

**[2023] PBRA 162**

## **Application for Reconsideration by Cannon**

### **Application**

1. This is an application by Cannon (the Applicant) for reconsideration of the decision of a Parole Board panel dated 5 August 2023 following an oral hearing on 22 June 2023, 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 dossier of 559 pages including the Decision Letter (DL) the subject of this application and other documents generated since the hearing.
  - b. The Grounds of Appeal dated 16 August 2023 submitted on his behalf by his legal representative.

### **Background**

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In January 2002 he was convicted of rape, indecent assault, theft, burglary, false imprisonment, and aggravated vehicle taking, taking a car without consent, and common assault. He was sentenced to life imprisonment with a minimum period to be served of 5 years, 5 months and 23 days. A Sexual Harm Prevention Order was made at the same time. His 'tariff' expired in April 2007.
5. The hearing of June 2023 was the 7<sup>th</sup> review of his case by the Parole Board. Since his last hearing in 2019 he has been transferred from the English to the Scottish prison system.
6. Following the hearing the Applicant's legal representative applied for an adjournment. On the 11 July 2023 the PB sent out an Adjournment Notice (dated 9 July), rejecting the Applicant's application for an adjournment concerning the possibility of an Approved Premises (AP) place in England, and asking for final submissions by 21 July. Submissions dated 24 July were submitted.



7. On 3 August 2023 the Parole Board again adjourned the issue of the Decision Letter (DL), until 11 August 2023, though the DL was in fact issued – as stated above - on 5 August 2023.

### Request for Reconsideration

8. The application for reconsideration is dated 16 August 2023.
9. The relevant factual background to the grounds for seeking a reconsideration is in summary as follows:
- a. It appears from the sequence of events from an initial referral by the Secretary of State for Justice (SoSJ) (the Respondent) to the Parole Board (PB) in July 2020, and a re-referral to the PB in 2021 in which the option of recommending transfer to open conditions was removed, that the Respondent envisaged that in due course the Applicant would be dealt with by the Scottish prison system which has different arrangements in place to those in England concerning "*open conditions*", and "*licence conditions*" following eventual release.
  - b. Evidence for the purposes of, and at, the hearing indicated that while in Scotland, unlike England, there is no provision for Approved Premises (AP), by the time of the hearing there was evidence from the (Scottish) Community Social Worker in Scotland that there were two addresses at which the Applicant could live if released but that they had not yet been checked by the police in Scotland.
  - c. The English Community Manager (COM) had not researched the possibility of release to an (English) AP since she believed that the Applicant would ultimately be released in Scotland.
  - d. The Scottish Prison Psychologist who gave evidence said at the hearing that if he had known that there was the possibility that the Applicant could be released to an AP in the north of England before eventually moving to an address in Scotland he may well have been able to recommend release on suitable conditions. Although no suitable address in Scotland had yet been identified the psychologist told the panel that he had that day – see b above - heard of two possible such addresses in Scotland.
  - e. Following this evidence, the Applicant's legal representative asked for an adjournment of the hearing so that the position both concerning an AP place and a possible first address in Scotland could be clarified.
  - f. The panel retired to consider the application but returned to say that it had not been possible in the time available to complete their discussions. The Panel Chair indicated that there would be a short adjournment – with a notice to that effect so that:
    - i. It could be clarified whether a longer adjournment would be necessary to carry out the inquiries necessary concerning accommodation in Scotland.
    - ii. Whether as a result a further adjournment might be necessary to research the availability of English APs.
    - iii. The Applicant's legal representative could in due course submit written submissions.
  - g. On 24 July 2023 the Applicant's legal representative sent a submission (now at pp 539-543 of the dossier) to the PB asking that it be passed to the panel. The submission referred to the possibility mentioned above that the Applicant could be released to an English AP from the prison in Scotland in which he was now held. Receipt of the submission was confirmed by the PB that day.



- h. So far as the DL itself is concerned the Applicant raises a number of issues:
- i. Although the DL indicates at paragraph 3.2 of the DL that there was a lack of clarity about the arrangements for the management of offenders on licence, that was an error. The responsible officer in Scotland, who had given evidence to the panel and was well aware of the Scottish system concerning released offenders on licence, while the English Probation Service (and the English Parole Board) retained overall control of the case.
  - ii. The panel was informed on the day of the hearing by the responsible officer in Scotland who had only discovered this that day, that there were two possible addresses in Scotland to which the Applicant might be released but that further checks needed to be made as to their suitability.
  - iii. The panel was wrongly influenced by its concerns that the Applicant's release in England would pose an unacceptable risk of serious harm. Although the Applicant is now being held in a Scottish prison he is still managed by an English COM who was unaware that release to an English AP followed by moving on to an address in Scotland was even possible. The panel was so aware – Paragraph 3.7 of the DL.
- i. Grounds 1 & 2 allege procedural unfairness concerning the application, which was refused, for an adjournment of the final decision for inquiries to be made either about the possibility of an English AP with a move on to a Scottish address or about the possibility of two suitable addresses in Scotland which had only arisen on the day of the hearing. Since the professional witnesses had indicated that if there were an AP within England with a possible 'move-on' address in Scotland their opinion on the Applicant's suitability for release might change, the panel was wrong not to adjourn the decision for sufficient time for those possibilities to be followed up. I have summarised these together since in reality they form a single ground.
- j. Ground 3 complains that the panel declined the opportunity to seek a full Risk Management Plan (RMP) from the Community Offender Manager (COM) which might have included a condition of residence at an English AP as a first step. The Applicant was disadvantaged by the COM's belief that such a plan was not possible.
10. Ground 4 makes the same point in respect of the possibility that, had the true position been ascertained following an adjournment and the possibility of release to an AP in England followed by a move to Scotland to reside at a particular address, the psychologist and the Prison Based Social Worker who gave evidence may well have been able to recommend release.

