

[2024] PBRA 138

Application for Reconsideration by Clarke

Application

1. This is an application by Clarke (the Applicant) for reconsideration of a decision (the Decision) made by a three-member panel dated 10 June 2024 not to direct the Applicant's release.
2. Rule 28(1) of the Parole Board Rules (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)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 Decision of 10 June 2024, the Application for Reconsideration dated 1 July 2024, the email of 9 July 2024 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) to the Parole Board, notifying the Board that the Respondent was not making any representations in response to the Application for Reconsideration and the Dossier totalling 462 pages.

Request for Reconsideration

4. The Application for Reconsideration is dated 1 July 2024.
5. The Grounds for seeking reconsideration of the Decision to refuse to release the Applicant are as follows:
 - (a) it was irrational for the Panel to conclude that there was further core offender behaviour work for the Applicant to complete when he had already completed a significant amount of work (Ground 1) and
 - (b) there was procedural unfairness as the Applicant disagrees with some of the information contained within the Decision (Ground 2).

Background



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6. On 29 October 2001, the Applicant was sentenced to life imprisonment for having a firearm with intent to commit an indictable offence and on that occasion, he also received concurrent sentences of 3 months' imprisonment for affray and 12 months' imprisonment for theft.
7. The Applicant has been released from custody on 5 occasions by the Parole Board after hearings and his licence was subsequently revoked on each occasion as
 - (a) he was released on 3 December 2009 and his licence was revoked on 20 October 2010;
 - (b) he was released on 8 May 2012 and his licence was revoked on 10 May 2013
 - (c) he was released on 22 January 2014 and his licence was revoked on 11 February 2014;
 - (d) he was released on 22 July 2014 and his licence was revoked on 28 July 2020; and
 - (e) he was released on 8 July 2021 and his licence was revoked on 28 April 2023.

Current parole review

8. The Applicant's case was referred to the Parole Board by the Respondent on 23 May 2023.
9. Oral evidence was given to the Panel by the Prison Offender Manager (POM), the Prison Psychologist and the Community Offender Manager (COM) and the Applicant, who was legally represented at the hearing.

The Relevant Law

10. The Panel correctly sets out in the Decision dated 10 June 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)

11. 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)).
12. 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)).



13. In the Decision, the Panel refused to make a recommendation that the Applicant should be moved to open conditions but this is not the subject of this application as it is settled that 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

14. 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.

15. 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.*"

16. 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).

17. 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. 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.

18. 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 it clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

19. 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.

20. 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.

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

The reply on behalf of the Respondent

22. In an email from PPCS on behalf of the Respondent to the Parole Board dated 9 July 2024 it was stated that the Respondent offered no representations in response to the Applicant's reconsideration application.

Discussion

Ground 1

23. This Ground is that the Panel was irrational to conclude that *"there is further core offender behavioural work for [the Applicant] to complete when he had already completed a significant amount of work [which included the following programmes]:*

- *Engaging with Cranstoun*
- *1:1 psychological work*
- *Harm reduction work - recognising [e]motions, intervention strategies, generating alternative decisions*
- *Positive changes - problem solving, setting goals, analysing emotions, adapting positive outcomes*
- *Challenging behaviour - dealing with conflict, recognising negative emotions, recognising negative behaviour, consequences of behaviour, recognising boundaries, mental health-PTSD, accepting ownership, trusting and helping others*
- *Intervention strategies and anger coping mechanism".*

These programmes will hereinafter be referred to as *'the Specified Programmes'*.

24. The Applicant's case is that the Panel had not *"fully considered"* the significant amount of work that he had already completed while doing the Specified Programmes when it stated that the Applicant had further work to complete before he could be safely released, therefore it is contended that it was irrational for the panel to state that the Applicant had further work to complete before he could be

released. It is not suggested that the Applicant had not completed the Specified Programmes.

25. In order to determine whether this Ground is valid, it is necessary to consider first, whether there was evidence at the time of the 2024 Decision that the Applicant posed a major risk of using physical violence and aggressive behaviour during and after intimate relationships; second, whether there was material which enabled the Panel to conclude that the Applicant was required to complete further core offender behavioural work before he could be safely released even though he had already completed a significant amount of behavioural work; and third to determine if these conclusions were irrational.

