

**[2024] PBRA 77****Application for Reconsideration by Yusuf****Application**

1. This is an application by Yusuf (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 7 March 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.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier consisting of 970 pages including the final submissions and oral hearing decision and the application for reconsideration.

**Background**

4. The Applicant received an indeterminate sentence of imprisonment for public protection (IPP) on 13 October 2008 following conviction for wounding with intent to cause grievous bodily harm. The tariff was set at 3 years and 6 months (less time spent on remand) and expired on 12 September 2011.
5. The Applicant was released on IPP licence in February 2018 but recalled following conviction and sentence for further offences of actual bodily harm and three counts of ill treatment of a child under 16. For those offences he received a sentence of 36 months imprisonment on 14 November 2019. On 12 September 2023 he received a further sentence of 22 months imprisonment in respect of a handling offence of items stolen between 2015 and 2018.
6. The Applicant was 33 years old at the time of sentencing for the index offence in 2008 and is now 49 years old.

**Request for Reconsideration**

7. The application for reconsideration is dated 27 March 2024. It has been drafted by his solicitors.

8. The grounds for seeking a reconsideration are set out in the written submissions. The grounds submitted are that the decision is irrational, procedurally unfair and whilst it is said that the decision contains errors, no errors of law are identified. The Applicant submits that there is an error in the panel describing this as his second review when he states that it is his third review. Even if that is the case it does not amount to an error of law and nothing turns on the question of the number of reviews. The question of the number of reviews does not play any part in the panel's reasoning or decision. Reference to the written arguments supplementing the grounds submitted will be made in the **Discussion** section below.

### Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 1 July 2021 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 Secretary of State whether the Applicant should be transferred to open conditions.
10. The case proceeded to an oral hearing on 18 September 2023. The panel consisted of three members; two independent members appearing in the prison hearing room and the psychologist member appearing by videoconference. The panel took account a dossier of 938 pages (786 at the hearing) and heard oral evidence from the Applicant, his Prison Offender Manager (**POM**), Community Offender Manager (**COM**) and Prison Psychologist. The Applicant was represented throughout the hearing. The Respondent was not represented by an advocate.
11. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the release decision that is open for reconsideration.

### The Relevant Law

12. 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 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)).



15. 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*

16. 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."*

17. 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.

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

#### *Procedural unfairness*

19. 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.

20. 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.

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

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

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



## Discussion

### *Procedural unfairness*

23. The Applicant raises and makes comment and complaint about a number of issues relating to the chair provided, his recent bereavement and the quality of his representation. However, he also states that he is not complaining about these matters and with regard to the numerous complaints about the quality of representation by his advocate acknowledges that this is a matter for him to address separately. He complains that the refusal of the panel to allow him to question witnesses directly was unfair. Finally, he complains that the hearing should have been adjourned for the panel to get sentencing remarks including sentencing remarks in respect of his co-defendants.
24. Rule 25 of Parole Board Rules provides guidance as to how an oral hearing should be conducted. In particular Rule 25(2)(c) states that the panel "*shall conduct the hearing in a manner it considers most suitable to the clarification of the issues before it and to the just handling of the proceedings*". It is not for the panel to enquire into the ability of a properly qualified advocate. In the absence of any evidence to the contrary the panel was entitled to assume that the nominated advocate was competent to represent the Applicant. In those circumstances it would not have been appropriate for the panel to allow questioning both from the advocate and the Applicant. There was nothing unfair in their decision to refuse to allow the Applicant to question the witnesses directly as there was an advocate present throughout who could and did do so. The Applicant was not disadvantaged by that decision as he was present throughout the proceedings and had the opportunity to consult his advocate privately at any stage of the hearing. He was able to make any further written submissions after the hearing.
25. The failure to obtain or to adjourn to obtain sentencing remarks did not lead to any unfairness. The sentencing remarks were not necessary for the panel to consider in order to ensure a fair hearing. The sentencing remarks relating to a co-defendant were subsequently obtained and added nothing of relevance to the Applicant's case or to the panel's reasoning.
26. Having considered all the matters raised, I am satisfied that no procedural unfairness arose from the change of the chair or failure to notice that the Applicant was distressed by his recent bereavement. Neither the Applicant nor his representative made an application for an adjournment and there is no indication that either of these matters impinged on his ability to participate fully in the hearing, to question witnesses, to put his case or to have a fair hearing. I am also satisfied that no procedural unfairness arose from the refusal to allow him to question witnesses directly. He had a legal representative to whom he was able to give instructions and who asked questions on his behalf and the panel also questioned the witnesses in respect of the issues that needed to be considered.
27. The Applicant has not shown any way in which the panel's conclusions would have been different if he had been provided with a medical chair, if the panel had been more conscious of his recent bereavement or if he had asked questions himself. There is no evidence presented in the submissions for me to conclude that there



was any procedural unfairness in the hearing or that the Applicant was not given a fair hearing. This ground therefore fails.

### *Irrationality*

28. The Applicant argues that information provided by the POM should have been supported with evidence which the panel should have directed to be produced. In cases where a prisoner has the benefit of legal representation, it would ordinarily be expected that any objections to the evidence will be challenged at the time. The panel were in a position to question the POM on any aspect of her evidence they found to be unsupported and to attach such weight to it that they considered appropriate. The Applicant gave evidence both before and after the POM and was able to take issue with anything raised by her. In their consideration of the evidence the panel clearly stated that they had not attached significant weight to the POM's evidence. On the issue of the Applicant's ability to engage with professionals the panel preferred to rely on the evidence of the prison psychologist and the COM. There was no need for the panel to recuse itself in the light of its reasoning and conclusions, there was clearly no conflict or unfairness or irrationality.
29. The Applicant argues that the panel's conclusion that he is yet to evidence an ability to manage himself in less restrictive conditions, is irrational. The conclusion of the panel is clearly based on the Applicant's previous conduct when in open conditions and on the evidence of the COM. This was a finding open to the panel and does not disclose any irrationality.
30. The Applicant submits that the refusal of the panel to call a previous offender manager to give evidence was irrational. I disagree. The previous work done by the Applicant was known to the panel and taken into consideration by them. Whilst it was not necessary for the panel to make reference to the Anthony Rice Principles, the more important consideration as the panel recognised and applied, was to have regard to the most recent report.
31. The remainder of the application consists of comments and disagreement with the panel's conclusions, unhappiness with the representative and misunderstanding of the role of the panel. None of that establishes irrationality in law. Being unhappy with the decision is not in itself grounds for reconsideration. Accordingly, this ground fails.
32. Finally, the application makes serious allegations against a witness of deceitfulness and a claim to disadvantage due to the Applicant's ethnicity. I have carefully considered these claims but have found no basis for them or merit in them. They are allegations that should not have been submitted on behalf of the Applicant by his representative.

### **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**  
**17 April 2024**



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