

[2024] PBRA 234**Application for Reconsideration by Adeokun****Application**

1. This is an application by Adeokun (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 14 October 2024. The decision was not to direct release or recommend a transfer to an open prison.
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 dossier, the decision of the OHP, the application for reconsideration drafted by the Applicant's legal adviser and the representations by the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 4 November 2024.
5. The grounds for seeking a reconsideration are set out below.

Background

6. The Applicant was sentenced in April 2007 to a sentence of imprisonment for public protection. The index offences were four counts of rape of a female and two counts of false imprisonment. The Applicant was 21 years old when sentenced. His tariff expired in April 2014. He was released on licence by the Parole Board in July 2016 and was recalled in July 2023. The index offences were committed on two separate occasions. On the first occasion the female victim was persuaded to return to the home of a friend of the Applicant. When the victim arrived at the premises. There were three associates of the Applicant present. The victim, at some stage asked to leave. The Applicant and his co-defendants refused to allow the victim to leave and the victim was subsequently raped by the Applicant and his co-defendants. The victim was also threatened with a knife and told she would be killed if she did not comply. The second offence occurred two days later. A second female victim was taken to a co-accused's home. The Applicant and two co-accused were present. The co-accused made sexual advances. The victim wanted to leave. Eventually the victim was the subject of an offence of rape committed by the Applicant and the co-



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accused. The Applicant was said by the sentencing judge to have played a "leading role".

7. Following release on licence. The Applicant began to live with a partner. His relationship with the partner became increasingly difficult. The Applicant began acting strangely. There was concern about taking of drugs and alcohol. There were various concerning incidents including an incident where the Applicant took a car belonging to his partner and videoed himself driving in a fast lane. He also called at the partner's home at various late hours asking to take their children out or saying that he was conducting "market research". On a further occasion the Applicant had banged and kicked on his partner's front door and the police were called. The Applicant was eventually arrested for the offence of harassment and also possessing a lock knife. No further action was taken in relation to the arrest as the Applicant's partner did not wish to support a prosecution.

Current parole review

8. The OHP were considering a first referral following the Applicant's recall. The panel were considering release or a recommendation for a transfer to open conditions. The Applicant was 39 years old at the time of the parole hearing.
9. The hearing was conducted by a Parole Board panel consisting of two independent members. Evidence was given at the hearing by a prison offender manager (POM) and a community offender manager (COM). The Applicant was legally represented. The panel also considered a dossier consisting of 457 pages.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 14 October 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State 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)** 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)**.
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.

Error of law

23. An administrative decision is unlawful under the broad heading of illegality if the panel:

- a) misinterprets a legal instrument relevant to the function being performed;
- b) has no legal authority to make the decision;
- c) fails to fulfil a legal duty;
- d) exercises discretionary power for an extraneous purpose;
- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

24. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

25. 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.

26. 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.*"



27. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

Reconsideration as a discretionary remedy

28. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

29. The Respondent indicated that no details of any accommodation address had been offered by the Applicant or any family member before the oral hearing.

Grounds and Discussion

Ground 1

30. The Applicant's legal adviser submits that the Applicant has indicated to his legal advisers that an accommodation offer had been proposed by the Applicant's mother to the Applicant's COM. It is therefore argued that the accommodation would be a suitable flat and therefore it was wrong for the panel to suggest that he did not have accommodation in place.

Discussion

31. As indicated above, the panel make their decision upon the evidence presented at the hearing. It appears that alternative accommodation was not presented to the panel at the hearing, and therefore an argument about irrationality would not have merit. The Respondent indicates, in representations, that no address was provided before the oral hearing. However, beyond the presentation of the material at the hearing, it is clear from the decision of the panel that accommodation was but a single factor, among a number of other factors, which led to the panel's decision. The major factor being the fact that there were serious concerns about the Applicant's mental health and whether his mental health problems could lead to an elevation of risk and violence in the community. I am not therefore persuaded that



the issue of accommodation is one which amounts to irrationality in the sense set out above.

Ground 2

32.It is submitted that the Applicant had resided in the community for some years before he was recalled and that previous settled behaviour should have been taken into account by the panel when deciding whether to direct release.

Discussion

33.The panel acknowledged within the decision letter that there had been settled periods in the community prior to the Applicant's recall. However, it was clear from the decision that the concern had been a deterioration in the Applicant's mental health and a deterioration in his management of his behaviour which led the panel to conclude that the Applicant's risk could not be managed in the community.

Ground 3

34.The Applicant's legal adviser submits that the panel "*should have had*" mental health assessments before them at the oral hearing. It is also submitted that the assessing of the Applicant's mental health had not been undertaken (by the prison) because of staffing shortages in the prison, something which (it was submitted) was not the Applicant's fault. For these reasons it is submitted that the matter should be reconsidered.

Discussion

35.It is clear from the decision letter that there was some dispute between the Applicant and professionals as to the Applicant's engagement with mental health services. The Applicant had indicated that he had consented to the prison mental health service accessing his mental health records. The Applicant had also indicated to the panel that he would engage with mental health services. The information available to the panel on this topic was limited, however, the panel took the view that overall there was evidence that the Applicant was not sufficiently engaging with mental health services to allow for an assessment to be undertaken. In any event, the panel were bound to make their decision on the basis of the evidence presented to them at the hearing. The panel were clear that there was insufficient understanding of the factors behind the deterioration in the Applicant's presentation and mental health in the community. There had also been incidents involving allegations of violence in the prison. I am not persuaded that there exists an argument under this head which meets the definition of a requirement for reconsideration in the sense set out above.

Decision

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

HH Stephen Dawson
29 November 2024

