

[2024] PBRA 133

Application for Reconsideration by Hedges

Application

1. This is an application by Hedges (the Applicant) for reconsideration of a paper decision dated 14 May 2024 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 the paper decision, the dossier (consisting of 315 pages), and the application for reconsideration (dated 20 June 2024).

Background

4. The Applicant received two sentences of imprisonment for public protection on 29 July 2008 following conviction after trial on two counts of rape. The tariff was set at 54 months, less time spent on remand, and expired in March 2012.
5. The Applicant was 27 years old at the time of sentencing and is now 43 years old.
6. He was most recently released on licence on 4 July 2023. His licence was revoked two weeks later on 18 July 2023, and he was returned to custody on 18 November 2023 after four months unlawfully at large. This is his third recall on this sentence, having previously been recalled in 2020 and 2022.

Request for Reconsideration

7. The application for reconsideration has been submitted by the Applicant without the benefit of legal representation and pleads grounds of both procedural unfairness and irrationality.
8. These grounds are supplemented by brief written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in November 2023 to consider whether to direct his release. This is the



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Applicant's first parole review since his third recall. The referral also invited advice on open conditions, but this is outside the scope of the reconsideration mechanism.

10. The dossier contains a form signed by the Applicant dated 5 December 2023. This indicates that:
 - (a) the Applicant would like to make representations against his ongoing detention; and
 - (b) the Applicant would like the Parole Board to consider any such representations at an oral hearing.
11. The form also notes that any representations must be received by the Public Protection Casework Section (PPCS) on behalf of the Respondent within 28 days. This 28 day period expired on 2 January 2024 (28 days from 5 December 2023). There are no representations from the Applicant within the dossier.
12. The matter was reviewed by a single member on the papers on 19 February 2024. The Applicant's intention to submit representation and the lack thereof was noted. The review was adjourned. It was noted that the Applicant was due to appear in court on 22 April 2024 in connection with charges of attempted grievous bodily harm with intent, assault occasioning actual bodily harm, theft, and three counts of assaulting an emergency worker. Directions were set for an update on the pending matters to be provided by 10 May 2024.
13. It is reported that the Applicant was convicted of the three offences relating to emergency workers (police officers) on 25 April 2024 receiving concurrent determinate sentences of 16 months, four months and four months. The conditional release date for the determinate sentences is in December 2024.
14. On 14 May 2024, a panel made no direction for release.
15. This was a provisional decision. Under rule 20 of the Parole Board Rules, the Applicant could apply in writing for a panel at an oral hearing to determine the case. Any such application must be served on the Parole Board and the Respondent within 28 days of the date the decision is sent to the parties.
16. The decision was issued on 14 May 2024, and the Applicant's Prison Offender Manager (POM) has confirmed that the decision was handed to the Applicant on 14 May 2024.
17. The 28-day window for an oral hearing application therefore expired on 11 June 2024.
18. No application having been received, the Parole Board wrote to the Applicant on 13 June 2024 noting that the decision not to direct his release remained provisional for a further 21 days to permit an application for reconsideration.

The Relevant Law

19. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

20. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

21. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

22. 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.

Procedural unfairness

23. 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.

24. 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.

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

Irrationality

26. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) by Lord Greene in these words: "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have*

come to it, then the courts can interfere". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

27. In *R(DSD and others) v Parole Board* [2018] EWHC 694 (Admin) the Divisional Court applied this test to Parole Board hearings in these words (at [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.*"

28. In *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) Saini J set out what he described as a more nuanced approach in modern public law which was "*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 regard 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*". This test was adopted by the Divisional Court in *R(Secretary of State for Justice) v Parole Board* [2022] EWHC 1282 (Admin).

29. As was made clear by Saini J in *Wells*, this is not a different test to the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in parole hearings as explained in *DSD* was binding on Saini J.

30. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

31. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

The reply on behalf of the Respondent

32. The Respondent has submitted no representations in response to this application.

Discussion

33. The Applicant argues that it was both irrational and procedurally unfair to conclude his review on the papers and states that he is making an application for an oral hearing. He also argues that his conditional release date for the additional sentence is 18 July 2024 since it took effect from 18 November 2023.

34. The Applicant's opportunity to apply for an oral hearing passed on 11 June 2024. His request for an oral hearing (dated 20 June 2024) is therefore out of time.

35. The question then becomes whether the decision not to direct his release was irrational and/or procedurally unfair.

36. There is no evidence to suggest the correct process was not followed throughout this review.

37. There are also no grounds on which it could be sustainably argued that the decision not to release the Applicant was so illogical that every other panel would have decided otherwise. Regardless of the sentence end date for the new matters, the Applicant was convicted of further offences against police officers after four months unlawfully at large in the community. There was no professional support for release and the panel has carefully and thoroughly set out five cogent reasons as to why it is necessary for public protection that the Applicant remains confined. The legal test for irrationality sets a high bar which this case does not meet.

Decision

38. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
17 July 2024