

[2022] PBRA 93

Application for Reconsideration by Ogo

Application

1. This is an application by Ogo (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 27 June 2022 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:
 - a) The decision letter dated the 27 June 2022;
 - b) A request for reconsideration in the form of written representations dated the 11 July 2022; and
 - c) The dossier, numbered to page 311, of which the last document is the decision letter. The panel had a dossier numbered to page 298.

Background

4. The Applicant is now 32 years old. On the 14 June 2010, when he was 20 years old, he received a sentence of detention for public protection following his conviction for possessing a firearm with intent to endanger life and possessing ammunition without a certificate. The sentencing court determined that he must serve 6 years (less the time he spent on remand) prior to being considered for release by the Parole Board.
5. The circumstances of those offences were that the Applicant and his co-defendant were travelling in a vehicle, which the Applicant was driving. Armed police officers, acting upon information, effected a stop. The Applicant stopped the vehicle but then drove off and only stopped again when the car collided with a lamp post. The Applicant and his co-defendant ran off, the co-defendant was apprehended but the Applicant was not. He was later arrested, seated in an aeroplane, bound for Dubai. Within the vehicle the Applicant had been driving was a Mach 10 sub-machine gun with seventeen rounds of ammunition and a magazine.



6. The Applicant's progress on his sentence is detailed within the dossier. There had been behavioural concerns, although this later improved and in July 2019, the Applicant was moved to an open prison following a review by the Parole Board. Prior to the move, the Applicant was reported to have assaulted a prison officer and a prisoner, but the Secretary of State allowed his move to an open prison. In November 2019, the Applicant was returned to the closed estate due to serious security concerns. The Secretary of State issued the Applicant with a warning and decided that he could return to an open prison, although it appears that this did not take place immediately because the fourth review by the Parole Board was underway.
7. In February 2021, following the fourth review of the case, the Applicant was moved back to an open prison. During his time in the open prison, the Applicant progressed to periods of day release in the community and from November 2021, he began periods of overnight release in the community.
8. The panel's review was the fifth review of this case. The Secretary of State referred the Applicant's case to the Parole Board on 26 May 2021. On the 5 October 2021, a paper review directed the case to an oral hearing and that hearing was initially scheduled to take place in April 2022.
9. In March 2022, prior to the oral hearing, the Applicant was returned to a closed prison because he had been found with unauthorised bank cards and a car key following a period of temporary release. The report at the time in the dossier established that the Applicant was only allowed to use public transport during any period of temporary release, and he had been seen driving a car. It was later established that the car belonged to the Applicant's partner. The bank cards belonged to the Applicant, although it seems he did not disclose his bank account to the prison, and he held two credit cards which he was not allowed to obtain when in custody. The Applicant was later to tell the Parole Board that he had held the bank account for some time, had not thought to disclose it, and had applied for credit cards to build a credit rating. During his time in custody, the Applicant had also registered himself as a director of a limited company, however, he had removed himself from this position when he was told that it was not allowed.
10. The panel adjourned the hearing in April 2022 and reconvened on the 30 May 2022. In the intervening period, the panel directed reports be produced to help it assess the circumstances leading to the Applicant's return to a closed prison. At the oral hearing, the panel heard from the Applicant, his partner, his Probation Officer in the community, the official managing his case in the closed prison, the official who had been managing his case in the open prison and from a prison psychologist. The Applicant was legally represented at the hearing.
11. The panel later issued its decision letter and did not direct the Applicant's release but did recommend to the Secretary of State that he should be returned to an open prison. There had been a delay between the oral hearing and the panel's decision letter because the Secretary of State amended the test the panel must consider in deciding whether to recommend a move to an open prison. The panel properly adjourned its decision to consider the Secretary of State's revised test before issuing its decision letter dated the 27 June 2022.



