

**[2023] PBRA 204****Application for Reconsideration by Quinn****Application**

1. This is an application by Quinn ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 31 October 2023, after an oral hearing on 17 October 2023, made a decision not to direct his release on licence.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

**Background**

3. The Applicant is aged 67 and is serving an extended determinate sentence for a sexual assault against a young boy. The Applicant pleaded guilty to the offence and was sentenced on 11 March 2022. At the time of sentence he was aged 65.
4. The Applicant became eligible for early release on licence on 8 July 2023. If not released early by direction of the Board, he will be automatically released on licence in April 2024 (his 'conditional release date'). His sentence will not expire until January 2027.
5. For most of his life the Applicant has been a law-abiding citizen with a good work record. However, he has now been before the courts on two occasions for sexual offences.
6. The first occasion was in April 2017 when he received a 2-year sentence for (a) causing a male child under the age of 16 to engage in sexual activity and (b) six specimen offences of making or distributing indecent photographs or pseudo-photographs of children. During his sentence for those offences the Applicant completed some risk reduction work to address both kinds of the sexual offending of which he had been guilty.
7. The offence for which he is serving his present sentence (the 'index offence') was committed on 2 January 2022 at a swimming pool. He was alleged to have sexually assaulted two young boys. He pleaded guilty to assaulting one of them but he must have denied the charge relating to the other one because it was left on the file. He maintains that he was not guilty of either offence but that he pleaded guilty to one of them because he did not think he would be believed.



8. In September 2022 his case was referred by the Secretary of State ('the Respondent') to the Board to decide whether he should be released on licence early.

### **The progress of the Board's review of the Applicant's case**

9. In March 2023 a Member Case Assessment (MCA) panel decided on the papers that the Applicant should not be released early. His solicitor applied for there to be an oral hearing and that application was granted.
10. The hearing was conducted by a two-member panel comprising an independent chair and a judicial member of the Board. The Applicant was represented by his solicitor. At the time of the hearing the dossier provided by the Respondent contained 299 numbered pages, and the panel considered oral evidence from three witnesses (the Applicant himself, his prison offender manager ['POM'] who was responsible for his supervision in prison and his community offender manager ['COM'] who will be responsible for his supervision in the community when he is released on licence.
11. At the hearing the Applicant sought a direction for early release. Neither the POM nor the COM supported that application, believing that the Applicant needed to complete further risk reduction work before he was released from prison. The work proposed was the Healthy Sex Programme ('HSP'). The Applicant had been assessed by a psychologist as '*suitable*' for the HSP but not '*treatment ready*' for it.
12. At the conclusion of the hearing the panel decided that two further pieces of information were needed. One was confirmation of the earliest date in which a bed would be available for the Applicant in probation approved premises ('AP'), and the other was additional information about the likelihood or otherwise of the Applicant being able to complete the HSP (if he was now found to be ready for it) before his conditional release date.
13. It was agreed that the Applicant's solicitor should provide his closing representations once those pieces of information were available. It was clear that the panel contemplated that it might (depending on the additional information) be in a position to direct the Applicant's early release on licence.
14. The panel chair issued directions dated 17 October 2023 (the day of the hearing) which stated that the case was adjourned and would be concluded on the papers. The directions provided that a report by the POM (dealing with HSP) and a report by the COM (dealing with the AP) should be provided by 19 October, and the solicitor's closing submissions by 20 October, and that the panel would review the position on 20 October. This was quite a tight timetable but the POM and COM managed to produce their reports on time.
15. The POM's report stated that she had liaised with the HSP Treatment Manager who had confirmed had the Applicant would be re-visited for further assessment of 'readiness' and, if he was found to be '*ready*' for HSP, his case would be '*discussed in the national allocation meeting with consideration of his conditional release date in April 2024*'. The Treatment Manager had indicated that, whilst there could not be an absolute guarantee that the Applicant would be able to secure a place, there would certainly be a '*concerted effort*' to enable him to engage in the identified core risk reduction treatment (HSP). This was, of course, completely dependent on him being assessed as '*ready*'.

