

[2024] PBRA 135**Application for Reconsideration by Stafford****Application**

1. This is an application by Stafford (the Applicant) for reconsideration of a decision made on the papers by a Parole Board Member dated 3 May 2024 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, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier consisting of 283 pages including the decision letter and the application for reconsideration dated 26 June 2024.

Request for Reconsideration

4. The application for reconsideration is dated 26 June 2024 and is drafted by the Applicant's representative.
5. The grounds for seeking a reconsideration are that the decision was irrational or procedurally unfair.

Background

6. On 9 December 2010, at the age of 46, the Applicant received a sentence of imprisonment for public protection (IPP) following his guilty plea to an offence of rape. There was no separate penalty for an offence of sexual assault. His tariff was set at five years less time spent on remand and expired on 11 August 2015. He is now aged 59 years old.

Current parole review

7. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in September 2023 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Respondent whether the Applicant should be transferred to open conditions.

8. Representations were received on behalf of the Applicant setting out his progress in open conditions and requesting an oral hearing. The application for an oral hearing was refused as being unnecessary for the reasons set out in the decision of 3 May 2024.
9. In his application for reconsideration the Applicant submits that the decision to refuse an oral hearing was procedurally unfair and irrational.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 3 May 2024 the test for release and the issues to be addressed in making a recommendation to the Respondent for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

11. 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)).
12. 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)).
13. 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

14. 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 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.
15. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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. In *R(on the application of Wells) -v- Parole Board* 2019 EWHC 2710 (Admin) 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 a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

17. As was made clear by Saini J 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.
18. 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.
19. 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.

Procedural unfairness

20. 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.
21. 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;
 - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
 - (f) the panel was not impartial.
22. The overriding objective is to ensure that the Applicant's case was dealt with justly.
23. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner



to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

24. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.]

The reply on behalf of the Respondent

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

Discussion

26. The panel correctly reminded itself of the decision in Osborne, Booth & Reilly and the importance of holding an oral hearing but stated that it was unnecessary in this case as the Applicant had not been tested. The panel recognised that there were disputes between the Applicant and the Respondent and stated that in respect of those disputes the panel would proceed on the basis of the Applicant's account.

27. The decision focuses on the lack of testing as being determinative of the case, appearing to adopt a position that in the absence of release on temporary licences (ROTLs) there is no need to hear any other evidence. Whilst on the face of it, it may appear to be unarguable to adopt an approach in which the Applicant's submissions are all accepted, it can without careful consideration lead to unfairness.

28. Adopting an '*even if*' all the evidence is accepted approach is that it can go against the principles in Osborn in denying an Applicant the opportunity to put forward his case as the panel in stating that they accept all his evidence thereby deny him the opportunity to deal with matters in his own words in a hearing. There were in this case matters with which the Applicant took issue: the community offender manager's (COM's) account, complaints about the age of the reports relied upon, explanations he wished to put forward about the lack of ROTLs and submissions he wished to make about emphasis that the panel could place on other aspects of his progress. Those matters were not all covered in the evidence that the panel had before it and on which they proceeded on the basis of an acceptance.



29. Proceeding on the basis of accepting his account also leads to uncertainty and can lead to contradiction and inconsistency. For example, the panel states it will proceed on the basis of the Applicant's account in respect of his sexual thoughts but later in the decision accepts the COM's assessment and conclusion that must therefore have involved some rejection of the Applicant's account regarding his sexual thoughts. In accepting the Applicant's account, it is difficult to see how the COM's account can also be accepted as the COM does not accept the Applicant's account. Nor is it a correct representation to suggest that there was no challenge to the risk assessment as the latter is based on some facts which are disputed by the Applicant.
30. Finally, adopting the approach in this case that the disputed parts of the Applicant's account are accepted but then drawing a conclusion which goes against him, gives the impression that no matter what the Applicant has to say, it can make no difference as he cannot succeed.
31. The Applicant states that the completion of ROTLs does not impact the test for an oral hearing. I agree. In Osborne it was said that *"the question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions and cannot be answered by assessing that likelihood."*
32. The panel has carefully considered the reports in the dossier but in refusing the application for an oral hearing has denied the Applicant the opportunity of putting disputed facts before the panel. A conclusion that his account is accepted does not cure that procedural irregularity.

Decision

33. For the reasons I have given above, I find that the panel's decision was procedurally unfair and accordingly the application for reconsideration is granted.

B Mensah
22 July 2024