

[2024] PBRA 238

## Application for Reconsideration by Byrd

### Application

1. This is an application by Byrd (the Applicant) for reconsideration of a decision of an oral hearing dated the 15 October 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 391 pages and the application for reconsideration.

### Request for Reconsideration

4. The application for reconsideration is dated 5 November 2024. It has been drafted by solicitors acting for the Applicant. It submits that the decision is irrational and was procedurally unfair. The submission is supplemented by written arguments to which reference will be made in the Discussion section below.

### Background

5. The Applicant received an extended sentence of imprisonment of 8 years with an extended licence period of 3 years following conviction for robbery. His sentence end date is October 2029.
6. The Applicant was aged 34 at the time of sentencing. He is now 40 years old.
7. This is his first review of the sentence.

### Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in June 2023 to consider whether or not it would be appropriate to direct his release.

9. The case proceeded to an oral hearing via video-conference on 20 August 2024. The panel consisted of two independent members. It heard oral evidence from the Applicant together with his Prison Offender Manager (POM), his previous POM, his Community Offender Manager (COM) and a prison 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.

### The Relevant Law

11. The panel correctly sets out in its decision letter of 15 October 2024 the test for release.

#### *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 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**



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

## Discussion

25. The first ground relates to the question of irrationality. The application sets out the legal test and principles to be applied in cases where irrationality is alleged. The application sets out the evidence and recommendation of the former POM and COM noting that the recommendation of the COM was in support of release. The application submits that the panel has put "irrational weight" on evidence of certain professionals regarding the use/lapse into drug use. The application repeats and emphasises submissions made to the panel. The application submits that there has been undue weight put on the Applicant's request to return to closed conditions and that there is no causal link to continued confinement and risk reduction.
26. The matters raised in the application were raised before the panel who dealt with all these matters clearly, thoroughly and fairly. At the risk of otherwise repeating much of the panel's conclusions which provide answers to the matters raised in the application the reasons for the decision reached are set out in the conclusions of the decision letter. It is not for the panel to simply select the witness proposing release and come to a positive conclusion on that basis. The panel clearly considered all the evidence, explaining where it accepts and does not accept evidence. The panel has given full and detailed reasons for why the test for release is not met. The panel did not put undue weight on the request to return but very fairly commended the Applicant for asking to return to the closed estate noting that that demonstrated his ability to identify "red flags" and remove himself from a "risky situation".
27. The panel noted the views of the professionals and noted that the COM had at one stage in the hearing expressed some doubts about the Applicant's manageability if released. However, following further questioning the panel notes that the COM "ultimately, on fine balance, was 'slightly swayed' to release". The panel in a balanced decision has given reasons why and to what extent it attached weight to aspects of the evidence. Nothing in its reasoning or conclusions can be said to be irrational.
28. The application sets out the test for irrationality, quoting from *R (DSD and others) v Parole Board* [2018] EWHC 694 (Admin) which follows that set out in *Wednesbury*, noted above, that the test is whether "the 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". This decision comes nowhere near meeting that test of irrationality and this ground must fail.
29. The second ground relates to procedural impropriety or unfairness. The application sets out the test for procedural unfairness. The application states that the panel made reference to the possibility of adjourning for the Applicant to undertake work. The Applicant's representative was given the opportunity to take instructions and informed the panel that the Applicant wished to proceed with the hearing. The application argues that nevertheless the panel should have adjourned for three months to allow for further consolidation and embedding of the learning undertaken.



30. It is difficult to understand an argument of procedural unfairness on the basis of the grounds submitted. The Applicant was represented. The panel allowed the representative time during the hearing to speak to the Applicant. Presumably the representative had the opportunity to take instructions and give advice. The representative informed the panel that the request was for the hearing to continue. It is not clear why in those circumstances the Applicant considered that the panel should nevertheless have adjourned. It was not a suggestion advanced by the representative at the hearing nor proposed by any of the professionals.
31. The panel recorded the evidence of the professionals and the evidence of the Applicant himself that he had made good progress and presented a genuine commitment to change. However, it was the early stage of his desire to change following a period of poor custodial behaviour including drug use. In those circumstances an adjournment would have been unlikely to yield the results hoped for by the Applicant. A significant amount of time would be required for him to undertake any necessary interventions and be in a position to persuade a panel that he had changed, that the change would be enduring and that the professionals could be confident that any risk could be managed in the community. The panel gave many reasons for concluding that the test for release had not been met and even if an application had been made for an adjournment, it would not have served any purpose and would not necessarily have provided any greater certainty.
32. Nothing in the panel's decision or process suggests unfairness or impropriety and this ground also fails.

## Decision

33. 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**  
**03 December 2024**

