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[2025] PBRA 4

Application for Reconsideration by Lowe

Application

1. This is an application by Lowe (the *Applicant*) for reconsideration of a decision dated 5 November 2024 (*the decision*) of a panel of the Parole Board (the *Panel*) following an oral hearing held remotely by video on 30 October 2024. The Panel decided not to direct the Applicant's release and not to make a recommendation for his transfer to open conditions.

2. Rule 28(1) of the Parole Board Rules 2019, (as amended in 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 that: (a) the decision contains an error of law; (b) the decision is irrational; and/or (c) the decision 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 papers are:

   - a dossier of 883 pages;
   - the Panel's decision dated 5 November 2024;
   - an application for reconsideration dated 7 November 2024 submitted by the Applicant to which was appended a handwritten letter of six pages (together *the application*);
   - a copy of a letter dated 18 November 2024 from the Applicant to his solicitor; and
   - representations dated 29 November 2024 by the Public Protection Casework Section (*PPCS*) on behalf of the Secretary of State (the *Respondent*).

4. I have also listened to a recording of the hearing held on 30 October 2024 which was approximately two hours and 13 minutes long.

Request for Reconsideration

5. The application is dated 7 November 2024. I have also taken account of a letter dated 18 November 2024 from the Applicant to his solicitor.

6. I have distilled three grounds for seeking a reconsideration of the decision. I have set these out below. The Applicant's handwritten letter includes his views about his sentence of imprisonment for public protection, and an explanation about why he has found it difficult to make progress. I have taken into consideration that the Applicant is representing himself in making the application, and to the extent that the Applicant's handwritten letter gives rise to or supplements arguments that are

relevant to a reconsideration of the decision, I have taken those arguments into account.

7. The Applicant's grounds for seeking a reconsideration are:

(a) **Error of law:** the Applicant submits that the decision contains an error of law because he was given insufficient time to consult with his legal representative. The Applicant's solicitor had instructed counsel to represent him at the oral hearing on 30 October 2024. The Applicant states that he was "*permitted to consult with my barrister [name] for approximately 25 minutes which wasn't enough time to obtain adequate counsel. In fact, I was informed by my solicitor [name] I would have 1 hour to prepare for my oral hearing with my barrister. This placed me at a disadvantage.*".

(b) **Procedural unfairness:** the Applicant submits that the decision is procedurally unfair for several reasons:

i. he had insufficient time to consult with his legal representative (see above);

ii. he was not provided with a copy of his dossier before the hearing and because of his "*inexperience of Parole hearings*", it did not occur to him to ask for a copy. He states that he was obliged to read his prison offender manager's (*POM*) copy of the dossier which was "*over 300 pages*";

iii. he was unable to present his case fully because he was restricted to answering questions from the Panel and one member of the Panel did not ask him any questions; and

iv. he felt at a disadvantage because the oral hearing was conducted by video link and was not a face-to-face hearing. The Applicant states that this meant he had not brought any paperwork or certificates to evidence his achievements to the hearing.

(c) **Irrationality:** the Applicant submits that the decision was irrational because the Panel focused only on the negative aspects of his sentence and appeared to overlook many of the positive aspects. The Applicant refers to his completion of a programme called Motivation and Engagement which he submits enabled him to "*defy the false narrative that has characterised me as someone who isn't stable enough to engage in any type of Offender Behaviour Programme*". He also states that he has been drug free throughout his sentence and that all his drug tests have been negative.

The Applicant states that he has stagnated and not made progress for several reasons including being prevented or obstructed from accessing accredited programmes due to the actions of hostile prison staff, prison transfers, and unstable prison regimes.

In support of his argument that the decision is irrational, the Applicant submits that his risk can be managed safely in the community and refers to: (i) having "*matured significantly*" during his sentence; (ii) risk management measures such as a GPS tag and a zero alcohol tag; (iii) the widespread use of CCTV cameras, car dashboard cameras, doorbell cameras, and mobile phone cameras in the community; and (iv) his high blood pressure for which he is medicated,

which the Applicant claims motivates him to remain calm and means that it is not "*physically possible*" for him to present a significant danger to the public.

The reply on behalf of the Respondent

8. The Respondent has made two representations:

   (a) In response to the Applicant's submission that the POM misinformed the Panel by advising that the Applicant was not on medication when he was in fact taking medication for high blood pressure, the Respondent states that on 12 September 2024, the Applicant told the POM that he was not taking any medication but did express concern about his blood pressure. The POM later sought confirmation about his medication from the Healthcare team which confirmed that the Applicant was taking medication for high blood pressure.

   (b) In response to the Applicant's submission that he was not given a copy of the dossier, the Respondent states that the Applicant was given an initial dossier although the Respondent cannot specify the date on which this occurred. All addendum pages (which I have taken to mean additional pages added to the dossier) were disclosed to the Applicant on an ad hoc basis between June and October 2024. The POM confirmed that the Applicant had not brought these pages with him to the hearing.