(i) Was there evidence at the time of the 2024 Decision that the Applicant posed a major risk of using physical violence and aggressive behaviour during and after intimate relationships?

26. By the time of the 2024 Decision, the panel considered that that the Applicant's risks on major intimate relationships had by then become a major area of risk and there was then ongoing evidence of risk within intimate relationships. By then, the Applicant had been convicted of affray in September 2023, receiving a 9-month sentence and the Panel notes that this conviction *"appears to relate to incidents relating to [2 females] and apparently were part of a plea bargain"*.

27. The Panel noted that these incidents occurred within the same relationship which was a factor in his previous recall in 2020. There was, as will be explained, much evidence of relationship violence on the Applicant's part and the Decision notes the significance of it as will be explained.

28. By the time of the Decision, the Panel accepted that the Applicant had *"completed a significant amount of work"* in the Specified Programmes, but the Panel having reviewed the evidence concluded that:

- (a) It is their assessment that *"the predominant risk [the Applicant] poses is within the context of any present or future intimate relationships based on the previous and most recent recall"* and *"the known adults at risk from him would be both [two named females] and future intimate partners"*;
- (b) that risk *"would be in the form of acts of physical violence and aggressive behaviour which could cause serious physical and psychological harm"*;
- (c) *"this risk would be heightened if [the Applicant] were in an intimate relationship, was using alcohol, failing to manage his emotions and entered into a conflict situation pertaining to those relationships"*;
- (d) *"risk would be further heightened if any such relationship were to end and which [the Applicant] failed to appropriately manage"*;
- (e) *"given [the Applicant's] lack of insight into his risks within these contexts and previous failure to make relevant disclosures, the Panel were not content that warning signs of increased risk would be evident at the present time and further emphasises the necessity of him completing further work to address this"* and
- (f) the panel *"assess that there remains core work for [the Applicant] to complete to address the risk factors involved within his relationships. Given his current*



conviction and previous recall, the Panel does not consider that this work can be undertaken within the community”.

- (g) by the time of the Decision now under challenge in June 2024, *“there remains core work for [the Applicant] to complete to address the risk factors within his relationships [and] the Panel does not consider this work can be undertaken in the community”.*

29. There is also much support for these conclusions from the professionals quoted in the Decision as, for example, the Applicant’s COM assessed the Applicant as posing *“a high risk to the public in the form of future intimate partners”*. She assessed his likelihood of intimate partner violence was greater than his risk of general violence. The COM *“did not support the release [of the Applicant] due to there being outstanding areas of treatment regarding relationships and the hostility of [the Applicant] towards future supervision which would undermine the efficacy of any future [Risk Management Plan].”*

30. When the Prison Psychologist used the Spousal Assault Risk Assessment tool, she concluded that the Applicant posed a moderate risk of engaging in general violent reoffending, but significantly a high risk of violent offending against an intimate partner. She did not support release due to the Applicant’s outstanding needs. The Applicant’s POM considered that *“further work was required to address [the Applicant’s] intimate relationships, problem solving and coping with emotions”*.

(ii) Was there material which enabled the Panel to conclude that the Applicant was required to complete further core offender behavioural work before he could be safely released even though he had already completed a significant amount of behavioural work?

31. The significance of this issue is that the allegation is that it was contended that it was *“irrational to come to the conclusion that there is further core offender behavioural work for [the Applicant] to complete when he’s already completed a significant amount of work”*.

32. It was apparent from the conclusions of the panel set out in paragraph 28 above that the Panel concluded in relation to the Applicant with emphasis added that:

- (a) *“the necessity of him completing **further** work to address [the risk he poses of using physical violence and aggressive behaviour during and after intimate relationships]”;*
- (b) *“[that they] do assess that there **remains core** work for [the Applicant] to complete to address the risk factors involved within his relationships. Given his current conviction and previous recall, the Panel does not consider that this work can be undertaken within the community”;* and that
- (c) by the time of the Decision now under challenge in June 2024 *“there **remains core** work for [the Applicant] to complete to address the risk factors within his relationships [and] the Panel does not consider this work can be undertaken in the community.”*



33. Similar views were expressed by the professionals. The COM “*did not support the release [of the Applicant] due to there being **outstanding areas of treatment** regarding relationships and the hostility of [the Applicant] towards future supervision which would undermine the efficacy of any future [Risk Management Plan]*”. The Prison Psychologist did not support release due to **outstanding needs**. The Applicant’s POM considered that “**further work was required** to address [the Applicant’s] intimate relationships, problem solving and coping with emotions”. Emphasis added.