16. The COM's report stated that a place would be available for the Applicant at an appropriate AP from 8 December 2023.
17. No closing submissions were provided by the solicitor by the time stipulated. The 14-day deadline within which (barring exceptional circumstances justifying an adjournment) the panel was expected to issue its decision would expire on Tuesday 31 October. On Sunday 29 October the panel chair, noting that no closing representations had appeared in the dossier, requested the Board's case manager to see whether any had arrived.
18. At 12.12 p.m. on Monday 30 October the case manager e-mailed the Applicant's solicitor, stating '*Please can you urgently advise if you have any legal reps for this case as the decision is ready*'.
19. The solicitor did not respond on that day but at 10.42 a.m. on Tuesday 31 October he e-mailed the case manager stating, '*Yes I have legal reps, they will be with you by 1 p.m. at the latest*'.
20. It does not appear that the panel chair was made aware of that message, and she sent the decision to the case manager for issuing at some time before the representations were e-mailed by the solicitor to the case manager at 11.44 a.m.
21. At 1.56 p.m. a colleague of the case manager sent an e-mail to the solicitor stating (a) that unfortunately the panel chair had issued the decision (b) that it would now be issued to all parties and (c) that the solicitor's closing representations had been added to the dossier, but the panel chair had not seen them before issuing the decision.
22. At 14.07 pm. the case manager's colleague sent a further e-mail to the legal representative stating that: "*I have sent the reps to the chair. She stated that the deadline was last Friday and that she will not be revisiting the decision*".

### **The Relevant Law**

23. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

#### *The Parole Board Rules 2019 (as amended)*

24. Under Rule 28(1) 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.
25. Reconsideration will only be directed if one or more of the following three grounds is established:
  - (a) It contains an error of law or
  - (b) It is irrational or
  - (c) It is procedurally unfair.
26. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:

- (a) A paper panel (Rule 19(1)(a) or (b)) or,
- (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or,
- (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

27. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the grounds that the decision was both irrational and procedurally unfair.

#### *Irrationality*

28. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out as follows 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."*

29. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.

30. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

31. Other cases establish that the reasons why a panel's decision may be found to be irrational include (a) the giving of manifestly disproportionate or inadequate weight to a relevant consideration and (b) a failure to provide adequate reasons for the rejection of the unanimous recommendations of professional witnesses.

#### *Procedural unfairness*

32. 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 focuses on the actual decision.

33. The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

34. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

### **The application for reconsideration in this case**

35. The application was made by the Applicant's solicitor on his behalf.
36. The solicitor's submissions in respect of the complaint of procedural unfairness are as follows:

*'Firstly, in respect of procedural unfairness, we submit that the decision appears to have already been taken as early as 29 October 2023 as the email from the panel chair states: "the decision is ready to go pending their receipt [closing submissions]". Closing submissions should be given proper weight in the decision process and not simply acknowledged as a courtesy in a Parole Board decision ....*

*'Secondly, before the decision was issued to all parties, the panel chair could have revisited the decision and asked colleagues to look at the decision. The Parole Board could have delayed issuing the decision until closing submissions were properly considered and, in that respect, fettered their own discretion.'*

37. The solicitor's submissions in respect of the complaint of irrationality are as follows:

*'Firstly, we submit that a significant part of the hearing was taken up with a discussion of the availability of HSP in [the prison where the Applicant is detained] before [the Applicant's Conditional Release Date] of ... April 2024. [The Applicant's] position was that he would not be able to complete this before ... April 2024.*

*'We note that since the Parole Board decision, [the Applicant] has had no contact from Programmes in respect of HSP, despite [the POM] informing the Parole Board that [the treatment manager] has confirmed that [the Applicant] will be revisited for further assessment of "readiness" pending the outcome of the hearing. This has not happened.*

*'We submit that the over-reliance in the Parole Board decision upon assurances of the availability of HSP before ... April 2023 [sic] was irrational in light of the oral evidence considered, both as there is a national waiting list for HSP which [the prison] are not able to jump, and also because [the Applicant] has not even been assessed as 'ready' for the programme.*

*'Secondly. no mention at all in the decision is given to the fact that the COM stated in oral evidence that New Me MOT is available in the community immediately with no waiting list. We refer to this in detail in closing submissions.'*


### **The reply on behalf of the Respondent**

38. The Respondent is a party to parole proceedings (the other party being the prisoner) and is therefore entitled to make representations to the Board in response to an application for reconsideration by or on behalf of the prisoner.
39. By e-mail dated 21 November 2023 the Public Protection Casework Section ('PPCS') of the Ministry of Justice ('MOJ') on behalf of the Respondent helpfully informed the Board

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that an assessment had been scheduled to take place between the Applicant and the Treatment Manager on 5 December 2023. Otherwise PPCS did not offer any representations in relation to this application.