### Current parole review

11. The case was referred to the Parole Board by the Respondent on 29 September 2022.

### The Relevant Law

12. The panel correctly set out in its decision letter dated the test for release.

*Parole Board Rules 2019 (as amended)*

13. Under Rule 28(1) of the Parole Board Rules 2019 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)).

### *Irrationality*

14. 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."*

15. 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.

16. 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*

17. 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.

18. 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.

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

### *Other*

20. 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 Respondent

21. On 5 September 2023 the Public Protection Casework Section of the Ministry of Justice indicated that there would be no submission on behalf of the Respondent.

## Discussion

22. I have focused on Grounds 1 & 2, having listened to the recording of the hearing and reviewed the correspondence between the Applicant's legal representative and the Board after the hearing. It is clear that the possibility that the Applicant might be released to an English AP with the further possibility or alternative of an 'approved' address in Scotland thereafter only arose during the hearing. By the time the DL was issued those possibilities had not been taken forward in such a way that the panel could have made a decision for release on that basis. However, the decision referred to above of 9 July 2023 dealt with the application as follows: *"The panel has considered the application to adjourn carefully. The application to adjourn is refused."* No indication of the reasons for that refusal was given. This was a surprising decision bearing in mind the lengthy discussions between the panel, the legal representative and the various professional witnesses at the hearing and the panel's original decision to adjourn the hearing at its conclusion. Equally, if not more, surprising was the absence of any reason given for the refusal.

23. The two issues which have given rise to this application, namely the late discovery of the possibilities of residence at Approved Premises in England and of two addresses in Scotland, which although not *"Approved Premises"* in the English sense, were addresses frequently used to house offenders recently released from prison before they found suitable independent accommodation, were discussed at some length towards the end of the hearing which lasted in total more than 4 and a half hours. From 3 hours twenty minutes into the hearing until it concluded, the possibility of licence conditions based on the Applicant's residence at one or another, or even both types of accommodation following release was the principal topic of discussion and the COM and the Scottish equivalent community-based Social Worker indicated that their stance on the suitability for release of the Applicant might change if there were such opportunities. After the hearing had concluded one of the panel members had to leave in order to fulfil another professional engagement and there was discussion between the two remaining members and the Applicant's legal representative about the future progress of the case. In the end – as is clear from the events set out earlier at paragraphs 5, 6 and 7 above - the DL dealt with this issue at paragraph 3.7 of the DL:

*"At the conclusion of the evidence at the hearing, and following a private consultation, [the legal rep] invited the panel to adjourn its decision for a risk management plan to be developed for [the Applicant] to be released to an Approved Premises in England, with a longer term plan for the transfer of his management to Scotland. The panel considered the application carefully, as well as the submissions submitted on [the Applicant's] behalf following the hearing. It had concerns that [the Applicant] has, on the face of it, been committed to a release plan in Scotland for many years and has not previously expressed any motivation to be released in England. The COM said she thought that [the Applicant]*



*could not now be released to England but there appears to be no legal bar to doing so. Notwithstanding that, the panel is of the view that [the Applicant's] risks are not currently manageable in the community, and declined the application to adjourn."*

## Decision

24. As stated above the decision not to grant the adjournment was a surprising one in view of -
- a. The problems caused by the fact that the Applicant had been sentenced in England and served most of his sentence in England, but was now held in a Scottish prison. This involved changes in the prison regimes governing the progression of life-sentenced prisoners in the two countries and the fact that the English Parole Board was thus having to grapple with the significantly different prison progression regime in Scotland – in particular concerning the National Top End Facility (NTE) and open prisons.
  - b. The emergence at the hearing of the possibilities, as yet unexplored, that the Applicant might initially be released to an English AP in the north of the country and then to reside at an address in Scotland which had been approved by the authorities there, or to be released direct from the prison in Scotland at which he was currently being held, and the absence of any explanation from the panel as to why the application for an adjournment was being refused. While it is right to say that the DL contains the summary set out above at paragraph 17 it does not explain why in its opinion – if a suitable AP or other Scottish accommodation was available – that fact could not reduce the risk posed by the Applicant who has now spent some 20 years in prison.
25. Accordingly, I find that the grounds for directing a reconsideration are made out on both grounds, procedural irregularity in failing to follow up what had clearly (and clearly to the Applicant at the hearing) been a route which the panel seemed to be prepared to follow, and irrational in that no reason for that apparent change of heart is there set out. I therefore direct that the Applicant's case be reconsidered.

**Sir David Calvert-Smith**  
**19 September 2023**