34. I have concluded that there was material which enabled the Panel to conclude that the Applicant was required to complete further core offender behavioural work before release which could not be completed in the community even though he had already completed a significant amount of work as would have been apparent to the professionals and the panel from reading the dossier.

(iii) Are the conclusions of the Panel and the professionals that at time of the 2024 Decision the Applicant posed a major risk of using physical violence and aggressive behaviour during and after intimate relationships and that there was a need for the Applicant to complete further core offender behavioural work before release irrational?

35. In deciding if these conclusions were irrational, it is necessary to stress that there can only be findings of irrationality if the conclusions under challenge meet the **DSD** test that the conclusions were “*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 [them]*”.

36. Crucially, no evidence or submissions has been found to show that the conclusions were irrational and I have concluded that the Applicant’s case falls a long way short of establishing irrationality in relation to the findings that at the time of the 2024 Decision, the Applicant posed a major risk of using physical violence and aggressive behaviour during and after intimate relationships and that there was a need for the Applicant to complete further core offender behavioural work before release.

37. I have considered with care the issue of whether the conclusions under review can be regarded as irrational and I have no doubt that they fall well below the threshold set out in the **DSD** test for a finding of irrationality in the light of the Applicant’s history and the unchallenged views of the professionals.

Ground 2

38. This ground is that reconsideration should be ordered because “[the Applicant] disagrees with some of the information in the Decision” in respect of three matters which will henceforth be referred to as ‘the three specified matters’. The Applicant contends that these errors in the three specified matters show that there was procedural unfairness in the Decision which means that reconsideration of the Decision should be ordered. I will consider first if the Applicant’s complaints on these three specified matters relied on by the Applicant are relevant to the risk he poses in intimate relationships and if so, second whether they constitute good grounds for showing that there was procedural unfairness; and if so, third even if the Applicant can establish procedural unfairness on the three specified matters



and in consequence the evidence in relation to that has to be excluded, the issue is whether this means that in the light of the other evidence reconsideration should be ordered as the Applicant is safe to be released.

(i) Are the three specified matters relied on by the Applicant relevant to risk?

39. The first of the three specified matters of which complaint is made relates to one of the matters which led to the Applicant's recall on 26 April 2023 and that was because of his conduct in relation to a female. It is stated in the Decision that on that day he engaged in a verbal altercation with one of his former partners before he hit her *"to the face and then hit her head against the door multiple times causing her to lose consciousness"*. The Applicant contests this explaining *"he was found not guilty of hitting the door against the head of one of the women multiple times causing her to lose consciousness and that he was not arrested nor charged with any public order offence"*. The Applicant states that there was no CCTV footage of him assaulting anyone. I accept if correct, these contentions of the Applicant on this matter could have been of some relevance to the risk he poses. I will return to consider if these matters constitute or show procedural unfairness.

40. The second of the three specified matters of which the Applicant complains is that he disputes the statement in the Decision that his father engaged in a gang culture, and he explains in his representations that he has since informed the prison psychologist of this. There is a memo that the prison psychologist sent to the Applicant apologising for this and stating that she has amended her report but *"the amendment does not impact on [the Applicant's] assessment of risk/formulation"*. This fact is not challenged and in any event, I cannot see how the fact that the Applicant's father was or was not involved in gang culture many years ago is of any relevance in determining in any way the risk posed by the Applicant in intimate relationships at the present time.

41. The third of the three specified matters of which the Applicant complains is that the Decision states he was given a mandatory life sentence for the index offence while the true position is that he was given an automatic two strike life sentence. Again, I do not see how this affects in any way the risk he now poses in relationships and the need for him to complete risk reduction work in respect of intimate relationships.

