA guidelines, we submit that this applies equally to the case at any stage. As such [the Applicant] has not had a fair review and it was procedurally flawed. At a minimum this case, to allow for fairness should have been adjourned for further information.*

*"It is clear that the decision maker does not have adequate information and this is accepted in terms that there is gaps in the RMP. The therapeutic interventions that [the Applicant] would most benefit from is in the community and this has not been considered.*

*"This is complex case and one where other options should have been explored to bolster the RMP. This is a man with additional needs and ASD where additional support should have been explored. Assessment of needs should have been directed.*

*"The Parole have the power to adjourn a case where more information is required and in this case they failed to exercise that power or indicate to me that this was a concern to allow me as a legal representative to address them on this issue."*

***Concluding Submissions for Reconsideration***

*"It is submitted that the decision is flawed due to irrationality based upon the above Grounds. Finally, this is clearly a case where the stakes are so high. This is a question of liberty. Justice must not only be done but seen to be done. We would therefore ask that this decision is quashed and a rehearing take place."*

**Current parole review**

7. This case was first referred to the Parole Board in February 2023 following the Applicant's second recall.

**The Relevant Law**

8. The panel correctly sets out in its DL the test for release.

*Parole Board Rules 2019 (as amended)*

9. 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)).

10. 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)). This is an eligible sentence.

*Irrationality*

11. 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."*

12. 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.

13. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then, another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *"more modern"* test set out by Saini J in **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

14. In the **Wells** case Saini J set out *"a more nuanced approach"* at paragraph 32 of his judgment when he said: *"A more nuanced approach in modern public law is 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".*

15. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

16. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a judge dealing with a judicial review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

17. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear, and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

18. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

19. The giving of reasons by a decision maker is *"one of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

20. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses, then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said: *"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

21. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

*Procedural unfairness*

22. 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.

23. 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 did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

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

*Other*

25. 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.

26. 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 Secretary of State (the Respondent)**

27. The Respondent has offered no representations in respect of this application.

**Discussion**

28. By Rule 28(1) of the Parole Board Rules 2019 the only decisions amenable to reconsideration are those under Rules 19, 21 or 25 to release or not to release. A Parole Board decision to recommend – or not to recommend - a prisoner's transfer to open conditions is not amenable to the reconsideration process. This decision is therefore focused on the question of the rationality or otherwise of the panel's decision not to recommend release.

29. Panels are frequently presented with differing opinions on the suitability of a prisoner for release by the professional witnesses. In this case, the Prison Offender Manager (POM) "*found it difficult to make a recommendation*". The Community Offender Manager, who had had responsibility for his case since before his last release on licence, did not recommend release. The two psychologists, one instructed by the prison and the other by the Applicant, recommended release.

30. Grounds 1-4. The evidence of the psychologists and the rationality of the DL concerning their evidence. The DL sets out its findings on this issue at paragraphs 3.8 and 4.2-6. As the panel made clear, the fact that he suffers from autism spectrum disorder (ASD) "…*whilst it may assist in explaining his behaviour it does not excuse it or mitigate his risk of serious harm*." The panel was reaching its conclusion against the background of a dreadful index offence and two unsuccessful recent periods of release into the community which had involved threats of violence and culminated in his recall, (DL paragraphs 2.3-8). The grounds are aimed at the recommendation of a transfer to open conditions – which is not amenable to reconsideration. The panel however, rightly, focused on the risk the Applicant still presents of causing serious harm and clearly concluded that that risk – which he currently presents, and would present on release, was too high to allow it to direct release. There was ample justification for such a finding.

31. Grounds 5-10. The POM was not prepared to make a firm recommendation "*in part because of the lack of appropriate work in custody*", DL 3.9. He was not opposed to the recommendation for open conditions albeit he saw limited benefits to the idea – in particular that highlighted by the DL at paragraph 4.6. The Parole Board's duty is to safeguard so far as possible the public from serious harm. The availability or otherwise of "*work*" in one or another custodial setting or at liberty on licence, while always relevant, cannot be determinative. The decision whether to direct the Applicant's transfer to open conditions is of course not for the Parole Board but the Secretary of State for Justice. There was no irrationality in the reasoning which led to the decision not to order release. The DL makes it quite clear why it did not accept the recommendations of the psychologists.

32. Grounds 11-15. There was no application on behalf of the Applicant for an adjournment – and, indeed, there was no need for one. The panel was presented, as is often the case with conflicting views from professionals. While the opinion of those with psychological expertise are very important the views of those who have and will or may have the day to day management of the prisoner are equally, if not more, important. There was no procedural irregularity in the panel's unopposed decision to decide the case on the evidence before it. No witness suggested that further time might reveal the existence of work which could be done in the community such as to reduce the risk the Applicant poses of serious harm.

33. Ground 16. This is a "*rolled up*" summary of the earlier grounds and adds nothing to the strength of the application.

34. Finally, I have considered the authorities above and the possibility that they might point in a different direction. They do not.

35. Accordingly, this application is refused.

**Sir David Calvert-Smith**
**03 January 2025**