

**[2023] PBRA 71****Application for Reconsideration by Garside****Application**

1. This is an application by Garside (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 21 March 2023 not to direct the release of the prisoner.
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 and by listening to the recording of the hearing. The papers are, the dossier consisting of 594 pages, the application for Reconsideration submitted by the Applicants solicitor and the response by the Secretary of State (the Respondent).

**Background**

4. The Applicant is serving a sentence of life imprisonment for the offence of murder. He was sentenced on 3 May 2005. His tariff expired on 26 June 2022. He was aged 56 at the time of sentence and is now aged 74. This was the second review by the Parole Board.

**Request for Reconsideration**

5. The application for reconsideration is dated 9 April 2023.
6. The grounds for seeking a reconsideration are that the oral hearing panel failed to address the issue of allegations directly with the prisoner or his representative.

**Current parole review**

7. The referral from the Secretary of State requested the Board to consider initially whether the prisoner should be released and if not whether there should be a recommendation for a transfer to an open prison.
8. The panel consisted of an independent chair, a psychologist member and a



third independent member. Evidence was received at the hearing from the Prison Offender Manager, a prison-based psychologist, the Community Offender Manager, and an independently instructed psychologist. The Applicant was legally represented and gave evidence. A prison chaplain was present and read a victim statement. The dossier consisted of 572 pages.

### The Relevant Law

9. The panel correctly sets out in its decision letter 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. The text of the test for release is now standardised on a template.

#### *Parole Board Rules 2019 (as amended)*

10. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

11. 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*

12. 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."*

13. 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.

14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### *Procedural unfairness*

15. 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.
16. 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.
17. The overriding objective is to ensure that the Applicant's case was dealt with justly.
18. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).
19. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.
20. 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

21. The Respondent offered no representations.

### Discussion

22. The primary complaint in this case arises in relation to five separate issues which were noted in the panel's decision under the heading of "*Risk-related behaviour*". The complaint by the Applicant's solicitor was that although these



matters were recited in the decision, they were not discussed or raised either at the hearing itself or in advance. None of the specific issues were put to the Applicant or to any of the witnesses for comment. The five separate issues are listed below and briefly consist of the following -

- a. An alleged threat to a female member of staff in 2020.
- b. An incident where the Applicant was said to have touched the back of a key worker and stood in her personal space.
- c. An incident where the Applicant made an inappropriate comment towards a member of staff making them feel uncomfortable.
- d. A factual matter recorded in the dossier namely that the Applicant had coerced his daughter into bringing drugs into the prison.
- e. An allegation that the Applicant threatened to "get" the daughter of the victim. The threat said to have been made in August 2020.

### Grounds

23. The essence of the complaint in relation to these incidents was succinctly set out by the Applicant's solicitor as follows:

*"It is submitted that where there are issues which concern the Panel, the Panel, as part of its independent function, should seek to explore those issues. This is a point made having regard to the issue of fairness. Enabling [the Applicant] an opportunity to provide evidence on the issue, to argue the issue and to enable for any witness giving evidence on his behalf to offer their opinion."*

24. The position relating to allegations has been recently explained by the Supreme Court in the case of **R (on the application of Pearce and another) (Respondents) v Parole Board of England and Wales (Appellant) 2023**.

25. In their decision the Supreme Court rejected the notion that allegations, which have not been proven on the balance of probabilities, may not be taken into account having regard to public safety. The court decided as follows (at paragraph 87)

*"If weight is to be given to an allegation of criminal or other misbehaviour in the risk assessment, the Board should first attempt to investigate the facts to enable it to make findings on the truthfulness of the allegation. If, as may often be the case despite its efforts to obtain the needed information, the Board is not able to make such a finding, it should investigate the facts to make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner which is relevant to the assessment of risk."*

*(vi) In some circumstances, however, the Board may not be able to make findings of fact as to the truth of an allegation either because of an inability to obtain sufficiently reliable evidence or because it would be unfair to expect the prisoner to give an answer to the allegation when he is facing criminal or prison disciplinary proceedings in relation to that allegation."*

*(vii) In such circumstances the Board, having regard to public safety, may take into account the allegation or allegations and give it or them such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true. But the Board must proceed with considerable caution in this exercise because of the consequences of its decision on the prisoner. Procedural fairness requires the Board to give the prisoner the opportunity to make submissions about how the Board ought to proceed. There may be circumstances where, because of the inadequacy of the information available to the Board, it concludes that it should not take account of an allegation at all. There may also be circumstances where the information is less than would be desired but the allegation causes sufficient concern as to risk that the Board treats it as relevant. Its assessment of the weight to be attached to an allegation is subject to the constraints of public law rationality.*

*(viii) Thus, a failure to make findings of fact where it was reasonably practicable to do so or an irrational reliance on insubstantial allegations could be a ground of a successful public law challenge."*

26. Having considered the representations in this case, and in the light of the guidance cited above, I have determined that this matter should be reconsidered.
27. The panel in this case cited five issues which were relevant to risk and were properly referenced by the panel as issues to be taken into account in connection with the Applicant's risk. It is highly likely that all these five matters would not be susceptible to any further investigation in terms of reaching a decision as to their merit on the balance of probabilities. However the Supreme Court have indicated that in circumstances where a panel is likely to base its decision upon allegations, the panel should give the prisoner the opportunity to make submissions as to "how it should proceed in relation to those allegations."
28. In this case the allegations were clearly disclosed to the prisoner and his legal representative within the dossier. However the panel were unaware of the interpretation of the law as it would manifest itself in the Supreme Court decision.
29. In the circumstances therefore I have determined that, whilst it appears that reliance upon the allegations by the panel was perfectly proper, the panel were under an obligation to give the prisoner the opportunity to make submissions as to how those allegations should be dealt with. The allegations were not specifically addressed to the prisoner or his legal representative within the hearing itself. The prisoner was not therefore given an opportunity either in advance of the hearing or during the hearing to make representations as to how those allegations should be addressed.
30. The guidance of the Supreme Court will create some difficulties, particularly in cases of relatively numerous and wide-ranging allegations (as in this case). Panels of the Parole Board will be required to pre-empt any matters which



amount to allegations within the dossier and to ensure that the prisoner has the opportunity to make representations about those allegations and how the assessment of those allegations should proceed.

31. In the light of my decision relating to this aspect of the prisoner's application I have not addressed other issues cited in the application and make no decision upon them.

### **Decision**

32. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, the decision to have been procedurally unfair in the sense of the definition above. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**HH S Dawson**  
**26 April 2023**