

[2024] PBRA 212

Application for Reconsideration by Denny

Application

1. This is an application by Denny (the Applicant) for reconsideration of a decision of an oral hearing panel dated 12 September 2024 not to direct his release but to recommend 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 dossier consisting of 577 pages, the oral hearing decision (dated 12 September 2024) and the application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 2 October 2024. It has been drafted by representatives on behalf of the Applicant. It submits that the decision was procedurally unfair and irrational.
5. The grounds for seeking a reconsideration are that the Applicant had received prior notification from the Secretary of State (the Respondent) that he would be ineligible/unsuitable for progression to open conditions and that having informed the panel of that information their consideration of the case and recommendation were procedurally unfair and irrational. In addition, the Applicant submitted that it was no longer necessary for him to remain in custody.

Background

6. On 15 July 2010 the Applicant received a sentence of imprisonment for public protection (IPP) following his guilty plea to an offence of wounding with intent to do grievous bodily harm. His tariff was set at 3 years, expiring on 15 July 2013.
7. Whilst in open conditions in 2014 he committed a further offence, robbery, for which he received an extended determinate sentence of 12 years (with 5 years extended



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licence period). This is his third review, his last review by the Parole Board was in 2015.

8. The Applicant was 21 years old at the time of sentencing and is now 35 years old.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Respondent in September 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.

10. The case proceeded to an oral hearing via videoconference on 29 July 2024. The panel consisted of two independent members and a psychologist member. It heard oral evidence from the Applicant, his Prison Offender Manager (POM), two Community Offender Managers (COMs), an HMPPS instructed psychologist and a prisoner instructed psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

The Relevant Law

11. Whilst the panel correctly sets out in its decision letter of 12 September 2024 the test for release, it does not set out the issues to be addressed in making a recommendation for a progressive move to open conditions. However it is clear from the decision that the correct test was considered and applied. The panel clearly considered all the evidence before it, considered the progress made by the Applicant during his sentence in addressing and reducing risk to a level consistent with protecting the public from harm and considered the question of risk of abscond.

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



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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) 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.

24. 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

25. The Respondent has submitted representations in a letter dated 14 October 2024 in response to this application. The Respondent states that while a letter dated 5 May 2023 was sent to the Applicant detailing the reasons for his cancelled pre-tariff review, the letter did not apply to this current review. The Respondent confirmed that *"while the decision to progress the Applicant to open conditions will need to be reviewed and accepted by the Respondent before a transfer can take place, this should not impact the Panel's decision-making or the application of the Open Test."*

Discussion

26. There are two reasons why the claim of procedural unfairness fails. In the first place, the Applicant's claim to have shown evidence to the panel of the Respondent's negative position in respect of his progression to open conditions is not reflected in the decision letter. If it was raised but ignored by the panel, the application does not identify in what way there has been procedural unfairness on the part of the panel. There is no evidence that the Applicant's case was not dealt with fairly.

27. The second reason this ground fails is that the response from the Respondent makes clear that the position referred to by the Applicant relates to an earlier review and is not applicable to the current review.

28. The panel thoroughly and fairly considered all the evidence presented. The panel did not consider (even if they were aware of it) the earlier view of the Respondent, the panel applied the correct principles in its consideration of transfer to open conditions and reached a clearly reasoned conclusion. For those reasons this ground must fail.



29. The second ground is that the decision is irrational as the panel made a recommendation despite being informed of the Respondent's previous position. The application also goes onto repeat that the Applicant's risk can be managed in the community.
30. The panel's recommendation, applying the correct principles, was made irrespective of the now confirmed to be erroneous interpretation of the Respondent's position. There is no irrationality in that decision. The submission made in general terms that the Applicant's risk can be managed in the community, in the absence of any particulars, amounts to no more than a disagreement with the panel decision. The decision is clearly and fully reasoned and there is no reason for any interference with it or reconsideration of it.

Decision

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

Barbara Mensah
01 November 2024