### Documents considered

40. I have considered the following documents for the purpose of this application:
- (a) The dossier provided by the Respondent which now runs to 328 pages and includes a copy of the panel's decision as well as the documents added after the hearing;
  - (b) The Applicant's solicitor's representations in support of the application for reconsideration, and the e-mails attached to them; and
  - (c) PPCS' e-mail of 21 November 2023.

### Discussion

41. This is a most unusual case. I will deal first with the issue of procedural unfairness. I am reluctant to criticise anyone at the Board, but for reasons which I will explain I am satisfied that in the peculiar circumstances of this case a situation arose which must be regarded as ultimately having been unfair to the Applicant.
42. One of the problems in the case was, of course, the process for determining whether a prisoner is qualified for a programme which is considered necessary by the professional witnesses, and if so when he will be able to undertake it. This does not make it very easy for the prisoner or for a panel of the Board which is considering his case.
43. Another problem was the delay in the provision of the solicitor's closing representations. The solicitor states that the delay was for reasons outside his control. He does not say what those reasons were, but it is usual for a legal representative to wish to discuss the closing representations with his client before submitting them, and there is often a delay in being able to arrange the necessary consultation. Certainly the deadline set by the panel chair for the solicitor's closing representations was so tight that it might well have been impossible to meet it.
44. It was to the panel chair's credit that, when she found that the solicitor's closing representations were not in the dossier, she caused enquiries to be made as to whether there were any such representations. It is unfortunate that the solicitor did not respond immediately to the enquiry made by the case manager. He has not explained why that was.
45. Equally it is unfortunate that the case manager does not seem to have immediately alerted the panel chair to the solicitor's message on the morning of 31 October.
46. The solicitor criticises the panel for having already made its decision before 31 October, but I do not think that criticism is justified. The drafting of a decision takes some time and it is sensible to prepare a draft as the 14-day deadline approaches, and if necessary to amend it if any new material comes in.



47. There can of course be no criticism of the panel chair for e-mailing the decision to the case manager for issuing on the morning of 31 October when she was unaware that closing representations were to be provided later that morning.
48. I can understand the panel chair's reluctance to re-open the decision when she became aware that closing submissions had after all been provided, albeit at a very late stage. However, the solicitor is correct in saying that sending the decision to the case manager for issuing is not the same thing as issuing the decision, and until the decision is issued to the parties it can be amended.
49. There is force in the solicitor's submission that (however irksome it may have been to have to re-open the decision) the fairer course would have been to delay issuing the decision to the parties until the panel had had a chance to consider the closing submissions. If necessary (as it would probably have been) a short adjournment could have been directed so that that exercise could be carried out. This was not an open and shut case and consideration of the closing submissions might have resulted in a change of mind on the part of the panel, or possibly a further adjournment so that it could be established whether the Applicant was 'ready' for HSP and if so when he might be able to undertake it.
50. There are two competing considerations which I have had to bear in mind in reaching a decision on the issue of procedural unfairness.
51. The first of those considerations is the importance of the parties and their representatives complying with directions of the Board (and in particular directions setting time limits). For the system to work efficiently those time limits need to be strictly complied with. It is essential that legal representatives (and PPCS) should comply with time limits unless there is a really compelling reason preventing them from doing so, and if there is a compelling reason an application should be made at the earliest opportunity for an extension of the time limit. If a legal representative fails to do that, as a result of which their client is disadvantaged, they will be creating not only a risk of injustice to their client but also a risk that they themselves will be liable for substantial compensation to the client for their negligence.
52. Compliance with a time limit for submitting closing representations is particularly important as the panel is itself under an obligation to comply with the time limit for issuing its decision. The Applicant's solicitor's complete failure in this case to comply with his obligation as explained above was the major factor in creating the situation in which the panel chair was unaware of the impending provision of closing representations when she sent the decision to the case manager on the morning of 31 October. I can see no excuse for the solicitor's failure to explain any difficulties and request an extension of time for the provision of his representations.
53. The other consideration is fairness to the prisoner, which as pointed out in paragraph 34 above is a fundamental requirement in any parole review; and in that connection justice must not only be done but be seen to be done. However much the solicitor may have been responsible for the unsatisfactory situation which he had created, the panel chair did have the opportunity to remedy that situation so as to ensure fairness to the Applicant. Closing submissions by a prisoner's legal representative are an important part of the whole process. Such submissions are normally made orally at the conclusion

