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**[2025] PBRA 24**

# Application for Reconsideration by Barton

## Application

1. This is an application by Barton (the Applicant) for reconsideration of a decision made by a panel member dated 22 November 2024 not to direct 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 the paper decision, the dossier consisting of 241 pages and the application for reconsideration.

## Request for Reconsideration

4. The application for reconsideration is undated. It has been drafted by representatives on behalf of the Applicant. It submits that the decision was irrational and procedurally unfair.

5. The grounds for seeking a reconsideration are the Applicant was denied an oral hearing and that the panel failed to deal with legal representations which had been submitted. It is also argued that the panel failed to take into consideration that the Applicant was in a "post tariff position".

## Background

6. On 12 August 2011 the Applicant received a sentence of imprisonment for public protection following his conviction for grievous bodily harm. His tariff was set at 3 years and 6 months. He also received a concurrent sentence of 12 months imprisonment for assault occasioning actual bodily harm.

7. The Applicant was aged 30 years at the time of sentence. He is now 43 years old.

8. He was released following a direction of the Parole Board on 25 July 2022. His licence was revoked on 28 November 2022 and he was returned to custody on 30 November 2022. This is his second review since his recall.

## Current parole review

9. The Applicant's case was referred to the Parole Board in July 2024 by the Secretary of State (the Respondent) to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.

10. After considering the principles in the case of **Osborn, Booth & Reilly [2013] UKSC 61** the panel member, giving reasons for doing so, considered the case on the papers.

**The Relevant Law**

11. The panel correctly sets out in its decision letter dated 22 November 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)*

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. 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.

16. 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."*

17. 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)**.

18. 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.

19. 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.

20. 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*

21. 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.

22. 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.

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

24. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The

Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

**The reply on behalf of the Respondent**

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

**Discussion**

26. The Applicant accepts that when the panel considered his case on 22 November no legal representations had been submitted. Representations were submitted on 12 December and further representations on 19 December 2024. He states that his representations of 12 December were rejected by a subsequent MCA member and those of 19 December were ignored.

27. The Applicant submits that the procedural unfairness arises from a failure to follow the authority of **Osborn, Booth and Reilly** and subsequent cases and failure to give reasons for not calling for an oral hearing.

28. Having considered the decision I am satisfied that the panel member clearly considered the principles set out in **Osborn, Booth & Reilly** which is noted at the outset of the decision. On the basis of the papers before the panel member, which included all the facts of the case and the reports, and which did not include any representations requesting or supporting an oral hearing, the decision to proceed on the papers was manifestly appropriate and fair.

29. Omitting to put submissions before a panel is not a ground for procedural unfairness **(Williams [2019] PBRA 7)**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available, necessary or required, and so there was nothing to suggest procedural unfairness.

30. The Applicant appealed the decision in his representations dated 12 December 2024. That application was considered by a Duty Member in a decision dated 19 December refusing the request. An addendum document dated 19 December was submitted by the Applicant but not received by the Duty Member. I have considered that addendum which repeats the work the Applicant has done and submits that he has addressed his risks and attitudes. Both the panel member in the decision letter and the Duty Member in directions considered the matters raised. The addendum representations are seeking to re-argue matters already fully and fairly considered.

The application does not identify any basis to direct an oral hearing, all the matters relied upon having been dealt with by the panel and again by the Duty Member.

31. The Applicant submits that the decision was focused on the outcome, was terse in nature, relied on out-of-date reports and did not take into account the complexities of the case or of the Applicant's custodial behaviour.

32. In the sense that the panel considered whether it was necessary for the protection of the public that the prisoner should be confined, the panel considered the outcome as it is required to do. The panel considered the index offence, the risk factors, the two previous releases (2016 and 2022) and recalls, the previous panel decisions (2022 and 2023), the further offences committed by the Applicant when released and his subsequent sentence for those new offences. The panel took into account the work done in custody to address his risk factors, his engagement with the in-reach mental health team and his positive custodial behaviour.

33. With regard to the reports before the panel, the Community Offender Manager's report is dated 30 September 2024 and the OASys assessment was completed on 2 October 2024. The psychology case advice note (PCAN) of June 2024 does not recommend a psychology risk assessment noting that "it would not be of benefit at this time given the understanding regarding his risk factors". None of the reports were out of date and the risk factors identified were clearly linked to his behaviour and circumstances.

34. The application submits that an oral hearing was necessary to consider risk, to identify why treatment had not commenced, and to question what work was to be done to reduce risk. I do not agree. The Applicant had been released and recalled twice during his sentence. On both occasions the recall was connected to a failure to disclose a developing relationship. The panel therefore concluded that risk reduction work remained outstanding. The risk factors are clearly identified in the reports as is the work to be done to reduce that risk. The panel gave reasons for finding that the risk management plan was not sufficient to protect the public. The matters raised in the application were all considered by the panel and the conclusions reached were ones which were clearly reasoned and supported by the evidence. There was nothing further identified in the representations or application to justify an oral hearing. There was no irrationality in this conclusion or unfairness in the process.

**Decision**

35. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Barbara Mensah**
**30 January 2025**