

**[2024] PBRA 177****Application for Reconsideration by Reilly****Application**

1. This is an application by Reilly (the Applicant) for reconsideration of a decision of an oral hearing panel dated 22 July 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier consisting of 326 pages and the application for reconsideration.

**Request for Reconsideration**

4. The application for reconsideration is dated 13 August 2024.
5. The grounds for seeking a reconsideration are
  - (1) Procedural unfairness. It is submitted that the panel knew that the referral was incorrect and yet, in the absence of any representations from the Secretary of State (the Respondent), proceeded with the hearing.
  - (2) Irrationality. It is submitted that all the professional parties were in support of release and the panel's rejection of their evidence was irrational.

**Background**

6. The Applicant was sentenced on 18 February 1999 to life imprisonment for two offences of robbery, possession of a firearm with intent to commit an indictable offence, using a firearm to resist arrest and possessing an air weapon with intent. The tariff was set at 3 years and 8 months and expired on 18 October 2002.
7. The Applicant was aged 25 years old at the date of sentence. He is now 51 years old.

**Current parole review**

8. The Applicant's case was referred to the Parole Board by the Respondent in February 2023 to consider whether or not it would be appropriate to direct his release. The referral stated that pursuant to a policy revision to the policy announcement of 21 May 2014, the Applicant was not eligible to be considered for transfer to open conditions.
9. The case proceeded to an oral hearing via videoconference on 19 June 2024. The panel consisted of two independent members and a psychologist member. It heard oral evidence from the Applicant, together with his Prison Offender Manager (POM), Community Offender Manager (COM) and HMPPS instructed psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The panel did not direct the Applicant's release.

### The Relevant Law

11. The panel correctly sets out in its decision letter of 22 July 2024 the test for release.

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

12. 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)).
13. 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)).
14. 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*

15. 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.
16. 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."*

17. In R(on the application of 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 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).
18. 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.
19. 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.
20. 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*

21. 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.
22. 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.
23. The overriding objective is to ensure that the Applicant's case was dealt with justly.

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



24. The Respondent's reply dated 30 August 2024 stated that "[the Applicant] is excluded from open conditions due to absconding from [establishment A] in January 2005 and from [establishment B] in June 2007".

## Discussion

### Ground 1 – Procedural Unfairness

25. The Applicant states that the panel knew that the referral seemed incorrect and the panel proceeded despite not having had a response or representations from the Respondent as to consideration of open conditions.

26. There is nothing on the face of the decision to suggest that the panel considered the referral appeared incorrect. Nor is there any evidence that the panel had requested a response from the Respondent. However, in response to the application the Respondent has provided the explanation set out above.

27. In the circumstances I am not satisfied that any procedural unfairness has been identified.

28. The Respondent's referral sets out the Board's powers and the panel is obliged to follow the terms of the referral. The option of consideration for recommendation for open conditions may not be available in a particular case for reasons of policy or law.

29. In the Applicant's case the panel were aware that he had been released and recalled on two occasions. He absconded from open conditions in 2005 and was subsequently convicted of an offence of escaping from lawful custody. (It is of note that he had a previous conviction recorded in his antecedent record for escape from lawful custody in 1993.) He was released again in November 2018 and recalled in May 2022 following further offending for which he received a further custodial sentence. A Parole Board decision of 8 November 2018, notes that because of his previous abscond the Applicant was not eligible to be tested in open conditions. The terms of reference for that panel did not request consideration for open conditions.

30. In the light of the Applicant's antecedent history, it is unsurprising that the referral did not request the Board to consider transfer to open conditions. Nothing in the decision letter persuades me that the panel was concerned about the terms of the referral, or that it should have been. In any event the position has now been clarified by the Respondent's response. Accordingly this ground fails.

### Ground 2 – Irrationality

31. The Applicant submits that all the professionals, having had the opportunity to interview him extensively, supported his release. He further submits that the panel, "in stark contrast, to the point of irrationality" concluded otherwise. The Applicant also submits that he had never been formally diagnosed with PTSD or a personality disorder despite the panel relying on that assertion.

32. It is the responsibility of the panel to make its own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. The panel must



make up its own mind on the totality of the evidence that it hears, including any evidence from the Applicant. There was clearly material that the panel had which justified the decision that the panel made and it cannot be properly described as irrational within the meaning set out above. The reasons for the decision are clearly and thoroughly set out in the decision letter and were supported by evidence. The panel dealt with the evidence of each professional witness separately explaining why it came to a different conclusion from that of the professional witness.

33. The psychological report notes the discrepancies in the reports related to the PTSD diagnosis and further notes that the Applicant had not been assessed for personality disorder. Even if the panel is wrong about PTSD symptoms (the panel does not rely on personality disorder) it would make no difference to its conclusions. The panel was concerned that the Applicant's possession of weapons, his long history of the use of weapons to threaten and harm, his withholding of information from professionals in the light of his emotional instability and feelings of frustration and fear, raised a risk which cannot be safely managed in the community. That conclusion does not rest on a finding of PTSD or personality disorder and cannot be described as irrational.

## Decision

34. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Barbara Mensah**  
**16 September 2024**