Background

9. In 2009, at the age of 33 years, the Applicant was given a sentence of imprisonment for public protection for offences of attempted rape, sexual assault by penetration, and sexual assault. His two female victims were strangers to him and both were sexually assaulted in their homes after the Applicant had forced his way in. The Applicant's tariff of 62 months expired in 2014. He is ten years over his tariff.

10. The Applicant has a history of aggressive and serious violent offending and weapon possession. His victims have included strangers, police officers, hospital staff, and intimate partners. He experienced trauma and adversity during his childhood. In 2015, during his sentence, he was assessed as meeting the diagnostic criteria for paranoid, dissocial, and emotionally unstable (borderline type) personality disorders. The Applicant has spent two periods in a secure psychiatric unit during his sentence.

Current parole review

11. The Secretary of State referred the Applicant's case to the Parole Board in February 2021 for his fourth review during his current sentence. Legal representations dated 16 June 2021 sought a direction for release or in the alternative a recommendation for a move to open conditions. The case was directed to an oral hearing in July 2021. There was a series of deferrals and adjournments during 2022 and 2023. In March 2023, the Applicant was transferred to a secure psychiatric unit pursuant to section 47/49 Mental Health Act 1983, as amended. While the Applicant was detained in the secure psychiatric unit, his review by the Parole Board was suspended. He returned to the prison estate in August 2023, and his review by the

Parole Board was reactivated. The case was subsequently directed to an oral hearing in April 2024. After a cancellation in August 2024, the hearing took place on 30 October 2024.

12. The Panel comprised a judicial member who chaired the hearing, a psychiatrist member, and an independent member. Evidence was taken from the POM and the Applicant's community offender manager (*COM*). The Applicant also gave evidence to the Panel.

The Relevant Law

13. The Panel correctly sets out 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 in the decision.

The Parole Board Rules 2019 (*as amended in 2024)*

14. 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)).

15. 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)).

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

Error of law

17. 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.

18. 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.

Irrationality

19. 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.

20. 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 paragraph 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."*

21. In **R(on the application of Wells) v Parole Board 2019 EWHC 2710 (Admin)** Saini J sets 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)**.

22. 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 **R(DSD and others) v the Parole Board 2018 EWHC 694 (Admin)** was binding on Saini J.

23. 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.

24. 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

25. 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.

26. 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.

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

Other

28. 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.*"

Discussion

29. **Error of law** – the Applicant submits that the failure to give him sufficient time to consult with his legal representative was an error of law. I do not consider that this constitutes an error of law, but I have addressed the issue under the ground of procedural unfairness.

30. **Procedural unfairness** – the Applicant makes several submissions under this ground and the thrust of his arguments are that he was not given a fair hearing, that he was not properly informed of the case against him, and that he was prevented from putting his case properly. I have addressed each of his submissions separately.

(a) The Applicant submits that he had insufficient time to consult with his legal representative.

The Applicant does not indicate what matters he was unable to discuss with his legal representative that he would have wished to, or how it impacted on the presentation of his case. The Applicant should have broached this matter with his legal representative. Failing that, he should have raised it with the chair of the Panel (*Panel Chair*). Having listened to the recording of the hearing, I note that neither the Applicant nor his legal representative mentions this matter to the Panel Chair at the beginning of the hearing. Also, there is nothing to suggest that the Applicant's legal representative was not fully prepared to present the Applicant's case before the Panel, or that the Applicant was unable to follow proceedings. At the beginning of the hearing, the Panel Chair made it clear to the Applicant that he could ask for a break at any point during the hearing

including to enable him to have a private consultation with his legal representative. The Applicant does not ask for time to consult with his legal representative during the hearing.

I do not find that the Applicant's submission has any validity. I consider that the Applicant had ample opportunity to raise this as an issue but chose not to and I do not accept that there was any unfairness to him in the proceedings.

(b) The Applicant submits that he was not provided with a copy of his dossier before the hearing, and because of his "*inexperience of Parole hearings*", he states that it did not occur to him to ask for a copy. He claims that he was obliged to read the POM's copy of the dossier which was "*over 300 pages*" during the hearing.

At the beginning of the hearing, the Panel Chair confirmed with the Applicant's legal representative that she had the same dossier of 883 pages as the Panel. It would have been good practice for the Panel Chair to ask the Applicant if he had a copy of the same dossier and had brought it with him to the hearing. It would also have been good practice for the Panel Chair to ask the POM and the COM if they had copies of the same dossier. This avoids issues materialising later in the hearing and, in this case, would have clarified whether the POM's copy of the dossier at the hearing was a complete copy.