42. So, my conclusion is that it is only the first matter set out in paragraph 39 above which could possibly be relevant on the issue of the risk which the Applicant now poses in relation to intimate relationships. The other two matters are not relevant on that issue but in case I am wrong, I will consider in the case of each of the three specified matters whether reconsideration should be ordered on grounds of procedural unfairness.

(ii) Does the Applicant have good grounds for reconsideration on grounds of procedural unfairness?

43. The Applicant can only succeed in obtaining reconsideration on this ground if it can be shown that there has been procedural unfairness, which, as its name suggests, is concerned with procedural issues and not with substantive issues such as factual matters relating to the Applicant's behaviour and factual errors in the Decision



which cannot be considered as procedurally unfair. In other words, procedural unfairness claims are required to focus on how the Decision was made and not on errors in the actual Decision which have to be dealt with as irrational claims and not as procedurally unfair claims. So, the first requirement for a claim for procedural unfairness is that the complaint must relate to a procedural matter and not a substantive issue such as an error in the Decision.

44. The second requirement for claim for procedural unfairness to be proved is, as I have explained in paragraphs 19 to 21 above, that the claim must fall within one of the categories set out in paragraph 19 above or that there is evidence that the claim was not dealt with justly. The Applicant's claim does not fall in one of the categories set out in paragraph 19 above and there is no evidence that the Applicant was not dealt with justly. Typically, procedural unfairness on the ground that a party has not been dealt with justly can be established if a party has been prevented from putting forward his case, for example by not being given an opportunity to address the decision maker on particular issues or to question a witness. No allegation of this type has been suggested or established in this case. So, my conclusion is that nothing has been put forward that a procedurally unfair approach was adopted by the Panel in this case. So, this claim of procedural unfairness fails in respect of each of the three matters of which complaint is made as they are based on errors in the actual Decision; therefore, any challenge relating to any of the three specified matters on the grounds that they were procedurally unfair must be rejected. This means that reconsideration cannot be ordered of the Panel's approach on each of the specified matters on the basis of Ground 2.

(iii) Even if (contrary to my conclusion in paragraph 44 above) the Applicant can establish procedural unfairness on any of the three specified matters and the evidence in relation to that has to be excluded, does that mean in the light of the other evidence reconsideration should be ordered as the Applicant is safe to be released?

45. I will consider this remaining issue notwithstanding my conclusion that there had not been procedural unfairness in respect of the three specified matters to which I have referred, and reconsideration cannot be ordered on Ground 2. This remaining issue is to consider the case on the basis that there had been procedural unfairness in respect of the three specified matters and so this issue to consider if the **remaining** evidence (excluding the three specified matters) shows that the Applicant would not then pose a substantial risk in intimate relationships so that he can be safely released. As I have explained, the professionals are agreed that the Applicant cannot be safely released because of the risk he poses and for the need for him to complete core risk reduction work prior to release.

46. There was much evidence of violence by the Applicant in intimate relationships when he has been in the community. As I have explained, he was convicted of affray in September 2023, receiving a 9-month sentence and the Panel notes that this conviction "appears to relate to incidents relating to [2 females] and apparently were part of a plea bargain". In addition, he has been recalled on 5 occasions since his initial release in 2009. The current recall occurred after the Applicant had been involved in a domestic disturbance with 2 females. The Decision states that "the decision to recall him on these occasions was entirely appropriate". All these matters show that if I am wrong and the claim for procedural unfairness succeeds,



he cannot be released and reconsideration cannot be ordered because there is still the remaining significant risk he poses in intimate relationships on the basis of the remaining evidence which the Applicant has not challenged, and which have been set out in paragraphs 28 to 30 above.

47. So, Ground 2 must be rejected because even if the allegations relating to the three specified matters are correct, the claim for procedural unfairness fails. Even if I am wrong and there was procedural unfairness, then the remaining complaints of the Applicant's risks in intimate relationships have to be considered without considering the three specified matters and the remaining evidence shows that the Applicant could not then be safely released.

48. I very much hope that when the Applicant completes the requisite work dealing with his problems with intimate relationships, a further application by the Applicant for parole can then be determined expeditiously by a panel.

Decision

49. 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.

Sir Stephen Silber
25 July 2024