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**[2023] PBRA 15**

**Application for Reconsideration by Hughes**

## Application

1. This is an application by Hughes ("the Applicant") for reconsideration of the decision of a Panel of the Parole Board ('the Board') which on 20 December 2022, after an oral hearing on 13 December 2022, declined to direct his release. The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

3. 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.

4. I have considered the following documents for the purpose of this application:

   - The dossier provided by the Secretary of State ("the Respondent") which now contains 843 numbered pages;
   - The Panel's decision letter ("DL");
   - The Application for Reconsideration ("the Application") submitted on behalf of the Applicant by his solicitor dated 30 December 2022;
   - Legal submissions in support of the Application, incorrectly dated to 30 December 2021;
   - An Email from an Approved Premises Manager dated 6 January 2023 which was not before the Panel.

## Background

5. The Applicant is now aged 57 and on 27 October 1995, at the age of 20 and upon his guilty plea, he was sentenced to custody for life for murder ("the index offence"). The Tariff Expiry Date is given as 1 June 2007.

6. The Applicant had 3 previous convictions including s.18 GBH for which he received a partially suspended term of 24 months imprisonment.

7. The index offence was committed on 17 June 1995. The Applicant had spent the evening drinking in a public house where he had met the 27-year-old female victim. They left together and had sexual contact in a public park. They were disturbed and the victim panicked at which the Applicant threw her to the ground and punched or stamped on her neck. He then manually strangled her "*to make sure*" before taking her handbag to make it "*look like a robbery*". In police interview he admitted the murder and expressed remorse.

**Current parole review**

8. The Applicant was transferred to open prison conditions in 2012 and was returned to closed conditions in 2015. This is his 7th review which was referred to the Board by the Respondent in April 2021.
9. The case was allocated to a Panel, which comprised three independent members of the Board. The Panel was chaired by one of the independent members.

10. The Applicant was represented by his solicitor who sought a direction for release.

11. At the hearing on 13 December 2022 evidence was given by:

    a) The Prison Offender Manager ("POM");

    b) The Community Offender Manager ("COM");

    c) The Applicant

    d) A Consultant Forensic Psychologist ("*the psychologist*") instructed on behalf of the Applicant by his solicitor.

**Request for Reconsideration**

12. The Application provides no details as to why the decision should be reconsidered. In the section headed "***The incorrect process was followed***" it is simply stated "See attached representations." The section headed **"*The decision was irrational***" has been left blank.

13. At para. 8 of the representations it is submitted that the Panel's decision was irrational and procedurally unfair and two grounds are relied on. These grounds will be discussed in detail below.

**The Relevant Law**

***The test for re-release on licence***

14. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the Panel in its decision. Indeed, nowadays, the test is automatically set out in the Board's template for oral hearing decisions.

15. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

16. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases 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.

17. In this case the Applicant is serving a life sentence of imprisonment and a decision was made by the Panel at an oral hearing not to direct his release on licence. It is thus eligible for reconsideration.

*Irrationality*

18. 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."*

19. 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.

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

21. It is helpful to refer to decisions of the courts or reconsideration panels of the Board which identify three specific situations in which a decision of a panel of the Board may be regarded as irrational.

22. The first of those situations is where the panel has failed to give sufficient reasons for its decision. The importance of giving reasons was reiterated in **R (on the application of Stokes) v Parole Board [2020] EWHC 1885 (Admin).** In that case the court cited the following explanation given by Lord Carnwath in **Dover District Council v CPRE Kent [2017] UKSC 79** for the need to give reasons in public law decision-making:

> *'I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the [decision maker] should be disclosed… It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so to make effective the right to challenge the decision by judicial review."*

23. It follows that a panel of the Parole Board must provide sufficient reasons to explain its logic and how its conclusion follows from the evidence put before it. There should not be an *"unexplained evidential gap or leap":* see the decision of Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

