

[2023] PBRA 114

Application for Reconsideration by Dennett

Application

1. This is an application by Dennett (the Applicant) for reconsideration of a decision of an oral hearing dated 24 May 2023 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)), 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 decision;
 - Representations from the Applicant's solicitors dated 30 May 2023;
 - The dossier, which contains 965 numbered pages, ending with the decision letter.

Background

4. The Applicant is now 36 years old. In October 2012, when he was 25, he received an extended sentence of 15 years imprisonment, made up of a custodial sentence of 10 years and 6 months, and an extended licence period of 4 years and 6 months. The index offences were sexual offences and assaults against his former partner, criminal damage and perjury. He had previous convictions; these included offences of violence and a sexual offence, all against previous partners. He denies the index sexual offences. His sentence expires in February 2027. It follows from those dates, all noted by the panel, that at the time of the decision letter, the Applicant had completed the custodial element of his sentence.
5. He was released on licence, automatically, on 22 May 2017, and recalled on 31 December 2018. He disclosed a relationship in June 2017, as required, but struggled to cope when his partner ended the relationship not long afterwards. There was no evidence of violence, but there was evidence of harassment, and a Non-Molestation Order was imposed. After a further successful period in prescribed accommodation he returned to live with his parents. He was recalled in December 2018, due to being wanted for breaches of his Sexual Offender Registration and Sexual Harm Prevention Order (SHPO), by being in two different relationships without disclosing them to his supervisors. In due course, he received a 4 month sentence of



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imprisonment for breach of the SHPO and sending malicious communications, which has now expired.

Request for Reconsideration

6. The application for reconsideration is dated 30 May 2023.
7. The grounds for seeking a reconsideration are as follows:
 - (1) Procedural unfairness: The panel failed to apply the correct test for release. The Applicant is in the extension period of his sentence and therefore the test for release should be reversed with the presumption in favour of release as set out in **R (Sim) v The Parole Board [2003] EWCA Civ 1845 (Sim)**. Also cited is **R (Gary Coney) v Parole Board and another [2009] EWHC 2698 (Coney)**. It is suggested that the test for release should be reversed in the Applicant's case.
 - (2) In the light of the above the panel's decision was procedurally unfair and therefore irrational.
8. I have also looked at **R (Browne) v The Parole Board [2016] EWHC 2178 (Admin)** (*Browne*), in which *Coney* (as well as *Sim*) is discussed.
9. The complaint is that the panel applied the wrong test for release. Whether that is best described as procedurally unfair or irrational, if the complaint is valid, that would call for the case to be reconsidered. It is also likely that the application of the wrong test for release would be an error of law.
10. The question, in any event, is whether the panel applied the wrong test for release.

Current parole review

11. This was the second review following the Applicant's recall. His application was for release.
12. The hearing took place by video link on 3 May 2023. The panel consisted of a psychologist member of the Parole Board and an independent member as chair. The Applicant was legally represented throughout. The witnesses who gave evidence were the Prison Offender Manager, a prison-based psychologist, the Applicant's keyworker, and his Community Offender Manager.

The Relevant Law

13. The panel correctly sets out in its decision letter the test for release.
14. 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. That test is the same for all Parole Board decisions as to release: **R (on the application of King) v The Parole Board [2014] EWHC 564 (Admin)**.



15. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

16. In *Sim* the Court of Appeal decided, in the case of prisoners serving an extended sentence, that, since it was the intention of the sentencing judge that in principle the prisoner would be on licence during the extension period, there is a presumption that he will be. No judge has ordered him to be detained during that period. Therefore detention has to be positively justified: *"the Board has to be positively satisfied that continued detention is necessary in the public interest if it is to avoid concluding it is no longer necessary"*. It should be noted that the test for release remains the same. The difference is in the interpretation of the word *"necessary"* in the case of prisoners like this Applicant.

17. As I said in **Ddin [2022] PBRA 169**:

"It is true that in his judgment in [Sim] (with which the other members of the Court agreed) Keene LJ used the word presumption, saying that the presumption of an extended sentence being passed "is that during the extension period the offender need not be in custody." However, the Court went on to explain what that means in the context of a Parole Board decision following recall during such a sentence. At Paragraph 44: "If after hearing all the evidence the Board remains genuinely unsure whether the prisoner needs to be detained or not, ... the prisoner in that situation would be at liberty." At Paragraph 51: "The Board has to be positively satisfied that continued detention is necessary in the public interest if it is to avoid concluding that it is no longer necessary." In other words, it is only if the Board is unsure that any so-called "presumption" may come into play."