12. Much of the panel's decision letter focuses on the incident in March 2022 and the Applicant's explanation of events. He had said that he had taken over the driving of the vehicle on the day in question at his partner's request, had parked about half a mile from the prison on his return and then rushed back to the prison because it was close to the time that he had to be back. The panel noted that he could not explain why the car key was in his pocket, *"given that his partner had initially been driving and they had swapped during the journey"*.
13. The panel had concerns about the Applicant's reasons for not driving to the prison car park, although he provided an explanation for this and the official managing his case in the open prison had said that it was not unusual for prisoners to remain outside of the entrance to the prison for some time at the end of any period of temporary release. The Applicant told the panel that his partner's car was a keyless vehicle and he subsequently discovered that he still had the car key in his pocket. The panel noted that he was unable to explain why he had not returned to the prison gate and asked staff to contact his partner so the key could be returned. Instead, he put the key into his locker. The panel determined that it would have been unlikely that the Applicant's partner would not have telephoned him during the ten minutes it took for him to walk from the car to the prison gate and ask for the key to be returned.
14. Although witnesses at the oral hearing remained supportive of the Applicant being released, the panel disagreed. In its decision letter, the panel doubted the Applicant's explanation of events and considered that despite having opportunity to do so at the oral hearing, he had failed to *"fill in the gaps in his account"*, which the panel stated, *"... makes it difficult to know to what extent, if at all, this incident goes to the question of his risk of harm as opposed to a question of compliance. In addition, professionals would not be able to assess properly what risks need to be managed"*.
15. In its assessment, the panel determined that the Applicant kept the car with the intention of using it for a reason that was not yet known. It said, *"The circumstances of his recent removal from open conditions are, at best, evidence of very poor decision making. At worst they show a blatant disregard for the rules although, as it is not clear what [the Applicant] used the car for, there may be other, more serious implications"*.
16. In its conclusion, the panel stated:

"The panel found the circumstances of [the Applicant's] removal from open conditions to be concerning as it showed a series of very poor decisions which he took to meet his needs without regard for the consequences. [the Applicant's] response after he was discovered breaking the rules raises further concerns. If [the Applicant] cannot be honest with professionals then he is not manageable as it is not possible to determine what risks need to be managed."

"The panel was not confident that [the Applicant's] risks could be safely managed. It concluded that he needed to remain imprisoned for the protection of the public and did not direct release."

Request for Reconsideration



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17. The Applicant's grounds for reconsideration are that the panel's decision was irrational and/or procedurally unfair, in that:

- a) The panel failed to give proper reasons for its decision, and the panel's decision failed to record adequate details of the evidence given by either of the officials managing his case in prison or the prison psychologist, despite the importance of their evidence.
- b) The panel's decision was based upon unproven allegations.

The Relevant Law

18. The panel correctly sets out in its decision letter dated the 27 June 2022 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

19. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

20. 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)).

21. 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

22. 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."

23. 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.

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

25. 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.*"

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.

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

The reply on behalf of the Secretary of State

28. On the 21 July 2022, the Secretary of State confirmed that he would not be making any representations about the application.

Discussion

29. I should note that the Applicant makes reference to **R (Wells) and the Parole Board [2019] EWHC 2710 (Admin), Associated Provincial Picture Houses Ltd and Wednesbury Corporation [1948] 1 KB 223 (CA), Cooper [2021] PBRA 17, Ullah [2019] PBRA 78** and **R (Pearce) and the Parole Board [2022] EWCA Civ 4**. I have taken note of this, where relevant, in determining the Applicant's application.



Ground a

30. The Applicant seeks to argue that the panel failed to give proper reasons for its decision and failed to record adequate detail of the evidence given, and that the decision was irrational.
31. The reason for requiring adequate reasons has been explained in a number of decisions including:
R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;
R (Wells) v Parole Board (2009) EWHC 2710 (Admin);
R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;
R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).
32. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by Reconsideration or Judicial Review would not be an effective one.
33. The Applicant accepts that he breached the conditions of his temporary release by having bank cards and a car key. However, he argues that his behaviour prior to this had been good and that all witnesses at the oral hearing recommended his release.
34. The Applicant submits that there was relevant evidence from the official managing his case in the open prison who stated that the Applicant was unaware of the rules about registration of a limited company and possession of bank cards, that the Applicant had expressed uncertainty about transport restrictions on his temporary release licence and that the licence at the time he drove the car did not prohibit him from doing so.
35. The Applicant says that the official managing his case in the open prison did not believe there was any anti-social intention behind his behaviour and that the prison psychologist said that professionals agreed that there was no evidence of illegal or anti-social behaviour and that the Applicant's risk could be managed in the community regardless of whether he had been lying or had simply made a mistake.
36. The Applicant also notes that the panel referenced his partner expressing concern at having her car number plate checked, but that this did not address the fact that the insurance certificate for the car had been provided and therefore the relevant details were available to be checked if there had been concerns about the Applicant's use of the car.



