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[2025] PBRA 38

Application for Reconsideration by Ford

Application

1. This is an application by Ford (the Applicant) for reconsideration of a decision of an oral hearing dated 21 January 2025 not to direct release, but recommending open conditions.

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 decision letter (DL) dated 21 January 2025.
   - Reconsideration representations drafted by the Applicant's legal representative and dated January 2025.
   - The dossier, which currently consists of 643 numbered pages, ending with the DL.

Request for Reconsideration

4. The grounds for seeking a reconsideration are lengthy. They consist of extensive extracts from the DL (and a previous DL), followed by assertions about the evidence which the legal representative suggests should have led the panel to come to a different conclusion about release. Such representations cannot amount to grounds for a finding that the panel's decision was irrational. I set out the legal definition of irrationality below.

5. Doing the best I can, the assertion that "*the decision makes no sense on the evidence of risk that was considered and … no other panel could have come to the same conclusion*" is, perhaps, arguable on the basis of the panel's finding that the Applicant does not present as posing an imminent risk currently. However, that finding was immediately followed by the panel saying *"although it was not clear to the panel whether that would change if [the Applicant] stopped taking his MMSA [medication to manage sexual arousal], which would be within his rights as this is a voluntary process."*

6. I therefore take as the only ground for arguing that the decision was irrational what is pleaded as "*The Risk of Serious Harm does not suggest there is any imminency*

*if released (*sic*) were to be directed*." All other complaints are expressed as dissent from the view the panel took as to the weight to be attached to various aspects of the evidence. There is no suggestion that the panel took into account irrelevant evidence or failed to take into account relevant evidence.

7. So far as procedural unfairness is concerned, this is what is pleaded:
   1. *Our client was not given a fair hearing due to certain individuals with backgrounds in certain areas and the way their questioning was presented.*
   2. *The Panel was impartial, and we would hope that a future Panel would be more mindful of being impartial around questioning both our client and witnesses*.

8. Of course I understand that typos do happen. I take it that this is actually a complaint about the panel's lack of impartiality, and I will discuss it below.

Background

9. The Applicant was 20 years old in 2011, when he received a sentence of imprisonment for public protection (IPP) for a sexual offence against a 14-year-old. He had a previous conviction in 2005 for a sexual assault on a 5-year-old. The tariff expiry date for the IPP sentence was in February 2015.

Current parole review

10. The Secretary of State (the Respondent) referred the Applicant's case to the Parole Board for consideration of a direction for release or recommendation that the Applicant remain in open conditions, where he has been since November 2021. The oral hearing took place remotely on 14 January 2025. The panel consisted of three independent members of the Board. The panel considered a dossier containing 605 pages. It heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM), a psychologist commissioned by the prison, and the Applicant. The Applicant was legally represented throughout, and his representative had the opportunity to question all the witnesses and to address the panel at the end of the hearing.

11. There are two versions of the DL in the dossier. I understand that the one from which I have worked, the last in the dossier, was issued on 23 January 2025 "under the slip rule": see the *Parole Board Rules 2019 (as amended),* rule 30. I have not sought to analyse the differences between the two versions.

The Relevant Law

12. The panel correctly sets out in the decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to, or continuation in, 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. This is an eligible decision, and an eligible sentence type.

Irrationality

14. 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.

15. In **R(DSD and others) -v- the Parole Board** [2018] EWHC 694 (Admin) (*Worboys*) 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."*

16. 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).

17. 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.

18. 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.

19. 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

20. 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.

21. 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.

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

The reply on behalf of the Secretary of State

23. The Respondent has indicated that she does not wish to make any reply to this application.

Discussion

24. I have not discussed the contents of the representations in respect of irrationality in any sort of detail, because, taken individually or together, even if I agreed with every word of them, they would not constitute proper grounds for granting reconsideration. What they do amount to is an attempt to persuade me to take a different view of the evidence from that which the panel took: for which, see paragraph 18 above.

25. Focusing on the panel's finding that the risk of serious harm may not be imminent on release, which was, of course, only one of the considerations for the panel, I have already drawn attention to the panel's caveat, that if the Applicant were to cease taking his medication, which he has the right to do, the risk (which to children and known adults was assessed by the witnesses as high), might change.

26. A principal area of concern for the panel, in coming to what it said was a finely balanced decision, was the inadequacy of the risk management plan (RMP) to manage the Applicant's risk to the public. The panel was particularly concerned with the absence of a licence condition that the Applicant submit to polygraph testing, and the fact that he would not initially be closely managed by a COM who had extensive knowledge of him. His current COM would not retain the case.

27. The panel considered all the evidence, including areas of concern arising from the Applicant's behaviour on temporary release from prison. The panel took into account the Applicant's explanations and the views of the professional witnesses, all of whom, as the panel noted, supported his release on licence.

28. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any RMP proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

29. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should

explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions: see **Wells** above. This panel explained its reasons with great clarity, and those reasons justify its conclusions.

30. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that the panel members saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered, unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. The Application here does not begin to reach the required level.

31. As to the suggestion of procedural unfairness, this is either without meaning or it is an attack on the impartiality of the panel members. It is irresponsible advocacy to make such an attack without there being grounds for it, and here no grounds whatsoever are advanced. There cannot be any basis for a finding of procedural unfairness on the material placed before me. All there is, is a vague slur, unsupported by argument, illustration or evidence.

Decision

32. 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.

HH Patrick Thomas KC
13 February 2025