

[2024] PBRA 165**Application for Reconsideration by Willerton****Application**

1. This is an application by Willerton (the Applicant) for reconsideration of a decision of an oral hearing panel dated 16 July 2024 (the Decision) making no direction for the release of the Applicant and no recommendation for transferring him to open conditions.
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 Decision, the Application for Reconsideration and an email dated 20 August 2024 from Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) offering no representations in response to the Applicant's reconsideration application.

Request for Reconsideration

4. The application for reconsideration is dated 5 August 2024
5. The grounds for seeking a reconsideration are as follows:
 - (a) the Decision is procedurally unfair as it does not include the recommendation made by the Community Offender Manager (COM) at the hearing on 4 July 2024 that the Applicant should be released. Alternatively, or in addition, the Panel Decision is irrational or there was an error of law in that the Panel failed to take into account a material consideration (namely that recommendation by the COM that the Applicant should be released) in reaching its decision on release (Ground 1).
 - (b) the Panel's decision is irrational because the Panel did not take into account and/or rejected the views and recommendations of the professional and did not provide reasons for so doing (Ground 2).

- (c) the Panel's decision was irrational or there was an error of law in that the Panel did not apply the correct legal test when considering the Applicant's release (Ground 3).
- (d) the Panel's statement that the Applicant had demonstrated a "sense of sexual entitlement" is irrational (Ground 4).

Background

- 6. On 9 October 1992, the Applicant, who was then 22 years old, was sentenced to life imprisonment for the murder of his eighteen-year-old female partner, who was the mother of his young son. The Applicant had had a stormy relationship with his partner with money problems after the Applicant lost his employment and was living beyond his means. Arguments escalated into violence and eventually his partner returned to her parents' home where the Applicant strangled her because she had apparently taunted the Applicant.
- 7. The Applicant had no previous convictions for violence.
- 8. He has been released by the Parole Board on 4 occasions between his Tariff Expiry Date in October 2002 and March 2023 but his licence was revoked on each occasion.

Current parole review

- 9. The Panel heard evidence from the COM, the Prison Psychologist and a former Prison Offender Manager (POM) of the Applicant as the current POM "was stood down by agreement..." before the hearing took place.
- 10. The conclusion of the Panel was that: *"[it] reached the view that it would not be possible to manage the risk presented by [the Applicant] in the community as he had shown no internal controls to manage the risk he presented. He had acknowledged to the panel that his risk was in relationships, which was positive, but he had not been able to use that knowledge to self-manage in the community. Licence conditions which related to disclosure would not manage risk without internal controls. [The Applicant] has outstanding risk factors which the panel concluded could not be managed in the community. He needs to remain confined for the protection of the public and the panel made no direction for release"*.

The Relevant Law

- 11. The panel correctly sets out in its decision letter dated 16 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))
14. 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

15. 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.
16. 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.*"
17. 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).
18. 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.
19. 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



20. 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.

21. 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.

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

The reply on behalf of the Respondent

23. By an email dated 20 August 2024, PPCS, on behalf of the Respondent offered no representations in response to the Applicant's reconsideration application.

Discussion

Ground 1

24. This Ground is that the Decision is procedurally unfair as it does not include the recommendation made by the COM at the hearing on 4 July 2024 that the Applicant should be released. Alternatively, or in addition the Panel Decision is irrational or there was an error of law in that the Panel failed to take into account a material consideration (namely that recommendation by the COM that the Applicant should be released) in reaching its decision on release.

25. The response of the Respondent has been to offer no representations in response to the reconsideration application on this Ground. So, no reason has been put forward as to why this ground cannot be accepted especially as the views of professional witnesses must be properly considered by a panel deciding on release. While the Panel is not bound to accept the assessment of professional witnesses, they must however make clear in its reasons why it is disagreeing with the assessment of the witnesses. The Panel has failed to do this and so this Ground must be accepted, and reconsideration must be ordered on this Ground.

Ground 2

26. This Ground is that the Panel's decision is irrational because the Panel did not take into account and/or rejected the views and recommendations of professionals and did not provide reasons for so doing.



27. For the reasons set out in paragraph 25 above this Ground must be accepted and reconsideration must also be ordered on this Ground.

Grounds 3 and 4

28. For the reasons set out in Paragraphs 25 to 28 above, reconsideration has to be ordered on Ground 1 and/or Ground 2 and so I will not consider Grounds 3 and 4.

Decision

29. For the reasons set out above, I consider that the Decision was procedurally unfair or irrational and the application for reconsideration is therefore granted.

Sir Stephen Silber
30 August 2024