37. The Applicant also submits that the evidence of the official managing his case in the closed prison was not detailed at all within the decision letter and she was not satisfied that the Applicant had been fully made aware of the rules.
38. Although the panel reference the registration of the limited company, there is little within its decision letter to suggest that this incident, on its own, had any real relevance in its determination not to direct the Applicant's release. Equally, although the panel makes reference to the Applicant's partner, its focus was on the concern that *"considerable reliance is being placed on [the relationship] to provide [the Applicant] with stability and support in the community"*.
39. Evidence within the dossier established that the Applicant had been returned to a closed prison because of the concern about the car key and him driving a car, rather than any significant concern about the possession of the bank cards.
40. In my view, any reading of the decision letter establishes that the panel was primarily concerned with the car key and the Applicant's use of the car. In summary, the panel doubted the Applicant's explanations, believed that the Applicant had not been open about the incident in his own oral evidence despite having opportunity to do so, and that this meant that it was difficult to determine whether his behaviour raised a question of compliance or was relevant to his risk of harm. The panel then went on to make a finding that the Applicant *"kept the car with the intention of using it for a reason that is yet unknown"*. The panel said that there may be other, more serious implications for him having the car.
41. I note that the panel did record in the decision letter that the prison psychologist had considered the incident and did not believe that it *"fundamentally alter[ed] the psychological risk assessment"*, that the official in the closed prison had considered the Applicant's behaviour there to be positive, and that his release was supported by those witnesses and his Probation Officer. The panel was also provided, in the dossier, with the Applicant's temporary release licences ('ROTL'S), one of which included the following condition:

"Your mode of travel when accessing ROTL must reflect your ROTL Application. If approval has been given for you to be collected, this must, at all times be from [the prison] Car Park as per the Notice to Prisoners. Visitors are not to park in any residential area within a 2-mile radius of the prison. Failure to adhere to this Licence Condition will result in disciplinary action and loss of ROTL."

42. A further condition stated:

"You will travel to and from the Placement by Public Transport. You must always travel the most direct route. Any deviations must be reported to [the prison] for



approval prior to travel. Any unauthorised deviations from approved travel arrangements will be considered a breach of licence conditions resulting in disciplinary actions.”

43. All the evidence before the panel established that the Applicant had not requested permission to travel by any means other than public transport and, even if he had been granted permission to use a car, had not utilised the prison car park as directed.
44. 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 risk management plan 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.
45. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in the cases of **Wells [2019] EWHC 2710 (Admin)** and **Stokes [2020] EWHC 1885 (Admin)**, both of which contain helpful guidance which I am bound to follow on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional and other expert witnesses can be regarded as irrational.
46. It is suggested in **Wells** that rather than ask “*was the decision being considered irrational?*” the better approach is to test the ultimate conclusions reached by a panel against all the evidence it has considered and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel’s experience and expertise.
47. Having reached conclusions upon the evidence it is clear that a panel is then required to explain its reasons, especially if they are going to depart from the recommendations made by experienced professionals. A panel can rationally depart from expert evidence, but a rational explanation for doing so must be given and it must ensure as best it can that its stated reasons are sufficient to justify its conclusions. It follows that I must decide whether on a reading of the panel’s decision, I am satisfied that the conclusions it reached are justified by the evidence it considered, and secondly whether I am satisfied that those conclusions are adequately and sufficiently explained or whether there are any unexplained evidential gaps or leaps in reasoning which fail to justify the conclusion that is reached.
48. The Applicant’s argument that the evidence of the official managing his case in the closed prison had not been “*mentioned at all in the panel’s decision*” is incorrect. There is reference to the evidence of this witness, albeit briefly. Panels are not required to



rehearse all evidence in its decision letter, the record of the oral evidence is in the official recording of the oral hearing and the panel was simply required to explain in its decision letter why it reached the decision that it did. In my view, the panel did just that. Other panels may have chosen to reference more of what was said in the oral hearing, and it may have been helpful, however, the key reasoning for the panel's decision not to direct his release was established in the decision letter.

49. The panel had concerns about the Applicant's explanation for the incident in March 2022 and it established its reasons for this and why it disagreed with the evidence of witnesses at the oral hearing. The panel was entitled to reach the conclusions that it did, and, in my view, there were no unexplained evidential gaps or leaps in reasoning. On any reading of the decision letter, it is clear why the panel did not direct the Applicant's release.

Ground b

50. The Applicant submits that the panel's decision was based upon unproven allegations and that the panel fell into error in its assessment of the incident that led to his return to a closed prison. In his view, the panel was required to make a finding of fact and to then proceed to the conclusions to be drawn from that finding. The Applicant believes that if the panel had concerns about his behaviour at the time of the incident and did not accept the evidence presented by the witnesses at the oral hearing, then it should have adjourned his review for further investigation.

