

[2024] PBRA 188

Application for Reconsideration by O'Donnell

Application

1. This is an application by O'Donnell for reconsideration of a decision of an oral hearing dated 14 August 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 1035 pages and the application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 29 August 2024. It has been drafted on behalf of the Applicant by his legal representative.
5. The grounds for seeking a reconsideration are listed as follows:
 - (1) The decision was irrational and or unreasonable;
 - (2) The decision would not have been arrived at by another panel based on the evidence heard;
 - (3) The decision appears to contain unlawful discrimination;
 - (4) The decision cannot be justified based on the evidence of risk that was considered.

Background

6. The Applicant received a sentence of life imprisonment on 16 May 2006 following conviction for two offences of rape. His tariff was set at 5 years and expired in May 2011.
7. The Applicant was 43 years old at the time of sentencing and is now 61 years old.

Current parole review



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8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2019 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 6 August 2024, the hearing had previously been listed but these hearings had been deferred. The panel consisted of two independent members and a psychologist member. It heard oral evidence from his Prison Offender Manager (POM), Community Offender Manager (COM), two prison commissioned psychologists (considering psychological and neuropsychological assessments), prisoner commissioned psychologist and a family member. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 14 August 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)).

Irrationality

13. 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.
14. 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.*"



15. 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).
16. 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.
17. 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 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.

Error of law

22. An administrative decision is unlawful under the broad heading of illegality if the panel:
- a) misinterprets a legal instrument relevant to the function being performed;
 - b) has no legal authority to make the decision;



- c) fails to fulfil a legal duty;
- d) exercises discretionary power for an extraneous purpose;
- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

The reply on behalf of the Respondent

23. The reply on behalf of the Respondent is dated 6 September 2024, reference to the arguments will be made in the discussion section below.

Discussion

24. The representations in paragraphs 1-3 of the application are concerned with immigration status, the application of the Tariff Expired Removal Scheme (TERS) and analysis of future risk. The Applicant states that the panel is wrong in stating that because he is from Northern Ireland, he is not a foreign national. The Applicant states that the Good Friday Agreement recognized "*the birthright of the 'people of Northern Ireland' to identify themselves and be accepted as Irish or British, or both as they may choose and accordingly hold British and Irish Citizenship.*" He goes on to state that he revoked his British Citizenship 6 years previously, remaining as a citizen of the Irish Republic.

25. The panel concluded that the TERS arguments were not relevant as the Applicant is from Northern Ireland and is not a Foreign National. The decision letter states that the Applicant's application to be transferred during his sentence to Northern Ireland had been rejected by the Home Office. The Applicant states that there is no factual basis to this claim which he says suggests an adverse inference on the part of the panel and which may have assisted in forming a negative view regarding risk and risk management. The Applicant submits that the panel's position may amount to irrationality and unfairness.

26. The Respondent in reply notes that the Applicant as a British National is ineligible for removal from the United Kingdom under the scheme. The TERS applies to foreign national offenders serving an indeterminate sentence. The Respondent confirmed that the Applicant is a British National and therefore ineligible for removal from the United Kingdom under the scheme.

27. There was no evidence before the panel, such as a certificate of renunciation, to support the claim that the Applicant had revoked his British Citizenship as he claimed to have done 6 years previously. It does not appear that this claim of revocation was made to the panel by the Applicant in his evidence or by his representatives through their submissions. The Respondent does not consider that claim. In the absence of any credible supporting evidence I reject that claim.

28. Although the panel states that it is reported that the Applicant's application to be transferred had been rejected by the Home Office, there are no further details provided in the decision letter as to who made the report or when the application was made. The Applicant states that he has never made such an application. The panel have reported this matter as part of the history of the case, there is no evidence in the decision that any adverse inferences arose from that statement.



Nor any evidence that an application for transfer could have affected any part of their reasoning. Even if the panel were wrong in concluding that there had been an application it formed no part of the reasoning and does not affect the decision.