24. This principle has been endorsed in a decision of a reconsideration panel which directed a re-hearing because the panel had failed to give sufficient reasons for its decision. It stated: *"[The Panel] had to be satisfied that there was evidence of change and reduction of risk … in my judgment it has not in a detailed decision pointed to evidence of a risk reduction in any key area. It can be said that given the circumstances that led to recall and the subsequent events in prison, the evidence pointed in a different direction … the obligation upon the panel was to provide a decision that fully explained and fully justified their conclusions".*

25. Other situations are (1) where the decision is *'outside the range of reasonable decisions open to the decision-maker'* (this is the familiar 'Wednesbury unreasonable' test which has been applied for many years by the courts in public law cases), and (2) where *'manifestly disproportionate or inadequate weight has been accorded to a relevant consideration'* (see **R (Gallagher) v Basildon DC [2011] PTSR 731 at §§31, 41; De Smith's Judicial Review at §11-029.)**

*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.

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

29. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

30. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

**The reply on behalf of the Respondent**

31. By email of 16 January 2023 it was confirmed that the Respondent offers no representations in relation to the Application.

**Discussion**

32. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration is entitled to substitute his/her view of the facts in place of those found by the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.

33. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.

34. Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact they 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.

35. I move now to consider in detail the grounds put forward by the Applicant and his arguments in support.

36. As to Ground 1, the Applicant submits that the Panel was unable to make a full risk assessment due to key witnesses and documents not being made available so that he did not have a fair hearing.

37. It is clear that a particular focus for the Panel was the support which would be available to the Applicant were he to be released into the community and considerable information was provided about RESETTLE, an intensive Offender Personality Disorder (OPD) service, with which the Applicant had engaged for

some time, and which might provide support if he was released to [redacted] area. The Applicant submits that the panel should have heard from a named individual from RESETTLE.

38. The Panel in fact had the benefit of an email from a RESETTLE professional dated 15 August 2022 which was put in evidence by the psychologist.

39. It is stated in the email, *"we think he [the Applicant] would benefit from a service such as Resettle, however at the time of our discussion he was of the opinion he did not need it, and it was being imposed on him by others."* It is also confirmed, *"we have deselected [the applicant]as oppose [sic] to him withdrawing consent, there was a mutual understanding that our service was not the right fit for him at this time. The decision was made jointly with [the applicant]to deselect him from our service."*

40. The Applicant is recorded as telling the Panel in evidence that he felt he was not really gaining anything new from the service and did not feel that he needed the intensive level of support they were offering. He was not unhappy when he was told that he was being deselected. He repeated that he did not need, in his view, to engage with RESETTLE.

41. In summary, RESETTLE was not an available option for the Applicant at the hearing nor was he indicating he would engage with the service. Indeed in written closing submissions his solicitor points to *"ample evidence in the dossier that this [RESETTLE] is too intense".*

42. The Panel read a comprehensive e-mail from the organisation and, had the Applicant wanted a representative of the service to attend to give evidence, his solicitor could have made an appropriate application either before or at the hearing.

43. An alternative, less intensive, OPD service was EVOLVE. The Panel had specifically adjourned the review so that release to another area with the support of EVOLVE could be considered.

44. Again the Panel helpfully had the benefit of an e-mail from that service explaining, *"We felt that he was limited in his motivation to engage with our service, and we had considerable doubt about the potential benefit to him or progress he might make with us, should we work together."*

45. The Panel acknowledged the Applicant's denial that he was not accepted by EVOLVE because he was unmotivated to engage with the service but it also recorded that he was clear that he resented professional intrusion into his life.

46. The Panel had a comprehensive e-mail from the organisation and, had the Applicant wanted a representative of the service to attend to give evidence, his solicitor could have made an appropriate application either before or at the hearing.

47. When the review was adjourned in August 2022 a direction was made for the filing of a summary, following a further MAPPA review of his case, of any concerns raised about the Applicant's potential management in the community or any support needs identified.

48. A summary of the MAPPA meeting on 31 October 2022 now appears in the dossier. The Applicant now seeks to criticise this as being insufficiently detailed and submits that the Panel should have requested a fuller document although this is not suggested in the written, closing submissions on his behalf.

