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[2025] PBRA 22

Application for Reconsideration by Williams

Application

1. This is an application by Williams (the Applicant) for reconsideration of a decision of an oral hearing decision dated the 16 December 2024 (the Decision) not to direct 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 are the usual dossier now consisting of 347 pages (316 at the date of the hearing), the application for reconsideration dated 6 January 2025 (the Application), the Decision and an email dated 14 January 2025 from the Public Protection Case Work Section (PPCS) on behalf of the Secretary of State (the Respondent) offering no representations in response to the Application.

Request for Reconsideration

4. The Application was drafted by the Applicant's legal representatives who represented him throughout the panel hearing. The grounds for seeking a reconsideration of the Applicant's parole review are not entirely clear (particularly as the Application contains a number of arguments or, from the way it was phrased, as possible arguments, which do not seem to be addressed within the framework of Rule 28). The Application launches a number of arguments or complaints based, as it seems to me, largely on a theme of failing to act fairly, reasonably or rationally or to investigate "*bare allegations*" (which are nowhere specifically identified save as mentioned below). Nevertheless, doing the best I can, the submissions appear to be as follows (some of which, it will soon be appreciated, overlap):

   a. The hearing was procedurally unfair in that:
      i. the panel did not seek evidence from the Applicant's father or mother as potential protective factors;
      ii. the panel expressed concerns about the Applicant's mother having contact with him on an illicit phone without investigating the matter further;
      iii. the panel expressed concern about the allegations of the Applicant's inappropriate behaviour as regards female staff without calling for witness

evidence or properly investigating the matter contrary to its own Parole Board guidelines;

iv. the panel should have adjourned the hearing for the Applicant to undergo a drugs test;

v. the latest OASys assessment report contained in the dossier (dated 26 September 2023) was over 14 months old at the date of the hearing and out of date in that the Applicant had completed a Thinking Skills Programme (TSP) subsequent to the date of the assessment.

b. The Decision was unlawful in that:

i. there was a failure properly or fairly to investigate the allegations referred to above;

ii. the recommendation that the Applicant's behaviour towards female staff (above) should be monitored was not linked to any forensic history or to the index offences and amounted in substance to a breach of the Applicant's rights to private and family life under article 8 of the European Convention of Human Rights (ECHR);

iii. in a conclusion that was "*fatal*" to the fairness of the parole review, the panel incorrectly determined that the Applicant had detained a person against their will in 2019 even though the Applicant's own Prisoner Offender Manager (POM) had told the panel at the hearing that the 2019 allegation was not related to the Applicant;

iv. by the time of the hearing the Applicant had completed all core risk reduction programmes, the Applicant's own psychological expert and the POM and Community Offender Manager (COM) all recommended release, but the panel preferred the prison based psychologist's evidence (not recommending release) and still felt further work could not be undertaken safely in the community which was inconsistent with the Applicant's sentence and a breach of his art 5 ECHR rights (right to liberty and security).

Background

5. The Applicant was sentenced on 22 April 2016, when aged 20, to an extended determinate sentence of 12 years' imprisonment with a two-year licence extension. His sentence expiry date is in April 2030 (SED). The index offences for which he received such sentence (following a trial) involved wounding with intent, affray and having an offensive weapon (a knife). He is now aged 29.

6. The circumstances surrounding the index offence, which occurred in February 2015, briefly involved a fight with another both apparently armed with knives. The victim fell to the floor whereupon the Applicant stabbed the victim in the neck and arm and then ran away.

7. The Applicant's history of offending involves repeated offences of drugs, affray, possession of knives, and violence. He also has a history of anti-social behaviour (theft and drug dealing) and association with pro-criminal peers.

Current parole review

8. This was the Applicant's first parole review having been referred to the Parole Board by the PPCS on 12 October 2023 to consider the Applicant's release. The panel

consisted of two independent members and a specialist psychologist. The hearing took place on 9 December 2024 via video link and heard evidence from six witnesses: the POM, COM, a security officer, the prison psychologist, a forensic psychologist on behalf of the Applicant and the Applicant himself whom as noted above, was legally represented throughout.