29. The panel's conclusions about the Applicant's nationality and transfer application did not and could not have had any impact on risk management. The Applicant submits that the panel conclusion on TERS if taken as part of the risk assessment or if not considered as part of the risk management package could amount to irrationality and unlawfulness. The Applicant is wrong in considering that the removal scheme, TERS, is part of the risk assessment. It is not. The panel having correctly concluded that the Applicant was not subject to removal proceeded to consider the evidence presented and reach a properly and thoroughly reasoned conclusion. The panel rejected the risk management plan as not being sufficient to manage the risk of serious harm the Applicant poses, whether he remained in England or moved to Northern Ireland. As the panel had correctly concluded that the Applicant was not eligible for removal under the scheme, there was nothing irrational or unfair in it not considering the scheme as part of the risk management plan.
30. The second ground can be taken shortly. The same decision may not have been arrived at by another panel as the grounds allege, but that is not the test. There are no grounds on which it could be sustainably argued that the decision not to release the Applicant was so irrational that every other panel would have decided otherwise.
31. The third ground argues that the decision contains unlawful discrimination. The argument appears to be based on a submission that as the Applicant suffers from a disability the panel should have granted release. This again is not the test and would be at odds with the need to consider the risk of the Applicant before directing release. The panel was aware of the Applicant's disabilities, in particular his cognitive decline. Taking into account those difficulties the panel considered as it was required to do, the test for release and having considered all the evidence presented concluded that it was necessary for the protection of the public that the Applicant should remain confined. The panel noted that there were unanswered questions regarding the Applicant's insight, his cognitive decline and the implication for risk management measures and risk of serious harm. The panel would have been failing in its duty if it had simply directed release on the basis of disability and failed to explore questions of risk and risk management. There was no unlawful discrimination in the application of the test or in the decision reached. This ground therefore also fails.
32. The panel considered evidence from a number of professional witnesses, from the Applicant and from one of the two family members who had attended the hearing. The panel also considered a dossier containing a large number of reports. The panel noted the differing professional views regarding the necessity for work prior to release, noted the Applicant's cognitive disabilities and did not find that the risk management plan as presented could manage the risk. The submissions under the final ground are an attempt to re-argue the matters raised at the hearing to submit that the panel should have reached a different conclusion. The grounds argue that the panel have given no reasons not to accept the evidence of the POM and the panel's conclusions are irrational.



33. In many cases there are several different decisions which a panel could be entitled to reach without any of them being irrational. In this case the panel thoroughly took into account all the evidence presented and reached a conclusion open to them which was rational and reasoned. The Applicant had over the years declined to engage in interventions to address his offending, even those which had not required him to accept responsibility for the offences for which he was convicted. The panel took into account the evidence of the COM that her previous discussions with the Applicant had been brief as he had not wanted to talk with her, his change of attitude appeared to have been revealed during the course of the hearing. The panel took into account therefore that there would be unanswered questions which could affect future risk and accepted the evidence of the COM that there was further work that should be done before release. The panel was entitled to attach weight to the significance of previous non-compliance for the reasons they had given (namely unanswered questions and unexplored matters and the necessity to take into account the intent to engage). There was nothing irrational in that conclusion, which in so far as it did not accept aspects of the POM's evidence was not irrational.
34. It is not right to say, as the application does, that the panel did not provide reasons for rejecting the neuropsychologist's view regarding residence with the family. After considering the issues carefully both from the professional witness and from the Applicant's family member who gave evidence, the panel concluded that the proposal was not realistic as it failed to appreciate the pressure that would be upon the family, particularly if there was a deterioration in the Applicant's mental and physical health in addition to potentially being a detriment to the family's own quality of life.
35. The application's repeated claim that another panel would not have arrived at the same decision and is therefore irrational, is simply wrong and misunderstands the test set out above. No doubt the Applicant was hoping for a different conclusion but that is not the test. The panel carefully considered the extensive oral and written evidence, applied the correct test and reached reasoned conclusions set out in the decision. There is no basis for reconsideration and rehearing of this case as requested by the Applicant.

Decision

36. For the reasons I have given, I do not consider that the decision was irrational or unlawful and accordingly the application for reconsideration is refused.

Barbara Mensah
23 September 2024

