

[2024] PBRA 197

Application for Reconsideration by Lang

Application

1. This is an application by Lang (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 9 September 2024. The decision was 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 dossier, the oral hearing decision, and the representations from the Applicant's legal adviser. No representations were received from the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 20 September 2024.
5. The grounds for seeking a reconsideration are set out below.

Background

6. The index offence in this case was robbery. The facts were that the Applicant and another threatened the victim, a 55 year old man, in his home. They secured knives from a kitchen with which they threatened the victim. They stole cash, his wallet and credit cards. The Judge concluded that the robbery was planned and premeditated from the outset.
7. The Applicant was sentenced to imprisonment for public protection (IPP). His tariff was three years. His tariff expired in November 2009. The Applicant was aged 35 at the time of sentence. He is now aged 52.

Current parole review

8. The Applicant was released by the Parole Board in January 2023 on licence. He was recalled in July 2023. This was his first review of the recall.



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

www.gov.uk/government/organisations/parole-boardinfo@paroleboard.gov.uk

@Parole_Board



0203 880 0885

9. The Parole Board panel hearing took place on 4 September 2024. The panel consisted of an independent member of the Parole Board as chair. Evidence was received from the prison offender manager (POM), the Applicant himself, and two probation officers (COMs). A dossier consisting of 474 pages was considered. The Applicant was represented by a solicitor.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 9 September 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. 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 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.
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.

Error of law

23. 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.

24. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Open Conditions

25. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, and **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.]

26. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

Reconsideration as a discretionary remedy

27. 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

28. The Respondent made no representations.

Grounds and Discussion



Ground 1

29. The Applicant's legal adviser contends that it was irrational to conclude that the Applicants "*pattern of serious offending over many years*", if repeated, would be likely to cause serious harm. This is argued on the basis that the Applicant did not have convictions for serious violence since 2006.

Discussion

30. In my determination this ground appears to conflate various issues referred to in the decision of the panel. The panel accepted in the decision letter that there had been no instances of serious violence "*for many years*". It was also the case however, that historically the Applicant had been involved in a pattern of serious violence. The offences in the past have included robbery and firearms offences, threats to kill, carrying weapons and aggravated burglary. The panel was entitled therefore to refer to the fact that there was a pattern of serious offending associated with the Applicant. The panel made it clear that their concern was that, if repeated, these offences would lead to serious harm.

31. The panel was obliged to consider risk in the future, but was clearly entitled to consider historical risk factors in making their assessment. At paragraph 2.32 of the decision, the panel listed a number of factors which it concluded raised concerns regarding potential future physical violence, and the potential for warning signs (of that physical violence) being missed. The panel therefore in my view, fully explained and set out in the decision, the basis upon which it had concluded that there was a risk of serious harm in the future.

32. As noted above, the panel accepted that there had been no further convictions for serious violence since the index offence, however an absence of convictions for serious offending could not be the sole factor to consider in assessing risk. I am not persuaded that the panel's approach to its assessment of the risk of serious harm could amount to irrationality in the sense set out above.

Ground 2

33. It is argued on behalf of the Applicant that the Applicant's perceived lack of coping strategies in the community, possibly leading to a risk of serious harm, had been unfairly overestimated. Particularly as it is argued that the Applicant received no support in difficult circumstances.

Discussion

34. The panel noted in its decision that the Applicant, on release in January 2023, had specialist support from an organisation in the city where he was living. He was also allocated a place in specialist probation approved premises in the city where he was living. After leaving the probation accommodation, he was provided with supported accommodation and continued to have support from the specialist support team and an organisation supporting those with personality difficulties. Despite this support, there were difficulties in connection with breaches by the Applicant of the rules relating to his supported accommodation. There was also evidence of misuse of a class A drug. At a meeting with his probation officer the Applicant demonstrated



verbal aggression and punched a locker. He apologised later for this emotional difficulty, however the Applicant then failed to return to his supported accommodation and was eventually found by the police in another city.

35. The assessment by the panel was that the Applicant had been released on the last occasion, with extensive external support, but still struggled to cope in the community and there was evidence of risk escalation. The panel also concluded that the Applicant's approach to negative behavioural issues was a matter of concern, in particular the belief that it was not inappropriate to assault a male, with whom he had a dispute.
36. Also of concern was the Applicant's return to class A drug misuse, his distorted belief that it would be wrong to be an informer and contact the police in circumstances where he was a potential victim of violence or conflict, and his decision to abscond (rather than seek help from his probation officer or the police) when faced with difficulties such as an alleged kidnap attempt.
37. The panel in my view, explained in some detail why it had concluded that the Applicant's problems with coping and his use of dysfunctional coping strategies led to the concern about the risk of serious harm. It does not appear to me that the panel overestimated the potential risk of serious harm. The panel was entitled to come to an assessment on the basis of the written evidence and on the basis of the oral evidence, in particular from the Applicant. I am not persuaded that this approach by the panel could amount to irrationality in the sense set out above.

Ground 3

38. The Applicant's legal adviser argues that reliance upon a psychological risk assessment, prepared in 2022, was procedurally unfair in that the panel relied on parts of the risk assessment but ignored others which were beneficial to the Applicant.

Discussion

39. The panel referred to the 2022 psychological risk assessment initially at paragraph 2.32 of the decision. The panel noted that, in order to undertake its own assessment of risk, it had taken account of the oral evidence from the hearing itself, the contents of the dossier, the previous panel's assessment of risk and the content of the 2022 psychological risk assessment. In the light of the fact that there had been no significant change in behavioural work undertaken by the Applicant, it is unlikely that the psychological assessment of risk would have altered significantly. The panel took account of a number of evidential factors, including the current information in the dossier and the oral evidence. This approach to risk assessment was not, in my determination, unfair. It does not appear to me to be unreasonable or irrational for the panel to take account of the historical analyses of risk assessments, in order to reach its own independent conclusion at this panel hearing. Particularly where that analysis was not obviously outdated or inappropriate.
40. A second reference to the earlier psychological risk assessment was made at paragraph 2.33 of the decision. There, the panel noted that the psychologist who wrote the report had set out possible warning signs of a risk of escalation. The panel



remarked that a number of those warning signs were in fact present during the period preceding the Applicant's recall. The panel, however, noted that in its view, because of a lack of openness by the Applicant, those warning signs could not be acted upon and could not be used to support improved behaviour and engagement and reduce risk. Again, a reference to the earlier report and its assessment of warning signs does not appear to me to be in any way irrational or procedurally unfair.

41. The Parole Board guidance in relation to updating of psychological reports is that the usefulness of reports should be reviewed on an annual basis. However, the guidance also indicates that updated or fresh reports would not necessarily assist in future risk assessment, in cases where there had been no new behavioural programmes or work undertaken or there had been no substantial change in the prisoner's presentation.

42. It is also the case that it would have been open to the Applicant's legal advisers to commission a fresh psychological risk assessment, or indeed to request an update of the current risk assessment. No application appears to have been made. I am not therefore persuaded that the references to the 2022 psychological risk assessment was procedurally unfair in the sense set out above.

Ground 4

43. The Applicant's legal adviser contends that failing to direct release of the Applicant on the basis of him posing a risk of serious harm to the public in circumstances where he has not committed any violent offences since 2006 is irrational and at odds with efforts being made to address "*the IPP crisis*".

Discussion

44. The panel in its written decision set out in some detail the basis upon which it had concluded that the Applicant did not meet the test for a direction for release as set out in statute. The panel's obligations in relation to risk assessment and any decisions to release prisoners are unchanged and remain the statutory test as set out in the panel's decision.

Decision

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

HH S Dawson
10 October 2024

