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**[2024] PBRA 250**

**Application for Reconsideration by Davis**

## Application

1. This is an application by Davis (the Applicant) for reconsideration of a decision of a two-member panel of the Parole Board (the panel) dated the 24 September 2024 following an oral hearing held on 20 September 2024 refusing his application for release.

2. Rule 28(1) of the Parole Board Rules 2019 as amended by the Parole Board Amendment Rules 2024 (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 include the decision of the panel, the dossier (comprising of 509 pages) and submissions made to the panel by the Applicant on his own behalf. In addition, I have also considered written observations by the Panel members and solicitors instructed by the Applicant in relation to the review and this application. Further, I have listened to the recording of the oral hearing.

## Background

4. On 11 December 2013, the Applicant, then aged 33 (now aged 44) was sentenced to an extended sentence of imprisonment made up of a custodial term of 15 years, and an extended licence period of 2 years. The Applicant, who appeared before the court with two others, had been convicted by a jury of robbery which had been committed on 12 May 2013. He was also sentenced for an offence of dangerous driving committed on 3 May 2013 to a term of 12 months imprisonment, and for an offence of arson also committed on 3 May 2013 to a term of 18 months imprisonment consecutive to the dangerous driving sentence but concurrent to the extended sentence for the robbery. These sentences are due to expire in December 2030.

## The Offences

*Dangerous Driving: 3 May 2013 at 1900.*

5. Police officers in an unmarked police vehicle saw the Applicant driving what was believed to be a stolen vehicle. The police vehicle stopped in front of the Applicant's

car to prevent him getting away. On no less than seven occasions, the Applicant's vehicle reversed and then drove at speed hitting the police car in an attempt to avoid arrest. On each attempt he increased his speed until he succeeded in forcing the police vehicle out of the way and made good his escape. Both officers were not seriously injured. The Applicant claimed he did not know that this was a vehicle containing police officers. He told the panel that he believed that the attempt to stop him was associated with the fact that at the time he was working as a minder for drug dealers.

*Arson: 3 May 2013 at 20.10*

6. Having got away from the police the Applicant drove for about two miles. CCTV footage captured him taking a petrol can from the rear of the stolen vehicle and setting it alight. Within moments another vehicle arrived and drove him away.

*Robbery: 12 May 2013 at 21.50*

7. The Judge in passing sentence described this offence as a professionally planned and targeted robbery in which the victim was attacked in his home in the presence of his wife and two teenage daughters. The Judge was satisfied that the robbery was planned by the Applicant and two others all of whom were armed and masked and who knew that the occupier of the property ran a pawnbroking business. One of the occupants was stabbed in the chest and a neighbour who tried to challenge the robbers was threatened with a knife.

8. The Judge in passing sentence described the Applicant as a *"career criminal"* observing that he had by the age of 33 been convicted of 77 offences since the age of 12 and had served 17 custodial sentences, albeit none for robbery. The court found that he posed a serious risk to the public, having been convicted of numerous offences involving violence.

**Current parole review**

9. This was the Applicant's first review. A two-member panel convened on 20 June 2024 when the Applicant was represented by his solicitor. The Applicant had been transferred to a different establishment the week before. His solicitor advised the panel of an incident which had occurred in April 2024 that had resulted in the Applicant being issued with an adjudication alleging that he had obstructed on officer. The panel were informed by the Applicant's solicitor that there was video footage of the incident that could be provided to the panel but was not then available. The panel agreed that it should see the footage and seek further information regarding the Applicant's recent transfer. Furthermore, the panel were concerned that a potentially important report from a professional witness was significantly out of date. For those reasons the panel were satisfied that they did not have sufficient information before them to conduct a fair and effective hearing. Therefore, a decision was made to adjourn and the same panel reconvened on 20 September 2024. The Applicant was represented at the adjourned hearing by the same solicitor.

**Request for Reconsideration**

10. The application for reconsideration is undated and was completed and signed by the Applicant in person.

11. It is necessary to set out in full the Applicant's only ground for seeking a reconsideration of the panels' decision:

    a. *"I had a parole hearing on 20.6.2024 scheduled for 10.00 am. At 9.00 am* (a named officer) *allowed me to have a phone call to my solicitor. During this phone call my solicitor informed me that she knew the chair of the panel personally as they went to school together. My solicitor asked me not to mention this as it could make things slightly awkward. My parole was adjourned for 3 months as my probation did'nt have any report or resettlement plan prepared. It was shocking to me that my probation had'nt prepared any reports and also that my solicitor did'nt put up any sort of defence on my behalf. It was even more shocking to find out find out that my solicitor and the panel chair* (named) *had been in contact with each other during this period before and after my parole as my solicitor informed me of this. So it seems very convenient that no reports or resettlement plan was put in place and the fact that my solicitor and the panel chair had known each other from their school days and that they had been in contact with each other before during and after my parole. It makes me wonder what has been said off the record between two old friends.*
    b. *I believe this to be a major conflict of interest as these two people had known each other since childhood and that they had been in contact before, during and after my parole"*

**The Relevant Law**

12. The panel correctly sets out in its decision letter dated 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)*

13. 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)).