9. In a very lengthy and detailed Decision, the panel carefully noted the Applicant's past offending behaviour, the identified risk factors (pro-criminal peers, poor consequential thinking skills, difficulty in managing feelings and anger, a propensity for weapons and violence, misuse of drugs and anti-social lifestyle), his disrupted education, and distrust of authority.

10. The panel also noted (in brief summary):

    a. his mixed behaviour in custody including consistent concerns with anti-social behaviour including a number of proven adjudications (41 raised and 11 proven) for a number of matters including disobeying lawful orders, assault, fighting, and possession of unauthorised articles (mainly mobile phones) but also "*detaining a person against their will (2019)*" (see above);
    b. a large number of negative entries (much on the above lines);
    c. a volume and persistence of security intelligence including involving drug facilitation, involvement with gangs/groups, misuse of phones and social media to have video calls with friends and even his mum, inappropriate staring behaviour towards female staff making them feel uncomfortable and pulling the hair of one female officer ("*in a joking manner*");
    d. positive aspects such as active engagement with and completion of core risk reduction programme sessions (including TSP), positive changes in mental health, attitudes and behaviour, his not being known to substance misuse services (although awaiting the result of a recent misuse of drugs test (MDT) at the time of the hearing, the previous one in March 2024 having been negative), his maintenance of contact with, and support of, family, the absence of evidence of proven violence since 2019;
    e. the recommendations for release (as noted above) by the POM and COM (even though she assessed the Applicant as posing a high risk of serious harm (at least until his risk was tested in the community), and by the Applicant's own expert psychologist.

11. The prison psychologist, on the other hand, had initially "*tentatively supported*" release but at the hearing, in light of updated information (mainly the security intelligence) did not recommend the Applicant's release.

12. The panel expressed concern at the nature and frequency of the security concerns and did not have confidence in the Applicant's ability to effectively manage his behaviour. Despite noting support from both his parents, the panel also noted that his mother could only accommodate the Applicant on a short-term basis. Whilst the risk management plan provided a proportionate and commensurate level of oversight and a number of external controls, the panel concluded it would not be effective in managing the risk posed by the Applicant particularly in the longer term following a period in an approved premises. The concerns, too, about his lifestyle, attitudes, anti-social and non-compliant rule-breaking behaviour, including a propensity to associate with negative peers, and his ability to manage these risks

remained. A sustained period of positive behaviour was required with evidence of his ability to apply insight to his current location.

13. Accordingly, the panel concluded it remained necessary for the protection of the public for the Applicant to remain confined and did not direct his release.

The Relevant Law

14. The panel correctly sets out in the Decision the test for release.

Parole Board Rules 2019 (as amended)

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)). This case is amongst those eligible for reconsideration.

17. As noted above, the Application is somewhat opaque in that it contained no argument or submissions in relation to the application of Rule 28. Such arguments as were addressed seem to have ultimately concerned errors of law and procedural unfairness rather than irrationality and I have accordingly largely confined this decision to those grounds.

18. Nevertheless, some general principles are worth bearing in mind.

Irrationality

19. **R (on the application of Wells) -v- Parole Board 2019 EWHC 2710** (Admin) Saini J set out what the judge 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 also 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). Nevertheless, this test is not intended as and is not a substitute for the well-known test in **Associated Provincial Houses ltd -v- Wednesbury Corporation 1948 1 KB 223** to the effect that to succeed an applicant must show the decision was one no reasonable panel could ever have come to.

20. 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.

21. 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

22. 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, for example, to the issue of irrationality which focusses on the actual decision.

23. In summary applicants 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.

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

Error of law

25. 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.

