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**[2024] PBRA 96**

# Application for Reconsideration by Campbell

## Application

1. This is an application by Campbell (the Applicant) for reconsideration of a decision of the Parole Board, following an oral hearing, dated 18 March 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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are:

   i. The dossier now comprising 920 pages including the Decision Letter (DL) sought to be reconsidered.
   ii. Submissions dated 18 April 2024 on behalf of the Applicant in support of his application.
   iii. An email dated 29 April 2024 from the Secretary of State for Justice (the Respondent) indicating that he does not wish to make submissions in connection with the application.

## Background

4. The Applicant is now 44 years old. In November 2012 he was sentenced to imprisonment for public protection for offences of false imprisonment, assault occasioning actual bodily harm, theft of a vehicle, theft from meter (x2), criminal damage and driving whilst disqualified. His tariff expired on 12 March 2015.

## Request for Reconsideration

5. The application for reconsideration is dated 18 April 2024.

6. The grounds for seeking a reconsideration are in summary as follows:

7. Under the heading of "*irrationality*":

   i. The three professional witnesses expressed the opinion in writing and at the hearing that the Applicant could safely be released on licence. It was irrational

for the panel not to accept those recommendations. Grounds paragraphs 13, 14 and 20.

ii. The reasons given in the DL for not following the recommendations were flawed because of mistaken findings of fact at paragraphs 2.4, 2.6, 2.9 (2 findings), 2.12 (2 findings), 2.16, 2.19.

iii. The submissions are accompanied with citations from authority, *E v Secretary of State for the Home Department [2004] QB 104, R(Kitto) v Parole Board [2003] EWHC 2774*, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295*, *E v Secretary of State for the Home Department [2004] QB 1044* and *R (Kaiyam) v Secretary of State for Justice and another [2014] UKSC 66.*

8. Under the heading of "*procedural irregularity/unfairness*" the Applicant submits:

i. The mistaken findings of fact, taken together or individually, rendered the decision procedurally irregular.

ii. The DL does not explain why the suggested licence conditions would not have been sufficient to eliminate any remaining risk of serious harm posed by the Applicant to the public.

**Current parole review**

9. The case was first referred to the Parole Board by the Respondent in March 2021. Unfortunately, for various reasons the hearing was adjourned or deferred twice in 2022 and once more in 2023, and, briefly, following the hearing, the subject of this application. None of the adjournments or the reasons for them are pleaded in support of the current application.

10. The case was heard by a three-member panel including a psychologist member on 4 March 2024 and the decision was issued on 18 March 2024.

**The Relevant Law**

11. The panel correctly sets out in its decision letter 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)).

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)).

*Irrationality*

14. 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."*

15. 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.

16. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *'more modern'* test set out by Saini J in **Wells [2019] EWHC 2710 (Admin)**.

17. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that *"no reasonable panel could have reached the impugned decision".* That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.

18. In the **Wells** case Saini J set out *'a more nuanced approach'* at paragraph 32 of his judgment when he said:

> *"A more nuanced approach in modern public law is 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".*

19. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

20. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration or a Judge dealing with a Judicial Review in the High Court to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

21. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

22. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

23. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

24. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

> *"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

25. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

*Procedural unfairness*

26. 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.

27. 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.

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

*Error of law*

29. An administrative decision is unlawful under the broad heading of illegality if the panel:

a) misinterprets a legal instrument relevant to the function being performed;
b) has no legal authority to make the decision;
c) fails to fulfil a legal duty;
d) exercises discretionary power for an extraneous purpose;
e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
f) improperly delegates decision-making power.

30. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

*Other*

31. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

32. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

**The reply on behalf of the Respondent**

33. No submissions have been made by the Respondent with respect to this application.

**Discussion**

34. The first ground submitted in respect of procedural unfairness did not in fact amount to a submission of procedural unfairness, rather of irrationality.

35. As to the second ground, it is clear that the panel's decision was based on its findings set out at paragraph 4.3-4.10. In summary, although important work had been done by the Applicant during his time in custody, subsequent events had shown that he had not been able *to "internalise this learning and apply it consistently, suggesting outstanding treatment needs. This is likely due to the complexity of his personality presentation and the entrenched nature of his schemas and past behaviours. This has resulted in [the Applicant] being recategorised, failing to progress with his sentence, and repeating such behaviour; accruing adjudications and other warnings. This in turn has led to despondency and frustration".*

36. I have considered the complaints of irrationality individually and in the round. The core of the appeal revolves around the fact that the professional witnesses considered that release should be directed and that the panel decided otherwise. This contention may be divided into two sub-contentions:

    i. It is irrational for a Parole Board panel to decide a case one way when all the evidence from the professional witnesses supports the other.

    ii. The decision was flawed because the panel fell into error when coming to conclusions concerning certain previous incidents involving the Applicant, and thus the reasons underlying the decision were "*irrational*".

37. The first of the submissions may be dealt with shortly. The whole point of a system which creates a tribunal independent of the offender on one hand and the "*authorities*" on the other is to provide an independent decision-making process similar though not identical to processes within the formal justice system.