of the hearing but it may be agreed, as in this case, that they should be sent in in writing. If the prisoner does not have the benefit of the panel considering those submissions, that is a significant departure from the normal process, and will normally mean that the prisoner has not had a fair consideration of his case by the Board.

54. If the legal representative has simply not sent in the closing submissions at all, or has sent them in after the panel's decision has been issued to both parties, that is a serious omission on his part and may have serious consequences for the prisoner. Once the decision has been issued the panel will be '*functus officio*' and have no power to reconsider its decision. In such a situation the prisoner will have suffered potential injustice but there will have been no procedural unfairness within the meaning of the rules for reconsideration by the Board: the prisoner's remedy for the injustice which he has suffered is not to seek reconsideration of the panel's decision but to take legal action against his legal representative who may (depending on the facts of the case) be ordered to pay financial compensation to the prisoner.
55. What if, as in the unusual circumstances of this case, the closing submissions are sent in after the panel chair has sent the decision to the case manager for issuing but before they have actually been issued to the parties? What would a properly informed and fair minded member of the public (the '*man on the Clapham omnibus*', to use the traditional expression) think about that? I believe that such a person would think it unfair that the prisoner should be deprived of his normal right to have his legal representative's submissions considered by the panel, albeit at a very late stage, when there was an opportunity for that to happen. It was, after all, the prisoner's liberty which was at stake and not his legal representative's.
56. I believe, also, that if I were to uphold the panel's decision in this case the Applicant would be left with a genuine and justified sense that justice had not been done.
57. I have carefully considered whether the solicitor's closing representations, if the panel chair had not decided that they should not be considered, might have made a difference to the panel's decision. Reconsideration is a discretionary remedy and, if there has been procedural unfairness but it could not have made any difference to the outcome of the case, the appropriate course is to refuse the application for reconsideration. I do not believe that this is such a case. I cannot of course say that consideration of the closing representations would necessarily have made a difference to the outcome, but equally I cannot say with confidence that it would not have done. The appropriate course is therefore for me to direct reconsideration of the panel's decision.
58. Of course, if I were to uphold the panel's decision the Applicant would be left with a potential legal claim against his solicitor, but that would be a significantly less satisfactory outcome than a decision (if such were to be made by the next panel considering the case) that he should be released on licence early.
59. In all those circumstances I am satisfied that in this exceptional case fairness to the Applicant must override the importance of compliance with the time limit, and that the panel's decision should be reconsidered on the ground of procedural unfairness. I would not like this exceptional case to be thought to be a precedent for reconsideration of decisions in other situations involving non-compliance with directions. It is unlikely that there will be other cases where the same combination of circumstances arises.



60. In the light of my finding on the issue of procedural unfairness I do not need to make any decision about irrationality. I would need a good deal of persuasion to find that either of the solicitor's submissions under that head would justify reconsideration of the panel's decision, but it is unnecessary to go into those submissions as this case is to be reconsidered anyway.

### **Decision**

61. For the reasons which I have explained I am satisfied that this application must succeed, and I must direct reconsideration of this case on the ground of procedural unfairness.

62. In the light of the information provided by the Respondent it may well be that a clearer picture of the prospect of the Applicant being able to undertake the HSP may well be available when the re-hearing of this case takes place.

**Jeremy Roberts**  
**13 December 2023**