

[2024] PBRA 75**Application for Reconsideration by Blaikie****Application**

1. This is an application by Blaikie (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 6 March 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:
 - a) The decision letter dated the 6 March 2024;
 - b) A request for reconsideration from the Applicant's legal representative dated the 23 March 2024; and
 - c) The dossier, numbered to page 557, of which the last document is the panel's decision letter. The panel had a dossier of 539 pages.

Background

4. The Applicant is now 47 years old. In December 2015, when he was 38 years old, he received an extended determinate sentence comprising of twelve years in custody and five years of an extended licence following his conviction for the rape of a child.
5. The Applicant became eligible to be considered for release by the Parole Board in August 2023. The panel's review was the first review of his case by the Parole Board. If not released by the panel, the Applicant would otherwise be released automatically in August 2027 unless a further review by the Parole Board directed his release.
6. The panel considered the Applicant's case at an oral hearing on the 26 February 2024. The Applicant was legally represented, and he gave evidence at the hearing. The panel also heard oral evidence from the Applicant's Community Offender Manager (COM), the Prison Offender Manager (POM), a prison psychologist, a therapist who had worked with the Applicant in prison and from another witness from the mental health team in the prison.



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7. On his custodial sentence, the Applicant had completed accredited courses to address his offending behaviour. He had also engaged with work to help him better understand himself, his past and his emotions. The Applicant had been seen to engage well in prison and it was proposed that on release work would continue with him in the community.
8. At the time of the oral hearing, the panel noted that the therapist was completing her work with the Applicant.
9. The panel reviewed the release plan proposed by probation. The witness from the mental health team had confirmed that referrals would be made to the Community Mental Health team if the Applicant was to be released. The panel noted the COM identified 'a number of unknowns' about the release plan, specifically there being no confirmation of the community support to address the Applicant's mental health needs. It was felt that appropriate levels of support would be beneficial in managing the Applicant's risk. Until plans were finalised, in terms of mental health support, the COM confirmed that risk would be theoretically manageable in the community with the other support available in the release plan.
10. The plan included a requirement for the Applicant to reside in specialist accommodation, which it was anticipated would become available to him on release. With this plan in place, there was support from witnesses for the Applicant's release.
11. In its decision letter of the 6 March 2024, the panel did not direct the Applicant's release. The panel noted that the Applicant had acknowledged his offending and the reasons behind that offending. The panel had noted the extensive period of therapy undertaken in prison and the positive view the Applicant had of this.
12. The panel was mindful that the Applicant was still completing his therapy, although it said that '*... conclusion is in sight, subject to consolidation time.*'
13. The panel stated that the Applicant remained '*... vulnerable to stress ... [and] ... it is not yet known how he will self-manage when his work ... has concluded.*'
14. In reviewing the release plan, the panel stated '*Though the panel accept that it is not possible to firm up a risk management plan in full detail in advance of release, important aspects of his RMP remain in development, with some obvious uncertainties ... Though external controls will be in place on release, we cannot overlook that he has proved non-compliant and devious in the past in evading such measures.*'
15. The panel then concluded, '*In light of these considerations and notwithstanding the professionals' opinions we have received and considered with care, and also the measured submissions of [the Applicant's legal representative], ... the panel are not persuaded that [the Applicant] meets the test for release....*'

Request for Reconsideration


16. The application for reconsideration is that the panel's decision was irrational and/or procedurally unfair in that:

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- a) The panel '*appear to have inferred from the evidence*' that the Applicant had further therapy to complete in custody. The Applicant submits that the evidence was that this work was to be completed in the community and not in custody. It is submitted that this evaluation had a '*significant impact upon the decision as a whole*'.
- b) The panel determined that the release plan was not sufficiently developed whereas the evidence from the witness working in the mental health team in the prison was that upon a release decision a referral would be in place and would be implemented immediately. The panel had identified '*uncertainties*' in the release plan but these had in fact been addressed in oral evidence. The panel was either in error in its assessment of the release plan or came to a conclusion that no other panel could have reasonably reached.

The Relevant Law

17. The panel correctly sets out in its decision letter dated the 6 March 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.
18. 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)

19. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
20. 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)).

Irrationality

21. 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,

"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."

22. 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 '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.
23. 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

24. 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.
25. 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.
26. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

27. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

28. 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.*"

The reply on behalf of the Secretary of State (the Respondent)

29. On 3 April 2024, the Respondent confirmed that he would not be making any representations.

Discussion

30. In determining this application, I asked for and received a copy of the audio recording of the panel's oral hearing. I then reviewed the evidence presented to the panel at the oral hearing.

Ground A

31. The Applicant is in error in his assessment of the evidence presented about therapy in custody. The witness, in her oral evidence, set out that there would be a further ten sessions to complete and that this would be taking place in custody. Five sessions of trauma work were planned, together with five sessions of consolidation work. Following any release, there would be an extensive handover to allow for consolidation work to continue in the community.

32. The panel was not in error in its consideration of this evidence and therefore this ground fails.

Ground B

33. The therapy witness advised the panel that on release, the Applicant would need consistent support '*that is predictable*'.

34. The witness from the mental health team noted that many referrals are made to the Community Mental Health team for prisoners being released. She noted that it would be '*normal practice*' to refer someone on a Friday if they were being released on the following Tuesday, because earlier referrals would not be accepted. Therefore, although no active referral was in place, the reality was that the processes in place would not allow for anything to be achieved any earlier.

35. The witness from the mental health team stated that it would be expected that the support in the community would mirror what was taking place in custody and that if the Applicant did not have the right support, he would struggle to manage his mental health.

36. The Applicant submits that the panel's evaluation of the release plan was irrational.

37. I accept that it was more likely than not that the proposed community mental health support would become available to the Applicant if he had been released. The evidence before the panel established this. However, I am not persuaded that this was fundamental to the panel's decision not to direct his release. Indeed, the panel had noted alternative support that would be in place under the terms of the release plan.
38. It is reasonable to consider that another panel may well have reached an alternative view about the release plan and its likely effectiveness. However, the panel's assessment was not *'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.'*
39. There is a high standard to establish irrationality and this ground advanced by the Applicant does not meet it.
40. In reviewing the panel's decision, I am satisfied that the conclusions reached by the panel were justified by the evidence and were adequately and sufficiently explained.

Decision

41. 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.

Robert McKeon
09 April 2024