26. 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. In the instant jurisdiction the instrument in question will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

27. 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.*"

28. 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.*"

29. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

Reconsideration as a discretionary remedy

30. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

31. I have previously mentioned that the Respondent declined to make any representations in response to the Application.

Discussion

Allegations: The Principles

32. Expressly or implicitly in relation to the complaints against the Decision, the Application refers to a number of "*bare allegations*" or other allegations which, it is seemingly suggested, should have been investigated. Reference was made to recent Supreme Court and Parole Board Guidance on dealing with allegations of fact, particularly in relation to the allegations surrounding inappropriate behaviour towards women officers and the use of illicit phones in communicating with his mother. This issue relates mainly to the allegations of procedural unfairness.

33. The law regarding how a panel should approach the use of allegations in its decisions is now settled and is as stated by the Supreme Court in the case of **Pearce v Parole Board [2023] UKSC 13.** Parole Board members are further assisted by Guidance prepared by the Board – the most recent version of which (version 2.0) is dated September 2023, published following the Judgment in **Pearce**.

34. The relevant conclusions reached by the Supreme Court in **Pearce,** given the nature of the challenge made to the panel's approach may be summarised as follows:

    a. The function of the Parole Board is not to find a prisoner guilty or innocent of any criminal offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence or, as it was put in **Pearce**, to address whether the safety of members of the public requires that the prisoner should remain confined. In so doing, the panel must have regard to the consequences of its decision on the interests of the prisoner, and the hardship he may suffer if he no longer needs to be confined in order to protect the public.
    b. The Board is not bound by the rules of evidence which apply in a criminal trial. It is entitled to take hearsay into account (and does so routinely) together with other evidence or information regarding misconduct or criminal offences. It must also take into account information or evidence regarding the good conduct of a prisoner, whenever it took place. Therefore, in making what has been described as a "*global assessment of risk*" a panel's assessment is bound to have regard to <u>all</u> the relevant information placed before it provided that the prisoner is given a proper opportunity to respond. Therefore, there is no limit placed on the Board as to the nature and character of the information it takes into account in assessing risk, provided that the Board in all respects act fairly.
    c. The weight to be given to the evidence or information received is and remains a matter entirely for the Board. If weight is to be given to an allegation of criminal or other misbehaviour the panel's first task is to examine the facts and consider if it is able to make a finding on the truthfulness or otherwise of the allegation. If, as often happens, a panel is not able to make such a finding, it should then examine the facts and consider if it can make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner that is relevant to the assessment of risk giving it as much weight as it considers appropriate following an assessment of all of the information before it.
    d. At all times a panel must proceed with considerable caution which includes giving the prisoner the opportunity of making submissions on how the panel should proceed.

35. It is also important to bear in mind that not every allegation or fact must be investigated but only those matters which are fundamental to or likely to affect significantly the outcome of a panel's deliberations. Otherwise, a panel could

become bogged down in endless inquiry sand investigations into matters which are, at the end of the day, whichever conclusion is reached thereon, unlikely to affect the overall outcome. A sense of due and proper proportionality is required.

The Allegations: The Applicant's Mother and Father

36. In relation to the allegations concerning the use of an illicit phone to communicate with his mother, the source of this evidence was the Applicant himself. The concerns of the panel in this context arose from the fact that whilst the panel accepted the COM's evidence that the Applicant's mother would be a protective factor and would not collude with any anti-social behaviour they had "*some concerns*" about whether she would be fully protective given the contact on an illicit phone. The panel accepted that it was unknown whether the mother was aware of this and commented that "*it does call into question the protectiveness of this relationship and the potential for collusion*". That is just what it was, a comment. The panel carefully noted they were making no finding of fact. Should the panel have adjourned to call her as a witness? It does not appear there was any application for them to do so and in any event the panel later noted that any accommodation the mother could offer was only likely to be on a short-term basis. In my judgment there was nothing unfair, irrational or unlawful in the panel's failure to take this matter further.

37. Likewise, as regards criticism of the Decision for failure to call the father as a witness. There was nothing to investigate in this regard. The panel noted that the father (the parents seem to have separated) was a protective factor and accepted a post hearing email from the father in which he explained, contrary to concerns expressed at the hearing, that he did not live in an anti-social locality. As it turned out this did not affect the outcome of the panel's deliberations. I also see nothing unfair, irrational or unlawful in this approach.