38. So far as the second is concerned it is clear that there were a number of matters which contributed to the panel's ultimate decision that the Applicant should not be released.

    i. Following his return from open to closed conditions in 2018 and 2019, in February 2020 the Parole Board once again recommended his transfer to open conditions. Unfortunately, the recommendation was not put into effect until June 2021 due in part to problems created by the Coronavirus epidemic. The panel expressed the opinion that that delay had in itself increased the risk posed by the Applicant and that that had been borne out by his speedy relapse to drug misuse and his most recent return to closed conditions. (DL paragraph 2.3.)

    ii. While in open conditions in 2021 a craft knife had been found in his cell. (DL paragraph 2.7.)

    iii. Since his return to closed conditions there had been a number of concerns about his behaviour. Many of the security reports rated the allegations of "*bullying….unsettled behaviour and the supply and use of illicit drugs*" as "*high*". (DL paragraph 2.4).

    iv. Since December 2023 and into January 2024 there were a number of reports of behaviour which, if accurately reported, were capable of indicating that the risk

the Applicant might pose upon his release was increasing. The professionals placed "*limited weight*" on these allegations. The panel disagreed having heard evidence from the Applicant and relying on the fact that the Applicant himself could not explain why false allegations would be made against him. Additionally the panel noted that one of the allegations had emanated from a staff member. (DL paragraph 2.5).

v. At paragraph 2.9 of the DL the panel records its unsuccessful attempts to obtain information from the POM concerning an allegation of assault in 2022 which had been referred to the police.

vi. The question of the weight to be attached to previous unproved allegations was dealt with in considerable detail by the panel at paragraph 4.7. I have found nothing in the conclusions reached by the panel to justify the suggestion that those conclusions were clearly wrong. The fact that a different panel may have reached a different conclusion on one or other of the matters under consideration is irrelevant.

39. The grounds submitted refer to the following *"alleged errors"* by the panel.

i. At 2.4 an alleged assault in 2022 was reported to the police, referred by the police to the prison for adjudication and ultimately dismissed.

The Grounds do not suggest how the panel's summary of those facts was flawed.

ii. At 2.6 the panel fell into error when expressing the opinion that the Applicant was unable to employ different coping skills when faced with difficulties other than "*avoidance*". This paragraph deals with the unfortunate events which had led to the last adjournment of his hearing in late 2023.

The panel expressed its sympathy with the Applicant concerning the additional stress to which the adjournment subjected him. The concern expressed concerning his inability to employ other "*coping skills*" was entirely rational.

iii. At 2.9 the panel fell into error,

i. When dealing with an allegation relating to two items found in the Applicant's cell in September 2023.

ii. When dealing with an adjudication against the Applicant in September 2023 for using threatening, abusive and insulting words.

40. As to (i), I have found no error in the way the panel dealt with the two allegations. The allegation concerning the "*white paste*" was proved. The allegation concerning a piece of paper was not.

41. As to (ii), the fact that the panel may or may not, had it once again adjourned the hearing, have discovered more detail about the proven allegation cannot contribute to a finding that the overall decision was irrational.

42. At 2.12 the panel is said to have fallen into error twice:

    i. when suggesting that the Applicant's arousal levels appeared to be *"easily triggered"*. It is submitted that the panel's willingness to allow the Applicant to leave the room to compose himself and then to use the fact that he had done so against him was *"deeply unfair".*

    ii. when indicating that the panel had itself tried to avoid asking questions which might "*trigger*" similar arousal levels and suggesting that professionals will have had to adopt similar strategies when talking to the Applicant it did so without asking the professionals concerned whether that had been the case.

43. As to (i), the dossier is replete with references to the "*triggers*" which have in the past and up to the present, and may in the future, provoke the Applicant into behaving irrationally or violently. See page 195 of the dossier.

44. As to (ii), while the possibility that other professionals may have had to deal with issues similar to those which arose during the hearing and resulted in short adjournments for the Applicant to compose himself may not have been expressly mentioned during the hearing there are many references to the possibility of such reactions, see paragraph 7.13 of the psychological report at page 202 of the dossier. One of the purposes of an oral hearing is to enable the offender, if he chooses, to give evidence to the panel. The panel is entitled, as are courts within the ordinary justice system, to assess witnesses not simply by what they say but by the way they behave when they are questioned and to draw conclusions from both as to the pointers there may or may not be to behaviour/risk of serious harm in the future in stressful situations.

45. It is noteworthy too that in the grounds submitted there is no reference to paragraphs 4.8-11 of the DL. These set out clearly and logically why, in the panel's view, the Applicant did not meet the test for release. In my judgment having read through the dossier and carefully considered the grounds advanced I have seen nothing which suggests that the conclusions reached by the panel were *"irrational".*

**Decision**

46. For the reasons I have given, and applying the criteria set out above by the higher courts for consideration of decisions of this kind, I do not consider that the decision was either irrational or procedurally unfair. Accordingly this application for reconsideration is refused.

**Sir David Calvert-Smith**
**17 May 2024**