

[2024] PBRA 160

## Application for Reconsideration by Bryan

### Application

1. This is an application by Bryan (the Applicant) for reconsideration of a decision of an oral hearing panel dated 10 July 2024 not to direct 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier consisting of 465 pages and the application for reconsideration.

### Request for Reconsideration

4. The application for reconsideration is dated 1 August 2024. It has been drafted by solicitors on behalf of the Applicant.
5. The grounds for seeking a reconsideration are that the panel was procedurally unfair and irrational in not accepting the Applicant's version of events of facts which were not proceeded with against him by the police and failing to give sufficient reasons for its decision.

### Background

6. The Applicant received a sentence of imprisonment for public protection (IPP) on 15 December 2006 following conviction for offences of rape and attempted rape of a female under 16. The tariff was set at 31 months and expired on 15 July 2009.
7. The Applicant was 24 years old at the time of sentencing and is now 42 years old. He was released on 5 March 2018 and recalled on 25 July 2018. He was released again on 4 March 2019, recalled on 23 September 2022 and returned to custody on 25 February 2023. This is his first review following the second recall.

### Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in March 2023 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



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was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

9. The case proceeded to an oral hearing via video conference on 28 June 2024. The panel consisted of three independent members. It heard evidence from the Applicant, his Prison Offender Manager (POM) and his Community Offender Manager (COM). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the release decision that is open for reconsideration.

## The Relevant Law

11. The panel correctly sets out in its decision letter dated 10 July 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)).

### *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) 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).

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.
18. 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.

### *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.
22. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

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

23. The Respondent has not submitted any representations in response to this application.



## Discussion

24. The Applicant's submissions are in relation to an incident that took place in February 2023, after he had been recalled but before he had returned to custody. The details of that incident taken from the police report dated 6 September 2023 at page 103 of the dossier were as follows:

*"On 12/02/2023 at 07:24 hours police were notified of a road traffic collision involving a [vehicle] which had hit two parked cars. The driver of the vehicle had ran off from the scene of the crash and a female was naked and unconscious in the front passenger seat. The female was taken to hospital with a serious head trauma and she had bruising to both her knees and her wrists. The following day she disclosed that she had been vaginally raped by "LB". LB was identified as [the Applicant] through witness enquiries, fingerprints found on the vehicle and CCTV enquiries. [The Applicant] does not currently have a driving licence, he is not the registered keeper of the vehicle and has no insurance. He also failed to remain at the scene of an RTC and failed to report the RTC.*

*The victim and [the Applicant] had been in ... [the] City Centre at ... [a] nightclub where there was a promotion event for a vodka. The victim and [the Applicant] have left the club together in the above vehicle and the rape has occurred sometime before the vehicle has been involved in the RTC.*

*When interviewed, [the Applicant] provided a prepared statement that he does not have a driving licence, and he was driving the vehicle on the morning of 12/02/2023. He stated that he was trying to take the vehicle back to the owner. He admits leaving the scene of an RTC. He stated that he met the victim at a nightclub. He stated that there was an incident where the police attended. He knew he was wanted so he went to sit in the car. Two friends came over and told him that the owner of the vehicle had left. He has later left the club with the victim and the two friends. They have asked for a lift to one of the friend's address which was on his way home. He drove the vehicle to the friends. He stated that the victim came onto him and has tried to kiss him a number of times. He stated that the victim has tried to lead him up the stairs, but the friend has stopped them. [The Applicant] stated that the owner of the vehicle called him and told him to return the vehicle. The victim has accompanied him. He had to stop the vehicle to make a phone call and the victim was still trying to come on to him. She was kissing him and biting his lip. She has asked him to take her home to have sex. The next thing he remembers is crashing the vehicle.*

*There are currently outstanding enquires and therefore this investigation remains ongoing..."*

25. A subsequent police report dated 14 February 2024 at page 322 of the dossier stated that no further action was to be taken against the Applicant and that the investigation had been closed, the police having found that there was insufficient grounds on which to prosecute.

