

[2024] PBRA 167

## Application for Reconsideration by Naseem

### Application

1. This is an application by Naseem (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 16 July 2024 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. 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 of 445 pages and the application for reconsideration. In addition I listened to the recording of the hearing.

### Request for Reconsideration

4. The application for reconsideration is dated 6 August 2024. It has been drafted by solicitors on behalf of the Applicant. It submits that the decision was irrational and procedurally unfair.
5. The grounds for seeking a reconsideration are as follows:
  - (1) The Decision was premised in part on the incorrect finding that the Applicant had not informed, or tried to inform professionals of his change in application;
  - (2) The Decision is irrational insofar as it deemed the Applicant's attempts to curb accusations of involvement in substance misuse as disclosing risk;
  - (3) The Decision is irrational because the conclusion does not properly flow from the evidence before the panel.

### Background

6. The Applicant received a sentence of life imprisonment on 23 July 2002 following conviction for 5 counts of rape. His tariff was set at 9 years (less time spent on remand) and expired on 1 October 2010. He also received concurrent sentences for indecent assault (4 years), kidnapping (7 years), false imprisonment (7 years) and threats to kill (4 years).
7. The Applicant was 39 years old at the time of sentencing and is now 61 years old.



3rd Floor, 10 South Colonnade, London E14 4PU



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



@Parole\_Board



0203 880 0885

## Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2022 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 was invited to advise the Respondent whether the Applicant should be transferred to open conditions.
9. The case proceeded to an oral hearing via videoconference on 5 July 2024. The panel consisted of two independent members and a psychologist member. It heard oral evidence from the Applicant, together with his two Prison Offender Managers (POMs), Community Offender Manager (COM) and a prison commissioned forensic psychologist. 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 Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The test is correctly set out in the oral hearing decision.

### *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*



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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*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) Saini J 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.
19. 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.
20. 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*

21. 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.
22. 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.



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

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

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

### **Discussion**

#### Ground 1

25. The first ground concerns the nature of the Applicant's application. The Applicant submits that he changed his application to wanting to be considered for release in addition to being considered for suitability for transfer to open conditions. He submits that the panel had erroneously recorded that one of the POMs gave evidence of being unaware that he was applying for release when such evidence had not been given. The applicant submits that the conclusions drawn by the panel were irrational and procedurally unfair. He further submits that the hearing transcript should be considered and a further statement obtained from the POM.

26. I have listened carefully to the transcript of the hearing and it is not necessary to obtain any further statement from the POM as her evidence at the hearing is clearly set out in the transcript. At the outset the Applicant's representative stated that the application was for release but in the alternative a recommendation for open conditions. His POM stated that the discussions with the Applicant had centred on a slow release into the community being a better plan. She said that she had spoken to the Applicant the Monday before the hearing. The Applicant had been aware that what was being considered and proposed was not immediate release but rather lower categorisation. However, the POM said that the Applicant had said that he had spoken to his solicitor and his solicitor had advised him to apply for release as well as considering the lower categorisation. The POM's position was that prior to the Monday before the hearing she had been under the impression that he agreed with the plan of a slow release to lower categorisation. Therefore, in that respect she had been unaware that his primary application was for release.

27. Even if the panel erroneously recorded that the POM had been unaware that the Applicant was applying for release, the panel's assessment of risk and test for release was based on a consideration of all the evidence and reached a conclusion that could not be described as irrational.

28. The fact that one of the POMs left the hearing early did not affect the fairness of the hearing. There were two POMs present, the other remained and was in a position to assist the panel if required to do so. The evidence of the POM who left had concluded before she asked to be excused due to illness. The Applicant's representative who was present throughout the hearing did not object to the POM leaving the hearing early. In cases where a prisoner has the benefit of legal representation, it would ordinarily be expected that any perceived deficiencies with the conduct of the hearing would be raised at the time, rather than via the reconsideration mechanism after the event. No objection was made at the hearing.



29. There was no procedural unfairness shown by the panel and no irrationality in their assessment and conclusions. There is no evidence that persuades me that the Applicant was not given a fair hearing and this ground therefore fails.

#### Ground 2

30. In this second ground the Applicant submits the panel conclusion that the reason he stopped his medication showed poor/impulsive decision making, was irrational. I do not agree. The Applicant states that he was entitled to stop his medication to prevent wrongful and false reports about his conduct. The panel did not deny his entitlement to do so, however his apparent willingness to sacrifice his pain management medication simply to avoid a report which he considered to be false could be described as evidence of poor/impulsive decision making. There is nothing irrational in that conclusion and therefore this ground also fails.

#### Ground 3

31. In the final section of the decision letter the panel fully sets out its analysis of the evidence presented. The panel has noted all the evidence in favour of a progressive move and also the evidence that goes against such a move. The matters raised in the application have not been overlooked by the panel. The weight attached to each of those considerations is a matter for the panel. The panel explains why, when it does so, it does not agree with conclusions of professionals. The decision is fully and fairly reasoned. The Applicant clearly disagrees with the conclusions, but disagreement does not establish irrationality in law. The legal test sets a high bar (see paragraph 16 above) which this case does not meet. Accordingly, this ground also fails.

#### Decision

32. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair in any respect and accordingly the application for reconsideration is refused.

**Barbara Mensah**  
**05 September 2024**