49. The Panel clearly considered this document in the light of the wealth of other evidence, both oral and written which was before it, and made clear that it disagreed with the concerns raised in relation to the issue of the risk of absconding.

50. The Applicant also makes reference to an OPD formulation which was not part of the dossier, making the obvious point that the Panel had therefore been unable to consider the document itself and submitting that the Panel should not place any weight on it.

51. According to the closing submissions made on behalf of the Applicant, this document dates from 2017, was prepared on consideration of the papers alone and. in the view of the psychologist may not have been balanced. It is therefore not surprising that the Panel did not feel it necessary to obtain a copy of this document (nor, it seems, was it asked to do so) nor does it appear to have been relied on as part of the Panel's findings and conclusions.

52. It is also submitted that the police should have been asked to confirm a particular piece of information which was hardly central to the case. If it was felt on behalf of the Applicant that this was essential, his solicitor could have made an appropriate application.

53. I do not find any procedural unfairness in the Panel's handling of these matters.

54. The second Ground put forward on behalf of the Applicant is that *"the Panel were aware that there were concerns over the COM's misrepresentation of [the Applicant] yet chose to take her evidence at face value".*

55. The degree of reliance to be placed upon the COM's evidence is of course a matter peculiarly for the Panel which would have been well aware (e.g from the closing submissions on behalf of the Applicant) of the attack which is made upon the evidence of the COM (who was not supportive of release) on the basis that she was an *"unreliable witness misreporting vital reports*".

56. Since I am precluded from considering the e-mail from an AP which postdates the hearing and which neither the COM or any other witness, as well as the Panel itself, have had the opportunity to consider and comment upon, this bold submission appears to be based solely on the suggestion that a registered psychologist (KW) who prepared a report in 2018 was said by the COM to have recommended the RESETTLE service when she now, in a statement dated

27November 2022 prepared on the instructions of the Applicant's solicitor, states that she recommended either a PIPE AP or intensive intervention and risk management services (IIRMS), without specifically naming RESETTLE which is an enhanced such service.

57. The psychologist (who supported release) describes this as a misunderstanding of KW's views and I find that this represents a tenuous basis for the Applicant to assert that the COM must therefore have misreported a large number of other reports such as from RESETTLE, EVOLVE and the MAPPA Minutes, particularly as the Panel was able to read original communications from these organisations themselves.

58. The essential points which the Applicant seeks to rely on in support of this Ground are made by his solicitor in her closing submissions at p.821 of the dossier in which they are characterised tendentiously as *"the COM and her misrepresentation across the board".* The Panel will have considered these submissions and clearly, as it was entitled to, chose to place no weight upon them while accepting that, although the COM had worked with the Applicant for nearly 6 years, it was sadly the case that currently their relationship was "*damaged".*

59. Unhelpfully, under this Ground, it is suggested on behalf of the Applicant, that KW should have been asked to prepare an addendum report. Given that she had not been involved in the case for some years and the Panel had the benefit of the longstanding involvement of the psychologist, such a report would appear to be unjustified and was not apparently sought by his solicitor.

60. Under a heading of **"*Conclusion*"** the Applicant's solicitor makes what are, in reality, further submissions in support of the application for release which I have considered carefully in the light of the DL and the significant amount of evidence that the Panel heard and read.

61. I am satisfied that the Panel set out its concerns and conclusions with considerable clarity, noting the differing professional assessments and that no witness considered core risk reduction work was outstanding. However, the Panel found that appropriate testing within the community from open conditions was essential to inform the Applicant's future management and that he would require more support and oversight than he acknowledged to enable his risks to be managed in the community.

62. I find that the Panel took proper account of the evidence and views of the professionals, which it analysed with care, and that it was justified, on the basis of the evidence before it, in reaching the conclusion that the Applicant did not meet the public protection test for release.

**Decision**

63. I find that the Application is without merit and, for the reasons I have given, do not consider that the decision was procedurally unfair or irrational and, accordingly, the application for reconsideration is refused.

**PETER H. F. JONES**
**23 January 2023**