The Applicant submits that it had not occurred to him to ask for a copy of the dossier beforehand because of his inexperience of hearings. I note from the dossier that he attended and gave evidence at a previous oral hearing in 2018, and therefore he would have had some familiarity with the parole process. The Respondent states that the Applicant was given the basic dossier and then additional reports were provided to him on an ad hoc basis.

Having considered the Applicant's submissions and the Respondent's submissions, and having listened to the recording of the hearing, I find on the balance of probabilities, that the Applicant was likely to have received a copy of the dossier albeit that he chose not to bring it with him to the hearing. I believe that if he had not been provided with a copy of the dossier, he would have asked the POM for a copy of the dossier so that he could discuss his case with his solicitor and his legal representative. There is nothing to suggest that the Applicant was hesitant in answering questions from the Panel or his legal representative, or that he was not aware of recent reports. Indeed, at one point, the Panel Chair checks whether everyone had access to a recent report dated 29 October 2024 (the day before the hearing), and the Applicant did not state that he had not seen it. I do not accept therefore that the Applicant was not properly informed of the case against him.

(c) The Applicant submits that he was unable to present his case fully because he was restricted to answering questions from the Panel and that one member of the Panel did not ask him any questions. The Panel questioned the Applicant for over an hour. The psychiatrist member of the Panel led the questioning of the Applicant, and the Panel Chair also asked questions of the Applicant. The Applicant is correct that the third member of the Panel did not ask him questions, but that is not unusual. The Panel had the advantage of an extensive dossier of reports and other material, and its focus was on asking questions that

enabled it to make an assessment of the Applicant's risk and consider his application for release. The Applicant was given an opportunity to give his reflections on the index offending, his understanding of his risks, how he had addressed his risks, and his account of certain incidents that had occurred in prison. After being questioned by the Panel, the Applicant was questioned by his legal representative who gave him an opportunity to talk about improvements in his behaviour, and how he had implemented his learning and his skills during his sentence. It was open to his legal representative to explore any matter in dispute and to challenge any of the witnesses' opinions, recommendations, and findings.

Before his legal representative was invited to present her closing submissions, the Panel Chair asked the Applicant if he wanted to address the Panel on any matter. The Panel Chair had advised the Applicant at the beginning of the hearing that he would have the option of speaking to the Panel which would have given the Applicant time to consider what he might wish to say. The Applicant did in fact raise issues about stagnation and lack of progress, which are mentioned in the application.

I do not find that there is any evidence that the Applicant was either prevented from presenting, or not facilitated to present, his case fully.

(d) The Applicant submits that he felt at a disadvantage because the oral hearing was conducted by video link and was not a face-to-face hearing. He does not explain why he felt at a disadvantage save for mentioning that he was not able to bring paperwork and certificates to the hearing. Copies of certificates are routinely added to a dossier, and the Applicant could have asked the POM to add any certificates he wanted the Panel to be aware of to his dossier. While it is the case that a face-to-face hearing had been proposed previously, when the case was directed to an oral hearing in April 2024, it was assessed that a remote hearing by video link was suitable. I can find no objection to a remote hearing having been made by the Applicant or his legal representative either before, or indeed at, the hearing.

31. **Irrationality:** the Applicant submits that the decision is irrational because the Panel focused only on the negative aspects of his sentence and appeared to overlook many of the positive aspects. In his introduction at the beginning of the hearing, the Panel Chair explained why the Panel's risk-related questions were likely to create an impression that its focus might appear negative to the Applicant. However, during the course of the hearing, the Applicant was able to discuss improvements in his behaviour and management of his risk, his accounts of recent incidents in prison, and how he was implementing learning and skills, and the Panel has recorded or reflected aspects of the Applicant's evidence in the decision. For example, his claim that he has been clear of drugs for 17 years is set out in paragraph 2.20 of the decision.

32. I do not accept that the decision is irrational. The decision presents the evidence in a logical and coherent way, and outlines the professionals' recommended treatment pathway for the Applicant. There was no support from the professionals for the Applicant's release or for a recommendation for a move to open conditions. The Panel sets out its thinking in unambiguous terms in paragraph 4.4 of the

decision, "… *he remains untreated and professionals have made it clear throughout this sentence that until he receives treatment within a custodial or hospital environment he cannot be considered safe to be managed in the community with the risks of further violent outburst and possible sexual attacks. It is to be hoped that the possibility of treatment in the [specialist] Unit can be successfully pursued. The panel is satisfied that [the Applicant] needs to complete further core risk offending behaviour work in custody and that at present he cannot be safely managed in the community.*"

Decision

33. For the reasons I have given, I do not consider that the decision contained an error of law, or was procedurally unfair, or was irrational. Accordingly, the application for reconsideration is refused.

Hedd Emrys
9 January 2025