

[2023] PBRA 120

Application for Reconsideration by Lewis

Application

1. This is an application by Lewis (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated 16 May 2023, following a video-link oral hearing on 25 April 2023. The decision of the Panel was not to direct release but to recommend the Applicant be transferred to open conditions. The hearing had begun on 28 June 2022 but after some oral evidence, the hearing was adjourned to allow further engagement with the prison progression regime and for the obtaining of a Prison Psychologist report. Oral evidence was received during the course of the two hearings from the Applicant's Prison Offender Manager (POM), his Community Offender Manager (COM), a Prison Psychologist (MA), an Independent Psychologist (MG), from LS of CGL (a voluntary sector drugs misuse charity) and from the Applicant.
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.
3. 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 [209] PBRA 6**.
4. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier (consisting of 482 pages).

Background

5. The Applicant was sentenced on 26 April 2007 to an indeterminate sentence of imprisonment for public protection (IPP) having pleaded guilty to reckless arson and criminal damage. A minimum term of 3 years', 3 months' and 9 days was specified with a tariff expiry date of 2 August 2010.
6. The index offending, committed in January 2007, involved the throwing of a TV set through the living room window of the flat of his then partner followed by threats to burn down the house occupied by her and her 11-year- old son. He, then, acquired a petrol bomb and, after lighting it, threw it through that window.

7. Earlier in the sentence, he had failed to return from a ROTL (release on temporary licence) and was returned from open to closed conditions. He was released by a Parole Board decision on 27 January 2016, being re-called on 22 February 2018 due to concerns as to alleged controlling behaviour towards a partner who was said to have required hospital treatment following an incident between them. Both he and his partner were said to have problems with substances.

Request for Reconsideration

8. The application for reconsideration is dated 5 June 2023 and submitted by the Applicant's legal representative. It seeks reconsideration on the grounds that the decision is illegal by way of error of law, procedurally unfair and is irrational.
9. The grounds for seeking a reconsideration, are set out in considerable detail in 11 pages of closely argued submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to illegality by way of error of law, procedural unfairness, irrationality are dealt with below.
10. The Applicant submitted:

Error of Law

- (a) By a fixation on the issue of the level of a prescribed methadone prescription, the Panel failed properly and fairly to consider the overall evidence and applied the wrong legal test for re-release/misapplied the statutory test for release. It failed to establish how such a prescription could lead to the conclusion that there was a high or unacceptable risk of violence or serious harm.
- (b) The Panel failed to give any or adequate regard to recommendations for re-release from the COM, POM, and both psychologists.

Procedural Unfairness

- (a) The Applicant had the right to feel he had had a fair hearing and, in singling out the one issue (the methadone prescription) as a negative and using that to justify its decision, the Panel had disregarded the successful completion of the Kaizen programme and the progression regime for which the hearing had been adjourned. As a result, the Panel failed to give a perception that his case had been given fair and proper scrutiny and that his evidence and representations had been properly taken into account, resulting in a procedurally unfair and unjust decision from fundamentally flawed proceedings.
- (b) The Panel's rationale demonstrated an inherent bias against the Applicant and/or the positive aspects of his application.

Irrationality

- (a) The Applicant accepted an overlap between the grounds of the application and emphasised:
- i) Over-reliance on the issue of the methadone prescription, a decision "*making no sense based on the considered evidence of risk*".



ii) No or no proper regard was paid to:

- i The length of time in the community pre recall;
- ii The matters triggering recall were unproven;
- iii The Applicant's good custodial behaviour since recall;
- iv The professional opinions of witnesses that risk could safely be managed in the community and that the release test was met; and
- v The insight demonstrated in evidence by the Applicant.

(b) The Panel, in describing the Risk Management Plan (RMP) as "*inevitably disjointed*", appeared to consider this to be an integral part of the decision not to direct release. This rationale "*lacked logic*" not being based on any cogent evidence that the Applicant would fail to cope with a placement in Approved Premises outside location A.

(c) The wholesale rejection of the unanimous recommendations for re-release, primarily due to the recommended, high dosage of methadone. In addition to the recommendations of those professionals, expert evidence from LS, a professional Substance Misuse Worker had indicated that the methadone prescription and dosage were appropriate for the Applicant's needs at the time.

11. In relation to the grounds of application reasons, considerable detail is given. As indicated in Paragraph 7 above, all aspects of the submissions have been fully considered.

Response from Secretary of State (the Respondent)

12. The Respondent, by e-mail dated 9 June 2023, indicated that no representations were made in response to the Application.

Current parole review

13. The Panel considered a dossier, then, of 476 pages.

14. The case was referred to the Board by the Respondent on 30 June 2021 as a post tariff indeterminate sentence case and the Board was asked to consider whether to direct release and, if release was not directed, whether the Applicant was ready to be moved to open conditions. The Panel was specifically asked to give full reasons for any decision or recommendation.