26. In the decision letter the panel recorded the Applicant's evidence regarding the February 2023 incident at paragraphs 2.16 and 2.17 as follows:



*"2.16 [The Applicant] denies committing the offence. He could not explain why the female was naked but was adamant that he had not taken her clothes off her and that he had not had sex with her. He told the hearing that his coat had been on her lap and when he went to take his coat before leaving the scene, he saw she had no trousers on; he said she was wearing a top.*

*2.17 [The Applicant] told the hearing he must have fallen asleep at the wheel. When asked why the female would have claimed he had raped her, [the Applicant] said she was probably scared about what her parents would say and so made up that story."*

27. In their decision the panel stated (paragraph 4.4) that it was unable to form a view as to whether or not the Applicant had had sex with the female and/or whether or not he had raped her. However, in relation to the surrounding allegation the panel did not believe the Applicant's account that he did not know why the female was naked when found.
28. The Applicant submits that it was unfair and irrational for the panel not to have accepted his account in the absence of evidence from any other witness. He further submits that the panel did not provide adequate reasons for its findings.
29. The law regarding how a panel should approach the use of allegations in its decisions is settled and is as stated by the Supreme Court in the case of **Pearce v The Parole Board [2023] UKSC 13 (Pearce)**. The function of the Parole Board is not to find a prisoner guilty or innocent of any criminal offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence.
30. The weight to be given to the evidence or information received is a matter for the panel. If weight is to be given to an allegation of criminal or other misbehaviour the panel's first task is to examine the facts and consider if it is able to make a finding on the truthfulness or otherwise of the allegation. If, as often happens, a panel is not able to make such a finding, it should then examine the facts and consider if it can make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner that is relevant to the assessment of risk giving it as much weight as it considers appropriate following an assessment of all of the information before it.
31. The panel undertook such an exercise and came to the conclusion that it could not make a finding in respect of the sex/rape allegation but could do so in respect of the Applicant's knowledge of the female's state of undress. The Applicant submits that the two conclusions are mutually exclusive. I do not agree.
32. Whilst the panel may not have given detailed reasons as to why it could not make a finding over the rape allegation, it is an obvious observation that the panel is not a criminal court and cannot make a finding of guilt. The question as to whether there had been sexual intercourse, whether that intercourse involved the Applicant and whether the intercourse was without consent amounting to rape had to be answered in the light of evidence from the female who was not part of the parole hearing. The panel did not have sufficient information in the dossier to consider or investigate the matter. Just because they had only the account from the Applicant that the allegation did not occur, did not oblige them to accept that account. The



panel was cautious in its assessment and as a matter of fairness noted that it could not form a view. Whilst the panel did not say so in terms, it is clear that in its assessment of risk the panel did not attach weight to that central allegation on which it had made no findings. There is no further reference direct or indirect to the allegation in the decision letter.

33. The panel could not make a finding regarding the central allegation but it was nevertheless able to make a finding on the collateral matter, namely the Applicant's knowledge as to how the female came to be naked in the vehicle. The Applicant has conflated all the matters into a single allegation and fails to see that there is the central allegation and collateral matters which can be investigated separately. The assessment of the collateral matter, of whether or not the Applicant knew why the female was naked, depended on the view the panel took of his explanation and clearly they did not accept it. They saw and heard him give his evidence and were in the best position to assess his credibility. That was a conclusion open to the panel. There was nothing unfair, procedurally unfair, inconsistent or irrational in their assessment or conclusions.
34. The Applicant submits that the panel has failed to give sufficient reasons for its findings or the weight attached to the findings and the impact on the overall decision. It may have been clearer to the Applicant if the decision letter had dealt with all the reasons in one section of the decision letter, however, the panel did give sufficient reasons albeit in various paragraphs in different sections of its decision. The panel considered the risk management plan and taking into account the fact that the Applicant had been recalled and that his behaviours did not appear to have changed, was not satisfied that he would not behave in the same way again thus undermining the robustness of the risk management plan.
35. In its concluding paragraphs (4.6 and 4.7) the panel notes that in the considerable time the Applicant was in the community, including the time he was unlawfully at large, he did not commit any further sexual offences or offences of violence. The panel placed weight on that positive factor. However negative factors, including those that went to risk were also considered. In particular the panel noted the Applicant's lack of openness and honesty with his professional team (paragraph 3.2) raising the concern that there may not be noticeable warning signs of risk in the future (paragraph 4.11). The panel's conclusions and the reasons for the conclusions are clear. There was no unfairness in its analysis or irrationality in reasoning.

## Decision

36. 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**  
**28 August 2024**



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