

[2025] PBRA 23

Application for Reconsideration by Gregory

Application

1. This is an application by Gregory (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 20 December 2024. The decision was not to direct release and not to recommend transfer to an open prison.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2024) (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 now consisting of 532 pages, the panel decision, the application for reconsideration drafted by the Applicant's legal adviser. The Secretary of State (the Respondent) offered no representations.

Request for Reconsideration

4. The application for reconsideration is dated January 2025 and was received on 09 January 2025.
5. The grounds for seeking a reconsideration are as set out below.

Background

6. The Applicant is serving a sentence of imprisonment for public protection. The index offence was wounding with intent to cause grievous bodily harm and assault occasioning actual bodily harm. The minimum term set by the judge was two years nine months and three days. The Applicant's tariff expired on 30 June 2010. This was the eighth review of the Applicant's prison sentence. The Applicant was aged 23 when sentenced.
7. The index offences were committed in circumstances where the Applicant and a co-accused had a dispute with the victim in this case. The Applicant broke into a caravan where the victim was living. The Applicant and co-accused were wearing hoods and balaclavas. The co-accused tried to stab one of the victims and both victims were repeatedly punched and hit with a baseball bat. Alcohol was behind the offending. The Applicant had convictions prior to his index offence. Those



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offences included robbery and attempted robbery, assaults and possession of an offensive weapon.

Current parole review

8. This case was referred by the Secretary of State to the Parole Board to consider whether the Applicant should be directed to be released or alternatively whether there should be a transfer recommendation to an open prison. The Applicant was aged 40 at the time of the review.
9. The review panel consisted of an independent chair of the Parole Board, a further independent member of the Parole Board and a psychologist member of the Parole Board.
10. Evidence was given by a consultant forensic psychiatrist, a prison instructed forensic psychologist, a prison offender manager, a community offender manager, and a prison officer. The Applicant gave evidence and was legally represented.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 20 December 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)

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.

Error of law

24. 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.

25. 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

26. 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)**, and **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.

27. 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."*

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 offered no representations.

General

30. The application for reconsideration in this case was submitted in a lengthy narrative form. No specific grounds for reconsideration were identified or numbered. The application was not made on the published form CPD2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how to look for evidence to sustain the complaints, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration.

31. This does not mean that the application was not validly made, however, the absence of specific grounds necessitates identifying those grounds from the narrative. I have identified the grounds as far as can be ascertained and they are set out below.

32. Applications for reconsideration are not appeals by way of rehearing. The application for reconsideration process mirrors applications for judicial review in the High Court. Accordingly the reconsideration mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by a panel, unless, of course, it is manifestly obvious that there was an error of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel. Therefore where a panel arrives at a conclusion, exercising its judgement, based on the evidence before it, and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. The test to be applied in reconsideration assessments is clearly set out above.

33. The reconsideration process is also an assessment of the evidence presented before the panel at the panel hearing. For that reason additional or fresh evidence is not amenable for consideration in a reconsideration application. In this case, the Applicant's legal adviser has submitted further references in support of the Applicant; these references cannot form part of the reconsideration process.

Grounds and Discussion

Ground 1

34. It is submitted that the panel's decision relied upon the fact that professionals did not have a consensus view about release. The argument adduced on behalf of the



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Applicant is worded as follows: *"it is not a necessary factor for all professionals to reach the same consensus on whether an offender meets the test for release."*

