

[2024] PBRA 42

## Application for Reconsideration by Saunders

### Application

1. This is an application by Saunders (the Applicant) for reconsideration of a decision of a MCA panel dated the 27 November 2023. The decision of the panel was 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, and/or (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 dossier consisting of 447 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

### Background

4. On the 16 November 2007 the Applicant was sentenced in relation to the following offences; causing or inciting prostitution or pornography involving a child; intending to meet a child following sexual grooming; causing a child to watch a sexual act and making indecent photographs on a computer. The Applicant was sentenced to an indeterminate sentence of imprisonment for public protection. The minimum term set by the judge was 3 and a half years, less remand time served. The tariff expired on the 8 October 2010.
5. The Applicant was released on licence by the Parole Board in September of 2022 and was recalled in December of 2022.
6. The facts of the index offence are that the Applicant sent invitations online to young women and girls, purporting to offer work as models in the pornographic industry. Photographs exposing male genitalia were also sent online.

### Request for Reconsideration

7. The application for reconsideration is dated the 29 January 2024.
8. The grounds for seeking a reconsideration are noted below.



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## Current parole review

9. This was the Applicant's first review by the Parole Board following recall. The review was by a single member and was conducted on the papers. A dossier consisting of 396 pages was considered. The paper panel member did not direct the release of the Applicant.
10. The panel member's decision not to release was then appealed by way of a request by the Applicant for an oral hearing pursuant to Rule 20 of the Parole Board Rules 2019. That application was refused.

## The Relevant Law

11. The panel correctly set out in its decision letter dated 27 November 2023 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)*

12. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).
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. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,
15. *"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. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. 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 Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing



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'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

*Procedural unfairness*

18. 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.

19. 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.

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

21. 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.*"

22. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

### The reply on behalf of the Respondent

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23. The Respondent indicated that some matters raised in the application were incorrect. In particular notification of the right of the Applicant to apply for reconsideration.

### **Reconsideration grounds and discussion**

24. The Applicant in this case was recalled after concerns about the Applicant's behaviour on licence. The Applicant had allowed a partner to stay in accommodation which was contrary to an agreement with the probation service. When this matter was raised with the Applicant by the appointed Community Offender Manager (COM) the Applicant was alleged to have left abusive and threatening voicemails at the probation service offices. In addition to these issues relating to compliance with accommodation, the probation service reported that the police had inspected a computer which contained a search history relating to pornography and references to pornography relating to young people. The use of the computer was potentially a breach of court orders. The Applicant was later charged with offences relating to the breaching of court orders relating to the use of internet enabled devices.

25. The Parole Board were asked to review the Applicant's position following recall. In May 2023 a parole board member considered the evidence within the dossier at that time. The reviewing Parole Board member determined that the matter should be adjourned for further information and directed details of any further charges to be added to the dossier.

26. The matter was further considered in August 2023 by a Parole Board member. At that time there had been no further update upon the breaches of orders and no details of any court date. The matter was further adjourned in October 2023 with similar concerns about the absence of details about the further allegations and the court hearing.

27. The Parole Board were told in November 2023 that charges had been laid and that the matter was being referred to the court. In November 2023 the matter came before a Parole Board member once again. Solicitors acting for the Applicant made submissions applying for the Applicant to be released on the basis of the written dossier and representations. The Parole Board member considered the position at that time. The Parole Board member indicated that because the Applicant had now been charged with offences there was sufficient information to conclude the review. The Parole Board member, after considering the evidence, made no direction for release. The Parole Board member also indicated that, in the event of an acquittal the Secretary of State was invited to refer the case back to the Parole Board.

28. Following this decision, the Applicant's solicitors firstly applied for an oral hearing by way of appealing the decision of the single member to proceed on the papers. As indicated above, that appeal was rejected by the Parole Board.



29. The Applicant now applies for reconsideration and cites a number of diverse issues many of them relating to human rights considerations and the rights to a fair hearing.

### The position relating to allegations

30. Guidance has been provided in fairly recent times in the case of **Pearce [2023] UKSC 13 on appeal from [2022] EWCA Civ 4** relating to the approach by the parole board to allegations. In addition to this court decision the Parole Board itself has produced comprehensive guidance by way of the publication of the *Guidance on Allegations September 2023 (V2.0)*.

The guidance suggests that:

*"8.2 Allegations in the form of police/Crown Prosecution Service ('CPS') charges when the investigation/prosecution is still on-going remain allegations.*

*8.3 Although panels should exercise caution when the allegation in question is subject to an on-going police investigation or court proceedings, panels can make a finding of fact (where the key principles and criteria in this guidance are satisfied) on the allegation in question. This is particularly important because the Parole Board has a duty under Article 5(4) of the European Convention on Human Rights to provide a speedy review."*

31. In this case the allegations, as set out above, are likely to be important factors in considering ongoing risk. The use of the internet in connection with sexual material is closely associated, in this case, with the index offences.

32. This also appears to be a case that, regardless of the final decision of the criminal court, a Parole Board panel may well wish to investigate the allegations. This may well lead to evidence of matters and surrounding circumstances relating to the allegations, which are important in connection with a decision relating to risk.

33. As noted in the guidance above, caution is required in connection with the decision to proceed to investigate allegations before they have been concluded in the criminal court. This is for the simple reason that the prisoner is in a different position within a criminal court. In a criminal court the burden of proving the allegations lies entirely with the prosecution. The prisoner has no requirement to respond and often will have no desire to respond for fear of implication. Parole hearings are inquisitorial, and the standard of proof is the civil standard. For that reason, prisoners are much more likely to wish to offer explanations and challenges to evidence.

34. The tension between unresolved criminal allegations and the assessment of risk based on those allegations is clearly one of some difficulty for the Parole Board. This tension is exacerbated in recent times because of the gross delays in the criminal courts and the pressures within the Parole Board itself.



35. The Board has a duty under Article 5(4) ECHR to provide speedy reviews of proceedings, delays by other organisations such as the police and courts impact upon the Board's duty under Article 5(4). Board members are therefore required to balance the requirements of article 5(4) with the need to act fairly in each case.
36. A fundamental issue in this case will inevitably be the circumstances surrounding the recall. Regardless of whether the criminal court make a finding, a panel of the Parole Board is likely to wish to undertake its own investigation of the circumstances surrounding the recall particularly as those circumstances are so closely associated with the index offence and with risk.
37. In the circumstances therefore I have concluded that this was a case which should have been adjourned to await the outcome of the criminal proceedings or which should have been concluded by way of an oral hearing to enable the Parole Board panel to consider the allegations and make findings.
38. I therefore conclude that this is a case which can be categorised as procedural unfairness on the basis that both the prisoner (and indeed the public) have the right to secure a decision based on any potential risk which may have arisen as a result of the circumstances surrounding the recall. I therefore order reconsideration.
39. I have not addressed the other grounds set out by the Applicant's legal adviser on the basis that this matter will be reheard in any event. I also considered further representations submitted by the Applicant's solicitor and dated 14 February 2024. For the reasons set out in this decision those representations do not affect my decision.

## Decision

40. In all the circumstances therefore, I conclude that the decision in this case was not irrational in the legal sense set out above but that the decision was procedurally unfair. I grant the application for reconsideration.

**HH S Dawson**  
**29 February 2024**