51. In **R (Pearce) and the Parole Board [2022] EWCA Civ 4** the Court of Appeal ruled that the Parole Board's *Guidance on Allegations* contained errors of law. In short, the ruling made the following points:

- a) On a proper construction of the law, in order to take allegations of wider offending into account, they need to be based on facts, so panels need to examine the evidence to see if they can find any factual basis for the allegation.
- b) If a panel is in a position to make a finding of fact about the allegation it can do so, but if not it must be careful not to go further than the background facts will allow. This is because the panel must be careful not to adopt a 'no smoke without fire' approach.

52. I do not accept the Applicant's submission that the panel fell into error. In this case it was the incident in March 2022 which formed the basis of the allegation against him. It had been alleged that he had been found with bank cards and a car key and that he had been driving a car. The allegation led to a decision to return him to a closed prison.

53. In terms of any finding of fact, the Applicant had accepted the allegation. He had admitted that he had driven the car, that he had the bank cards, and that the car key was in his pocket. All witnesses accepted that he had done this, the panel was entitled



to accept the account and could be satisfied that he had behaved in the way that was alleged.

54. The question for the panel was what, if any, relevance the allegation had to the panel's review and the weight to attach to the concerns arising from the allegation. In its review of the case, the panel explored the incident in detail, and it heard from witnesses, and the Applicant, about it.

55. The panel was entitled to find, as it did, that the incident was relevant to its assessment of his case. At paragraph 2.13 of its decision letter, the panel had this to say:

"The panel did not find [the Applicant's] explanations as to why he had the car key, made the decision to drive on the Tuesday and had credit cards to be credible. There was no plausible reason for him to have stopped the car half a mile from the prison when he had to rush to return to the prison to avoid being late. At the oral hearing, [the Applicant] was given more than sufficient opportunity to be open about this incident but chose to not do so. As [the Applicant] has chosen to not fill in the gaps in his account, it makes it difficult to know to what extent, if at all, this incident goes to the question of his risk of harm as opposed to a question of compliance. In addition, professionals would not be able to assess properly what risks need to be managed."

56. In its Conclusion, the panel stated:

"... [the Applicant] is yet to evidence that he can consistently make good decisions."

"The panel found the circumstances of [the Applicant's] removal from open conditions to be concerning as it showed a series of very poor decisions which he took to meet his needs without regard for the consequences. [the Applicant's] response after he was discovered breaking the rules raises further concerns. If [the Applicant] cannot be honest with professionals then he is not manageable as it is not possible to determine what risks need to be managed."

"The panel was not confident that [the Applicant's] risks could be safely managed. It concluded that he needed to remain imprisoned for the protection of the public and did not direct release."

57. The panel was under a duty to investigate matters in this case and did exactly that. It was established in the written evidence and in the oral evidence that the Applicant had behaved in the manner that was alleged in the incident leading to his return to a closed prison. The panel questioned witnesses and the Applicant about the incident to try to establish more background to the matter in its effort to determine the relevance of the incident to its assessment of his case.



58. The panel was entitled to reach its own conclusions in terms of the credibility of the account provided by the Applicant and it weighed this against the other evidence before it. Other panels may have decided differently, however, the panel was entitled to find that it did not accept the Applicant's explanations and, based on the available evidence, that the Applicant had the car with the intention of using it for a reason that was unknown.
59. The panel did not go on to make any specific finding as to why the Applicant had the car, it simply stated that it didn't believe his account and that at the time of the review his reason for having the car was not known and, in its view, this was relevant in its assessment of his case.
60. In considering the Applicant's submission, it seems to me that he sees the reason for the incident as the allegation and not the incident itself. In my view, it is the incident that forms the allegation and the question then arising for the panel was why he behaved in the way that he did. This forms the background to the allegation, however, the allegation itself was proven because the Applicant had accepted that the incident took place.
61. Even if the reason for the incident was considered to be the allegation, the panel was entitled to consider that background to be relevant. The only findings by the panel were that it didn't accept the Applicant's reasoning and that he had the car for an unknown purpose. The panel gave reasons for this and it was entitled to reach the conclusions that it did. The panel was entitled to consider the relevance of the matter in its review of the case and to make an assessment of it.
62. The Applicant suggests that the panel should have adjourned for further investigation. I do not accept that submission. The panel was under a duty to investigate and, as I have already explained, it did just that. The scale or detail of any investigation was a matter for the panel, and it had the expertise to determine how far its investigation should go in its review of the Applicant's case.

Decision

63. 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.

Robert McKeon
27 July 2022