15. It was the Applicant's sixth review on this sentence. As indicated above, there had been two part-heard oral hearings at each of which evidence was given by professional witnesses and by the Applicant.

16. In its 13-page decision, the Panel dealt in detail with the Applicant's lengthy offending history which including serious violence, much with a domestic background. The index offences had been committed whilst the Applicant was on bail.

17. The Panel recorded that LS said the Applicant had completed work with CGL and that there was no evidence of substance misuse. The Applicant remained on a substantial



daily dose of medication which, due to anxiety issues, had been increased the previous year but that he was currently stable. Overall, the aim of CGL was to reduce dosage, but he did not wish to alter medication whilst in prison. The POM considered the Applicant to be more stable, evidencing good behaviour with no discipline concerns, and having completed all stages of the progression regime. The COM felt he, himself, did not have the necessary knowledge to comment on methadone dependency but emphasised that, whilst in Approved Premises, the Applicant would be referred for substance help. Both psychologists accepted that the Applicant would find stress in the community to be difficult but considered that appropriate support would be sought, one commenting that steps could be taken to reduce the methadone script when there were no longer stressors "on the horizon" and the other that a reduction in the script needed to wait until he was sufficiently stable and strong.

18. All professional witnesses, with the exception of LS, who was not asked to make any recommendation, recommended release subject to the RMP which was judged as robust and effective.
19. The RMP had originally envisaged an initial period in an Approved Premises in location A. A place was not, however, available there but one was available, for 3 months, at an Approved Premises in a different location. The Applicant would be referred for drug agency support. There would be normal provision for a nighttime curfew and daytime signings in, but his COM, would continue to supervise his case with the Applicant being required to travel. There was also provision for drug testing and offending behaviour work via programme commitment. Save for the COM, the other professionals are not recorded as having been questioned on their acceptance of the viability and appropriateness of the plan and the COM had indicated that prioritised intensive supervision on relationship support had been arranged.
20. There is no record of any of the professional witnesses other than the COM being challenged as to the practicalities of the RMP.
21. With this evidential background, the Panel concluded:
 - i) That the Applicant had completed appropriate programme work and begun to apply necessary skills but that he would benefit from further opportunities and support to develop those skills.
 - ii) It was "*concerning*" that the previous year, he had found it so difficult to cope that he needed to increase his, already high, methadone script. Although there was no evidence of illicit substance use in custody, the level of script indicated on-going addiction problems leading the Panel to conclude that he had not yet achieved the stability or internal controls necessary to manage his risk.
 - iii) The RMP was described as "*inevitably disjointed*" and, despite the RMP being considered appropriate by professionals, was judged by the Panel to mean that risk was not manageable in the community.

The Relevant Law

22. The panel correctly sets out in its decision letter the test for release, in accordance with the law as it then stood.



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23. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. In the case of an extended determinate sentence, in considering whether only risks that might arise before the sentence end date or risks that might arise indefinitely after that date, the Panel was required to consider the latter.

Error of Law/Illegality

24. 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.
25. 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.

Procedural Error

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 from 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.

Irrationality

29. 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."

30. 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.
31. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
32. 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.
33. 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."*
34. In **R (Wells) v Parole Board [2019] EWHC 2710** it is stated *"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."*

Discussion

35. In assessing the application as against the findings of the Panel, I express some sympathy with the Applicant's legal representative in seeking to distinguish between the three separate strands of an application, leading in many ways to a repetition of many of the same factors as applicable to each.



36. It is important to emphasise that the reconsideration process is not a re-hearing of the evidence and that, in its decision, the Panel is not required to identify precise details of evidence but is required only to give a fair summary and aspects of the evidence leading to its final conclusions.
37. I am satisfied that a fair overview of the Panel's conclusions is that the decision is based, firstly, on the Panel's findings that the continued dependence on a high dose of medication indicated, in itself, that the Applicant would continue to represent a significant danger in the community and secondly that, the additional travel burdens imposed by non-provision of local Approved Premises on initial release would mean that the RMP did not provide necessary safeguards for the public in contrast to one which involved local residence during that initial period.
38. I am further satisfied that such findings are in direct conflict with the evidence of all professional witnesses, each of whom is recorded as giving considered professional opinions and whose evidence appears to be unchallenged on any factual basis. The clear impression is given that the final conclusions are based more on the Panel's own concerns rather than on any evidence justifying basis.
39. It is far from easy to label these flaws as being irrational, procedurally incorrect or made under error of law – each aspect is affected. Looking at the decision in the round, I find that the decision cannot be fairly justified on the basis of the recorded evidence and is, to that extent, irrational, that it takes into account irrelevant considerations or fails to take account of relevant considerations and is, to that extent, an error of law and that the Applicant and his Legal Representative were not properly informed of the case against him and, accordingly, there was a procedural error.

Decision

40. For the reasons I have given, I grant this application.

Edward Slinger
5 July 2023

