

[2023] PBRA 131**Application for Reconsideration by Robinson****Application**

1. This is an application by Robinson (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 11 June 2023. The decision of the panel was 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)) either on the basis (a) that the decision contains an error of law, and/or (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 dossier consisting of 528 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On the 18 May 2007 the Applicant was sentenced in relation to an offence of sexual assault. The Applicant was aged 41 years old when convicted. The Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP). The minimum term set by the judge was one year and one day. The Applicant's minimum term expired on the 18 May 2008. The Applicant was released on licence by the Parole Board in October 2021 and was recalled in January 2022.
5. The victim was a female person known to the Applicant. The offence was committed in a motor vehicle. The Applicant was taking the victim home having offered her a lift. He then sexually assaulted the victim in the vehicle.
6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of offences prior to committing the index offences.

Request for Reconsideration

7. The application for reconsideration is dated the 3 July 2023.
8. The grounds for seeking a reconsideration are set out below.

Current parole review

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9. This was a review by the Parole Board of the Applicant's position. The Applicant had been released and recalled and this was his first review since recall.

Oral Hearing

10. The review was conducted by an independent Chair of the Parole Board, a psychiatrist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by a Prison Offender Manager (POM), a Community Offender Manager (COM) and a prison commissioned psychologist. The Applicant was represented by a solicitor.

11. A dossier consisting of 518 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 11 June 2023 the test for release.

Parole Board Rules 2019 (as amended)

13. Pursuant to Rule 28(1) of the Parole Board Rules 2019 (as amended) the only kind of decision which is eligible for reconsideration is a decision that 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)).
14. 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

15. 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."

16. 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.



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

Procedural unfairness

18. 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.

19. 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.

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

21. 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.*"

22. 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.

23. 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.

The reply on behalf of the Respondent

24.The Respondent offered no representations.

Reconsideration grounds and discussion

Ground 1

25.Information within the decision is incorrect and had a bearing upon the decision.

26.The Applicant's solicitor indicates in the application for reconsideration that the panel made an error of fact in paragraphs 3.6 and 3.7 of the decision. In paragraph 3.6 of the decision the panel note: "*If released, the plan would normally involve initial accommodation in Approved Premises, for added monitoring and support. However, [the Applicant] is not likely to be eligible for a placement in Approved Premises, because of the short period of time remaining on licence and so appropriate accommodation will have to be sourced in the community. Currently, there is no suitable release address*".

27.In paragraph 3.7 of the decision the panel note: "*If released, consideration would have to be given to suitable accommodation. [the Applicant] is not eligible for a placement in Approved Premises, because of the assessed levels of risk and so appropriate accommodation will have to be sourced in the community. Currently, there is no suitable release address available.*"

Discussion

28.The Applicant, as noted above, is serving an indeterminate sentence for public protection. The Applicant's licence period is therefore indefinite (subject to an application to rescind the licence by termination). It is also noted within the dossier (at page 453) that the probation service would have applied for an Approved Premises placement out of area in the event of a decision to release the Applicant.

29.These paragraphs within the decision are clearly errors. As noted in the case of **Alconbury** (cited above) a mistake of fact must have played a "*material part in the decision of the panel*".



30. Despite indicating that Approved Premises were unavailable (as indicated above) the panel at (paragraph 4.4.5 indicate as follows "*While there is a placement available in Approved Premises, the panel considers that external risk management strategies are only effective as a secondary measure to internal understanding and insight*"). The panel therefore appears to have noted at this point of the decision that Approved Premises were in fact available but had concluded that the Applicant's risk could not be managed even with the availability of an Approved Premises place.
31. Having considered the decision I am persuaded that the availability of Approved Premises did, in fact, play a material part in the decision of the panel. The panel also listed other considerations of concern, such as an absence of openness and honesty, difficulties with managing emotional problems and the Applicant's behaviour on licence.
32. The Panel's decision is confusing. It is unclear whether the panel accepted or discounted the availability of Approved Premises. Accommodation provision was a fundamental factor in assessing the management of risk in this case. It was incumbent on the panel to accurately record their findings and the basis of their decision. In the light of this confusion, I determine that the matter should be reconsidered.

Remaining grounds

33. In the light of my decision to order a reconsideration of this matter I have not considered the remaining grounds argued by the Applicant in this case.

Decision

34. Whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, the decision to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

HH Stephen Dawson
18 July 2023