18. *Sim* remains good law, despite any changes which may, or may not, have been introduced by LASPO (the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*). It follows that the test the panel in the instant case set out is the correct one: it has, however, to be interpreted in accordance with *Sim*.

19. This was the approach taken by the High Court in the cases referred to above, *Coney* and *Browne*.

Parole Board Rules 2019 (as amended)

20. 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)).



21. 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)).

Error of law

22. 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.

23. 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.

Irrationality

24. 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."

25. 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.

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

27. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"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 respect 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."

Procedural unfairness

28. 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.

29. 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.

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

31. 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 Secretary of State (the Respondent)

32. The Respondent has chosen not to make any representations in reply to this application. Given the nature of the application, the Parole Board might have been assisted by representations from the Respondent.

Discussion

33. In *Sim* the panel said this:

"The panel is of the unanimous view that your immediate release would present an unacceptable risk to the public of further offences being committed and your representations against recall are rejected."

34. In *Coney* the panel said this:



"The Probation service have concerns about Mr Coney's future manageability on licence and in the panel's view this is warranted given that this is his second recall; the first being the result of possessing indecent images of children."

"It was concluded that risks were not currently manageable the community. The panel made no recommendation as release."

35. In Browne the panel said this:

"The panel concluded that your risk is not manageable in the community for the period remaining until your sentence expires and therefore did not direct your re-release."

36. In the instant case, the panel said this:

"4.1. The panel considered all the written and oral evidence and listened carefully to [the representative's] closing submissions. Through his offending behaviour, [the Applicant] has demonstrated that he is capable of causing serious harm.

4.2. The panel noted his progress, particularly since the last Parole Board review. It is positive that [the Applicant] has undoubtedly started upon a journey to desistance. His positive custodial conduct and his improved relationships with professionals has been taken into consideration, along with all other protective factors that have been identified by witnesses and the panel.

4.3. However, his history of breaching his licence conditions and court orders cannot be discounted and previous lack of compliance cannot be discounted.

4.4. The panel have considered the recommendations of the professional witnesses and there remain concerns, particularly as to outstanding areas of risk, his likely compliance, previous difficulties of openness and honesty with those managing him and his difficulties of reflection and emotional control.

4.5. This panel's main concern is the imminency of risk once in a relationship. Previous external controls of licence conditions and court orders have been insufficient resulting in further offending on licence, and ongoing psychological harm to his partner following his recall.

4.6. The pattern of breaching conditions and risky behaviour adds to a history of intimate partner violence that spans many years. [The Applicant] still does not appear to recognise high risk situations despite having completed offending behaviour programmes.

4.7. Whilst giving [the Applicant] credit for the progress he has made, the panel could not be confident that he would fully comply with the licence conditions in place to protect potential victims from harm and that he had sufficiently developed his internal controls to manage his risk in the community.



4.8. Despite the robust risk management plan proposed the panel was not satisfied that it was no longer necessary for the protection of the public that [the Applicant] remain confined. The panel therefore do not direct his release."

37. In each of the cases cited, the High Court upheld the Parole Board's decision, even taking into account any suggested neglect of the principle enunciated in *Sim*.

38. In *Coney*, the Judge, Burnett J (as he was then) said this:

*"There is no basis on which to accept the supposition that the Parole Board failed to appreciate that they were dealing with an extended prisoner past the custodial period ... There is no suggestion in the reasons of the Parole Board that they failed to recommend his release because he had failed to discharge any burden of proof. On the contrary, the Parole Board noted all the information before them and reached a conclusion, which although not identical in language to the formulation of the Court of Appeal in *Sim*, is to the same effect."*

39. I am satisfied that the same conclusion is appropriate here. The panel did not apply the wrong test for release.

Decision

40. For the reasons I have given, I do not consider that the decision was irrational, procedurally unfair, or founded on an error of law, and accordingly the application for reconsideration is refused.

HH Patrick Thomas KC
20 June 2023

