

[2023] PBRA 200

## Application for Reconsideration by Lewis

### Application

1. This is an application by Lewis (the Applicant) for reconsideration of a decision dated 9 October 2023 made by a panel following an oral hearing not to direct his release.
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 decision, the dossier (comprised of 1,190 pages), and the application for reconsideration. I have also listened to an audio recording of the hearing.

### Background

4. The Applicant received a sentence of life imprisonment on 20 December 2002 following conviction after trial for rape. His tariff expired in May 2007.
5. The Applicant was 40 years old at the time of sentencing and is now 61 years old.

### Request for Reconsideration

6. The application for reconsideration is dated 30 October 2023. It has been drafted by the Applicant. It submits that the decision was procedurally unfair and irrational.
7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

### Current Reference

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2017 to consider whether or not it would be appropriate to direct his release. This is the Applicant's seventh parole review.
9. The matter proceeded to an oral hearing on 27 September 2023 before a three-member panel, including a psychologist specialist member. The Applicant was legally represented throughout the hearing. The Respondent was not legally represented. The panel heard oral evidence from the Applicant, his Prison Offender Manager



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(**POM**), his Community Offender Manager (**COM**), an HMPPS psychologist (the **prison psychologist**) and a psychologist commissioned by the Applicant (the **prisoner psychologist**).

10. In the professional opinion of the POM, COM, the prison psychologist, and the prisoner psychologist (that is, all professional witnesses), the Applicant was not suitable for release (nor transfer to open conditions).
11. The panel did not direct the Applicant's release. In doing so, it concluded that no risk management plan, however stringent, could currently manage the Applicant's risks safely in the community.

### The Relevant Law

12. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for decisions.

#### *Parole Board Rules 2019*

13. 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)).
14. 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)).
15. 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**.

#### *Procedural unfairness*

16. 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.
17. 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.

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

### **The reply on behalf of the Respondent**

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

### **Discussion**

20. The main thrust of the application is concerned with the quality of the written and oral evidence provided to the panel. It is also argued that there was insufficient time at the hearing for that evidence to be properly examined.
21. The Applicant was legally represented at the hearing. If he, or his legal representative, felt that more time was required in the interests of fairness, then this should have been put to the panel. It cannot be procedurally unfair for the hearing to have concluded in the absence of any such challenge.
22. The application notes differences in the opinions of report writers. Professional opinion is exactly that and where there is a difference of opinion, it is up to the panel to decide which opinion it prefers. That is the panel's job. The Applicant also contends that he did not have an opportunity to put forward his opinion; the reasons for the decision suggest otherwise. The Applicant's opinion in relation to his innocence and his engagement with offending behaviour work is very clearly stated.
23. The Applicant has questioned the validity of the risk assessments undertaken in a letter to the prison psychologist and again in the application for reconsideration. Disagreement with a report, or the outcome of the hearing, does not establish procedural unfairness in law. The Applicant was given sufficient opportunity, both directly at the hearing and via closing written legal submissions to make his case for release. The panel was not persuaded to direct his release. That does not make its decision procedurally unfair.
24. Neither is the panel's decision irrational. It cannot be said to be so illogical that no other panel would have arrived at it. There was no professional support for release. The panel agreed with the views of the professional witnesses. It is permitted to do so, provided that it explains its reasoning. It did so. The Applicant clearly has a differing view, but that is not enough for the panel's decision to be overturned on the basis of irrationality. The legal test for irrationality sets a high bar, which this case does not meet.

### **Decision**

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

**Stefan Fafinski**  
**17 November 2023**