14. 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*

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 I cannot and will not substitute my own 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. This aspect of the reconsideration powers of the board is at the heart of this application (see paragraph 22(f) below). I have set out other routes (above) only for the sake of completeness. In conducting its proceedings, the Board must comply with the requirements of procedural fairness which is the modern term for the rules of natural justice. 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.

*Bias*

24. The sole basis of the application in this case is highly unusual and since the introduction by the Parole Board of the Reconsideration procedure, quite possibly unique. The suggestion made by the Applicant is in effect that he was not given a fair hearing because of a pre-existing connection between his solicitor and the panel chair. He alleges, in effect, that the panel was biased, that is to say, in breach of the fundamental requirement that a tribunal such as a panel of the board must be impartial.

25. In the case of ***Porter v Magill and Weeks v Magill [2001]UKHL 67; [2002] 2 A.C. 357*** the House of Lords held that a court investigating an allegation of bias should first ascertain all the relevant circumstances and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal, or court, or court like body (such as a panel of the parole board) was biased. That is the test I have followed in this application.

26. In my Note to the parties dated 22 October 2024 I gave directions to the parties to ascertain relevant information. The enquiries were conducted by or on behalf of the Parole Board's Legal Adviser.

**Response to Enquiries**

27. While appreciating in particular the difficulties of solicitors in sensitive circumstances such as these, I am very grateful indeed for the careful and helpful responses of all those invited to comment.

28. The panel chair has responded as follows:

i. The allegations made by the Applicant are she says entirely untrue.

ii. At the outset of the hearing she says she made it clear that the Applicant's solicitor was known to her because they both attend the same gym where they would see each other occasionally. She added that it is her practice to raise this connection on the occasions when she and the solicitor find themselves at the same hearing. She notes that no objection was raised by anyone at the hearing following this disclosure.

iii. She notes that her co-panellist was made aware of the connection prior to both scheduled hearings of this review.

v. She did not attend the same school as the solicitor and neither have they known each other since childhood, as the Applicant says he was told.

vi. She has never and would never discuss a case in which she and the solicitor have been engaged in the manner suggested by the Applicant.

vii. She confirmed that she has not discussed the Applicant's case before, during or after his oral hearings.

viii. She confirms that the panel's decision was wholly based upon concerns relating to the Applicant's risk in accordance with Parole Board Rules as set out in the panel's Decision.

29. The co-panellist responded as follows:

i. He confirmed that before both oral hearings, the panel chair disclosed that she occasionally bumps into the solicitor at the same gym and that the chair is in the habit of mentioning that whenever the solicitor is appearing before her.

ii. He described that the chair reported that the extent of any communication between them is along the lines of *"a nodded hello"* and that there had never been any discussion between them regarding this or any other case.

iii. He added that the chair explained these matters to the Applicant before both hearings got underway.

iv. He detected no bias nor compromise in the chair's conduct in this or in any of the several cases upon which they have sat as part of the same panel.

30. The solicitor who represented the Applicant at the Oral Hearing, having been given permission by the Applicant to do so, has responded as follows:

i. She does not accept that the Applicant's account of their telephone conversation on 20 June 2024 is correct. She simply observed that the subject matter of the call was entirely different.
ii. She confirmed she did tell the Applicant weeks prior to the hearing that she knew the panel chair outside of their professional dealings, but not in the circumstances suggested by the Applicant in his application. She said she had asked for and received the Applicant's conformation that he was content that she should continue to represent him and that he did not raise any concerns thereafter.

31. The Applicant's solicitor in this application confirms that the Applicant maintains his version of the matters as set out in the application, and this is the basis on which she was instructed.

**The reply on behalf of the Secretary of State (the Respondent)**

32. The Respondent has indicated that she does not wish to make any submissions in response to the application.

**Conclusions**

33. I am entirely satisfied that I can accept the panel's responses and those made by both solicitors regarding the allegations made by the Applicant.

34. I am unable to accept the assertions made by the Applicant. I am in no doubt that there is no credible evidence of, nor any credible basis for, the serious allegations of impropriety and bias made by the Applicant. I find that the Applicant has manufactured a wholly false claim of bias in a deliberate and calculated attempt to mislead and secure an unwarranted reconsideration of a decision to refuse his application for release. It follows that I accept that the panel at every stage of this review followed all proper procedures and were wholly impartial.

35. While recognising that it is not suggested otherwise, I wish to make it clear that I find the panel's decision not to be unlawful nor irrational. The panel decision represents a balanced and fair minded analysis of all of the evidence placed before the panel. I find that the panel satisfied its public law duty to provide evidence based reasons that adequately and sufficiently explained and justified the conclusions it reached to refuse release. In my judgment, it cannot be sensibly argued that this was a decision that no reasonable panel could have come to.

**Decision**

36. For all the reasons given I find that the conduct of this review was not in any respect procedurally unfair. Accordingly, the application for reconsideration is refused.

**Postscript**

37. Having listened to the recording of the oral hearing, it seems that the comment made by the chair to the Applicant that she and his solicitor knew each other through their mutual use of a gym did not find it's way onto the recording. I have no reason to doubt it was said. I would simply wish to add that it would in my judgment have been preferable if it had been referred to on the face of the Oral Hearing Decision itself, perhaps under the heading of **"Any other information"**.

**HH Michael Topolski KC**
**24 December 2024**