Discussion

35. At paragraph 4.3 of the panel's decision, the OHP listed individual factors which the panel took into account in reaching a conclusion as to why the Applicant, in their view, did not meet the test for release. One of those listed factors was that there was *"no consensus"* among professionals about whether the Applicant met the test for release.
36. The position, so far as professionals are concerned, in Parole Board hearings, is that they appear as witnesses. Professionals present their factual findings and their own professional views based upon those factual findings. The panel's role is to assess the evidence presented by the professionals, to make a judgement about the factual findings, and to make a final determination about the views of professionals based upon these factual findings. The panel are clearly entitled to either accept or reject any particular professional view so long as the panel set out their reasons for such a rejection or acceptance. The panel's decision is independent of the views of professionals, but may well be influenced by the professional view. In this case, there were mixed views as to whether the Applicant's risk could be managed safely in the community. An important factor was the availability of suitable accommodation and a suitably developed resettlement plan. There is no evidence, in the decision, that the panel merely took account of whether a consensus of professionals supported release. This was a case where the panel set out in some detail their findings in relation to the evidence and their reasons for rejecting a direction for release. So far as the submissions on behalf of the Applicant are concerned there is clearly no requirement for a consensus of professionals to be reached in order to direct or not to direct release. The requirement of the panel is to receive evidence from professionals and the prisoner, to consider that evidence together with all other evidence written and oral presented at the hearing, to reach an independent conclusion, and to apply the statutory test. In this case, it appears to me that the panel did just that.

Ground 2

37. The panel erred in concluding that warning signs would not be easily identified if risks were rising in the community.

Discussion

38. One of the factors, identified by the panel in relation to their decision not to direct release, was the view that warning signs, which have led to an escalation of risk, would not be easily identified and therefore the public would be at risk. The Applicant's legal adviser argues that the panel were wrong to conclude that warning signs would not be identified. This was clearly a matter for the assessment of the panel based upon the evidence before it at the hearing. However, the panel noted in its decision that there were incidents relating to the Applicant which appear to have occurred without warning. The Applicant himself admitted that although he



was on a specialist drug reduction wing, he had been taking drugs illicitly for a few times each month and had not been detected. This was an honest admission by the Applicant. However, it was an example of risky behaviour which was undetected. The panel also described a situation where the Applicant was held overnight in a prison on his way to an open prison. The Applicant felt that the overnight accommodation had not been properly prepared and his objections and strong reaction to the overnight arrangement led to him being returned to the closed prison. Again this appeared to be an example of behaviour which was impulsive and there appeared to be no warning signs that the Applicant would react in this way to staying overnight in a prison on his way to an open prison. The panel were therefore entitled to make an assessment of the evidence presented to them and to reach a conclusion that warning signs was a concerning issue. The panel found as follows: *"the panel believe increasing instability in his mood, which can quickly change, could result in professionals not being able to recognise his warning signs, and intervene and manage his risks."* I am satisfied that the panel came to their conclusion on the basis of credible evidence. Accordingly, I am not persuaded that their findings in relation to a lack of warning signs could be considered irrational in the sense set out above.

Ground 3

39. The panel failed to recognise that the Applicant had insight into his own risk factors.

Discussion

40. The Applicant's legal adviser sets out reasons why it is submitted that the Applicant has insight into his own risk factors. The presence of internal controls was a factor in the panel's determination and considerations. There were a number of examples within the decision letter which could credibly point to a lack of internal control. These included the decision by the Applicant to involve himself in a fight in the prison in order to help a friend, the decision not to attend an appointment with the psychologist to prepare a psychology report, the decision to continue to take illicit drugs while on a drug-free unit, and the recorded behaviour of the Applicant while in an open prison where there were a number of adjudications for breaches of rules. Again, it is accepted that the Applicant himself believes that he has internal controls, however, there was credible and sufficient evidence considered by the panel to support the contention that the Applicant had a limited ability to use internal controls to manage his behaviour and risks. I am not therefore persuaded that there is an example of irrational decision-making in this ground.

Ground 4

41. It is submitted on behalf of the Applicant that the panel were irrational in concluding that a longer period of stability in a new environment would assist in demonstrating the management of risk.

Discussion



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42.As indicated above, the panel received evidence relating to the Applicant's behaviour over the longer and shorter term. By the time of the hearing there had been a period of stability in a drug-free unit in the prison. It is not uncommon that one of the measures used in assessing risk is the historical evidence of stable behaviour by a prisoner. In the case of the Applicant, there had been some years of instability and difficulties. There had however been a period of stability in the months before the panel hearing. The more recent stability had also been in a relatively controlled environment of a specialist drug wing. The panel (and one of the professionals) took the view that there was limited evidence of the Applicant's ability to manage his behaviour and risk in differing environments where there may be further challenges. Again this view by the panel was one which they were entitled to adopt. There was credible historical evidence upon which they could base their view that a period of, and evidence of, managing internal emotional difficulties was an important factor and required further time. Again, I am not persuaded that this amounts to irrationality in the sense set out above.

