

**[2024] PBRA 54****Application for Reconsideration by Brown****Application**

1. This is an application by Brown (the Applicant) for reconsideration of a decision of an oral hearing panel dated 12 February 2024 not to direct his 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.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 367 pages), and the application for reconsideration (dated 28 February 2024). I have also listened to an audio recording of the hearing.

**Background**

4. The Applicant received an extended sentence with a custodial period of six years and a four-year extension period on 30 November 2017 following conviction for wounding with intent to do grievous bodily harm to which he pleaded guilty. He also received two six-month determinate sentences (one consecutive, one concurrent) for two counts of unauthorised possession in prison of a knife or offensive weapon, to which he also pleaded guilty. The offences were committed while the Applicant was serving a three-year sentence for dwelling burglary and theft.
5. His parole eligibility date passed in May 2022. His conditional release date is in May 2024 and his sentence ends in May 2028.
6. The Applicant was 30 years old at the time of sentencing and is now 37 years old.

**Request for Reconsideration**

7. The application for reconsideration has been submitted by solicitors acting for the Applicant.
8. It argues that the decision not to release the Applicant was both irrational and procedurally unfair because:
  - a) The panel chair undertook the hearing while taking co-codamol and did not disclose this at the beginning of the hearing;

- b) It was incorrect for the panel to state that the psychologist witness did not recommend release; and
  - c) The decision misrepresents the evidence given by the Prison Offender Manager and from the Substance Misuse Team (**SMT**) report.
9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.
10. No submissions were made regarding error of law. The application incorrectly states that the only grounds for reconsideration are irrationality or procedural unfairness.

### Current Parole Review

11. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in July 2022 to consider whether or not it would be appropriate to direct his release. This is the Applicant's second parole review.
12. The case proceeded to an oral hearing on 31 January 2024. The panel consisted of two members including a psychiatrist specialist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**) and an HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
13. The panel did not direct the Applicant's release.

### The Relevant Law

14. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

### Parole Board Rules

15. 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)).
16. 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)).
17. 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.

### *Procedural unfairness*

18. 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.

19. 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; and/or
- (e) the panel was not impartial.

20. The overriding objective is to ensure that the Applicant's case was dealt with justly.

### *Irrationality*

21. In *R (DSD and others) v the Parole Board* [2018] EWHC 694 (Admin), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said 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."*

22. This test was set out by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374. The Divisional Court in *DSD* went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

23. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

### **The reply on behalf of the Respondent**

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

### **Discussion**

*Ground 1: Panel chair taking co-codamol*

25. It is first submitted that the hearing was procedurally unfair because the panel chair's judgement was impaired since she had taken prescribed co-codamol.
26. The application notes that the chair began the hearing by addressing the Applicant by another prisoner's name.
27. I have listened to the recording of the hearing. The chair does start by calling the Applicant by another prisoner's name. Having checked case listings, it appears that the panel had two hearings on the day. The first case was the Applicant's. The chair incorrectly called the Applicant by the name of the prisoner in the panel's second case of the day.
28. The chair apologised to the Applicant and said *'It's a good job I did check [your identity] because otherwise you'd have thought "who's this person? She's lost it"'*.
29. The application also notes that the chair forgot to allow the Applicant's legal representative to question him after the panel had finished. The recording shows that the chair had offered a short break after the panel had finished questioning the Applicant. The co-panellist interjected and reminded the chair that the legal representative had not had the chance to question the Applicant.
30. The chair apologised and explained that she had been to Accident and Emergency the previous day due to a post operative infection and had been prescribed co-codamol and antibiotics. She said that *'to some extent I don't know if I'm coming or going but I'm all right for this hearing'* but may appear to be *'a little bit dozy or dopey'*.
31. The application acknowledges that, at the time, it did not appear as though the chair was affected by the medication. The Applicant's legal representative did not offer any comment at the time of the disclosure by the chair or make any representations regarding the chair's capacity or her ability to conduct a fair hearing. Moreover, the matter was not raised as an issue by the legal representative in her closing submissions after all oral evidence had been heard. The legal representative also knew, at the point of disclosure, of the confusion regarding the Applicant's name at the start of the hearing, but, in full knowledge of this, did not object.
32. The timetable which the panel receives prior to the hearing has all cases for the day listed on it. Although choosing the incorrect case would not get the hearing off to the best start, it is not an especially egregious error, and does not fatally undermine the fairness of the entire hearing or the panel's decision. There is nothing else within the recording or the decision itself that suggests that the panel was at all confused about the identity of the Applicant.
33. It cannot be said, as a general principle, that, if a panel chair (or panel member) is taking prescribed medication then any hearing in which they participate is automatically unfair. However, a hearing may become unfair if the impact of any such medication is such that other aspects of the decision-making process become unfair.
34. The first ground therefore fails. The second and third grounds move on to deal with purported deficiencies in the recording of evidence within the panel's decision.

*Ground 2: Psychologist's professional opinion*

35. It is next submitted that the panel's statement that the psychologist "was unable to recommend that [the Applicant] be released" was incorrect.
36. The psychologist noted that her written report did not contain a professional opinion (as it dated from a period during which HMPPS witnesses were specifically precluded from doing so). The recording shows that she said that she felt conflicted and giving a professional opinion was difficult. However, she said she was 'leaning towards release' given that the Applicant had access to specialist designated accommodation and there was also support from community psychological services for his COM. She noted that it was a 'really tricky, not clear cut issue at all', but confirmed that the findings of her report did equate with a professional opinion in favour of release.
37. The conclusion of the decision also states that professionals 'were unable to recommend that [the Applicant] be released'.
38. Although the psychologist did not explicitly say words to the effect of 'in my professional opinion, the Applicant can be released', I find that her evidence, as a whole, indicated that she was in favour of release. As such, I also find that the panel's decision, at best, failed to take this view properly into account and, at worst, mis-stated the professional opinion of the psychologist.
39. I make no causal link between the chair's medication and the identified deficiencies within the decision. Even though the chair conventionally takes the lead in drafting, no decision is issued without having been scrutinised by any and all other co-panellists. The cause of the misstatement is immaterial to the fairness of the proceedings.
40. However, the panel's mistreatment of the psychological evidence is, in my view, sufficient to make the decision both procedurally unfair and irrational. Ground 2 therefore succeeds.

*Ground 3: Misrepresentation of evidence from POM and SMT*

41. Having established a successful basis for reconsideration, there is no need for me to consider the final ground in any detail, other than to say that I would also have been similarly persuaded by the arguments put forward on the Applicant's behalf.

**Decision**

42. For the reasons set out above, the application for reconsideration is granted.

**Stefan Fafinski**  
**11 March 2024**