The Allegations: Inappropriate Behaviour as Regards Female Staff

38. Again, the Decision was criticised on the basis that the allegations involving female staff should have been investigated and the panel should not have accepted the recommendation that the Applicant's behaviour in this respect should be monitored. I see no error or failure in this regard. The panel decided merely that the concerns having been raised regarding the Applicant's conduct should be monitored in this (as well as other) respects. The so-called inconsistency with his offending history and alleged breach of his rights under the ECHR are neither here nor there and I am not at all persuaded there were any such breaches with regard to these matters. The fact that the Applicant had no forensic history of sexual offences did not matter nor does it matter that these matters were not of the type of conduct for which he was sentenced as regards the index offences. The task of the panel was one, fundamentally, of risk assessment and protection of the public. The panel was perfectly free, based on evidence before them to accept a recommendation that the Applicant's conduct should be monitored. Ultimately how and to what extent that was done was and is a matter for the prison authorities. In my judgment there was nothing unfair, irrational nor unlawful in the panel's approach on this aspect of the case.

MDT Test Results

39. There is nothing in this point. The panel noted that there was no evidence of the Applicant's being known to substance misuse services and that a previous test outcome had been negative (above). This seems to have been treated as a positive factor in his favour and an adjournment to obtain the result would only have added an unnecessary delay to the proceedings with an outcome (if in his favour) which would not have altered the Decision or (if against) confirmed it.

The Out-of-Date OASys Assessment

40. I certainly accept the desirability of a panel having as up-to-date information as possible before it. I accept that the OASys assessment the panel had in the dossier was now, at the time of the hearing, somewhat ancient. Nevertheless, it is clear the panel had copious amounts of more recent information before it including security information, adjudications, reports, compliance with core risk reduction work and a variety of negative and positive factors as well as the evidence of the witnesses they heard. The panel also had the one piece of information that the Application complains was missing from the assessment, namely the Applicant's completion of the TSP. The failure to place a more up-to-date OASys assessment before the panel in the circumstances did not render the Decision unlawful, nor for that matter irrational nor procedurally unfair.

Unlawfulness – Inappropriate Behaviour as Regards Female Staff

41. I have nothing to add to the conclusions already reached on this ground above.

Unlawfulness – The incorrect statement regarding the 2019 Detention

42. I accept that from a fair reading of the Decision it does appear that the panel took the (mistaken and incorrect view despite being told to the contrary) that there had been an adjudication against the Applicant for detaining a person against their will in 2019 (see above). (It might also well be read that it was an unproven allegation, but I am prepared to accept the Applicant's submissions in this regard.) As noted above, however, this fact does not appear to have had a significant or "*fatal*" (as alleged) overall influence on the result of the parole review but merely one piece of evidence before the panel.

Unlawfulness – The Views of the Experts

43. As previously noted, it is for the panel to accept or reject the evidence before them and a matter for them which evidence they prefer or not as the case may be. Despite the recommendations of the POM, COM and the Applicant's own expert, the panel preferred and accepted the views, albeit modified on the basis of the evidence at the hearing, of the prison psychologist. This they were entitled to do, and they expressed their reasons for so doing. It must also not be overlooked that the panel had the advantage of a specialist psychologist member. I see no basis for interfering with that conclusion.

Overall Conclusion

44. Bearing in mind the legal framework set out above, standing back and adopting a global or holistic approach with the requisite degree of anxious scrutiny to the Decision and the material before them I see no basis for interfering with the Decision of the panel on any of the grounds advanced or otherwise. There was more than ample material to justify their careful and balanced conclusions and assessment of the risks to the public measuring both the positive and negative factors involved.

Decision

45. For the reasons I have given, I do not consider that the Decision was irrational/procedurally unfair or unlawful and accordingly the application for reconsideration is refused.

HH Roger Kaye KC
28 January 2025