Ground 5

43.It is submitted on behalf of the Applicant that the panel erred in indicating concern relating to an incident where the Applicant reacted negatively to an overnight stay in a prison during the transfer process to an open prison.

44.It is also submitted on the Applicant's behalf that the panel were wrong to assume that the Applicant has limited internal strategies and that reliance for the management of risk would depend heavily upon external controls.

Discussion

45.These points are addressed above. The Applicant's legal adviser repeats the view that the panel were in error in relying upon the breakdown in behaviour by the Applicant when being transferred to an open prison, as being indicative of concerns about risk. The Applicant's legal adviser also repeats the argument that the Applicant, in the view of the legal adviser, has internal controls. Again this is a matter of determination and opinion, the decision of the panel would only be irrational if it were unsubstantiated by credible evidence and so outrageous, in its defiance of logic, that no sensible person could have arrived at it. I am not persuaded that this is the case on the basis of this aspect of the decision.

Ground 6

46.It is submitted that the panel failed to acknowledge the hobbies and voluntary work undertaken by the Applicant in custody and that although he was adjudicated for being involved in a fight his involvement was in circumstances where he was attempting to protect himself and others.

Discussion



47.The panel did not, in its decision, focus upon personal development issues. This was unsurprising as the Applicant had complex challenges, as evidenced by the fact that the panel heard evidence from both a consultant forensic psychiatrist and a forensic psychologist. I am not persuaded that the absence of references to hobbies and voluntary work would have had any material effect upon the decision of the panel. Therefore I am not persuaded that it was irrational not to address these within the decision itself.

Ground 7

48.A number of character references have been submitted showing the Applicant's politeness and helpfulness to staff in support of this application for reconsideration.

Discussion

49.As noted above, the reconsideration process is not a rehearing of the evidence. A reconsideration decision can only be based upon the evidence presented to the panel at the panel hearing.

Ground 8

50.It is submitted, by the Applicant's legal adviser, that the Applicant has ambitions to work on the railway network and is keen to engage with animals on a voluntary basis if released. The panel failed to acknowledge the Applicant's positive view of life.

Discussion

51.As indicated above, it is acknowledged that the panel did not dwell for any length of time upon the Applicant's ambitions in terms of work either on the railways or with animals. It was apparent that the fundamental issue in this case was the ability of the Applicant to remain stable for a period of time and to be able to demonstrate that stability can be transferred to a life in the community. Given the psychological and psychiatric challenges of the Applicant, it was clear that any ambitions to undertake railway work would be likely to be in the medium or longer term. Again, I'm not convinced that the absence of references to these interests are indicative of an irrational decision by the panel.

Ground 9

52.It is submitted that it was irrational for the panel to rely upon the fact that the Applicant gave contradictory evidence during the hearing as (it is submitted) it is well known that prisoners will be anxious and worried about a parole hearing.

Discussion



53.It is noted that although the panel took the view that there was contradictory evidence given by the Applicant, the panel did not specifically identify that evidence. However, it was clear from the decision itself that the Applicant was a complex character. He expresses a strong desire to secure release and to live in the community, however, as evidenced by the period of time in an open prison, the Applicant's behaviour when in circumstances preparing for release appear to be in conflict with his expressed desire to demonstrate that his risk can be managed. Panels of the Parole Board are also experienced in receiving evidence from prisoners and fully understand the stresses of giving evidence and attending a parole hearing. The decision itself does not indicate that the panel failed to offer an opportunity to the Applicant to fully present his case in evidence.

54.It is also clear that the panel relied on a number of factors in reaching their decision not to direct release (listed at paragraph 4.3 of the decision). One of those factors was the contradictory evidence which was received from the Applicant. However there were a number of other considerations which in total led the panel to conclude that the Applicant's risk could not be safely managed in the community and that he did not therefore meet the test for release. Again, I'm not persuaded that this ground amounts to irrationality in the sense set out above.

Decision

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

HH Stephen Dawson
28 January 2025