

[2024] PBRA 201

Application for Reconsideration by Morrison

Application

1. This is an application by Morrison (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 4 September 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 decision, the dossier of 603 pages and the application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 23 September 2024 and has been drafted by the solicitors acting for the Applicant.
5. The application argues that the risk management plan is sufficient to manage the Applicant who it is said has completed all the offence focused work set out in his sentence plan. It is submitted that the evidence has not been balanced by the panel, that the Applicant's physical and health conditions have slowed up his progression and the decision recommending he remain in the open estate is irrational.

Background

6. The Applicant received a discretionary life sentence on 20 November 2009 following conviction for two offences of rape of a child under 13 and concurrent sentences of 12 months imprisonment for two offences of indecency with a child. The tariff was set at 9 years and expired on 20 November 2018.
7. The Applicant was 48 years old at the time of sentencing and is now 63 years old. This is his third parole review.

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 August 2023 to consider whether or not it would be appropriate to direct his release.
9. The case proceeded to oral hearing via video conference on 27 August 2024. The panel consisted of two independent members and a psychologist member. It heard evidence from the Applicant, the head of residence, a psychologist instructed by HMPPS, a psychologist instructed on behalf of the Applicant, the Prison Offender Manager (POM) and the Community Offender Manager (COM). 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 4 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.
20. 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.

The reply on behalf of the Respondent

21. The Respondent has submitted no representations in reply to this application.

Discussion

22. The grounds in effect amount to a disagreement with the Panel's decision. The grounds argue that the risk management plan (RMP) is sufficient to manage the Applicant's risk.
23. The panel carefully considered the RMP and for the reasons set out did not consider that it was sufficient to manage the Applicant's risks. In particular the panel noted



recent stubbornness when faced with the fire alarm and the lack of demonstrated evidence of his willingness to share his sexual thoughts. The panel took into account the Applicant's physical and medical health considerations and the progress he had made with regard to resettlement.

24. The application places weight on the evidence of the Applicant's expert witness and his conclusion that risk could be safely managed in the community. The panel has given clear reasons why it does not agree with that conclusion but prefers the more cautious stance of the HMPPS commissioned report for the reasons given. The panel noted that other witnesses (POM, COM and prisoner commissioned psychologist) with "varying levels of confidence" were supporting release. However, having conducted its own risk assessment on the basis of all the evidence presented the panel gave reasons which justified its conclusion that the Applicant is not ready for release.

25. The reasoned conclusions are different from those hoped for by the Applicant and not supportive of those of his own instructed psychologist but cannot be described as irrational within the meaning set out above.

Decision

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

Barbara Mensah
21 October 2024