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[2025] PBRA 37

Application for Reconsideration by Morrow

Application

1. This is an application by Morrow (the Applicant) for reconsideration of the decision of the Parole Board, following an oral hearing on 29 November 2024 not to direct his release.

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:

   a. The dossier now comprising 562 pages including the decision letter (DL) the subject of this application.
   b. Undated written submissions sent in by the Applicant's legal representative following the hearing which were uploaded to the Parole Board system on 9 December 2024.
   c. The (undated) application submitted on behalf of the Applicant together with (undated) handwritten applications/submissions submitted by the Applicant himself.
   d. An email dated 28 January 2025 on behalf of the Secretary of State (the Respondent) indicating that she does not wish to make representations in respect of the application.

Background

4. The Applicant is now 53 years old. In January 2009, following conviction and sentence at the Crown Court, he was sentenced to imprisonment for public protection for the offence of sexual activity with a child, meeting a child and sexual grooming. His minimum term was set at 4 years less time on remand. In 2019 he was transferred to open conditions and a Parole Board panel directed his release in March 2021. He was released on licence in July 2021 and recalled to prison on 9 September of the same year.

Request for Reconsideration

5. The grounds for seeking a reconsideration of the case submitted by the Applicant's legal representative are set out in full below:

Procedural Unfairness

"[The Applicant] was considered by a panel of the panel board on 29th November 2024 and an application for release was made.

"During the course of the hearing additional information came to light through the Prison Offender Managers evidence and the client's evidence which clear had a significant impact on the psychological risk assessment.

"In order to assist those reviewing this application, the following information will be helpful. [The Applicant] is a privately funding individual who is not entitled to legal aid due to the strict parameters of having more than £3,000 in savings. However, it is a very considerable expense for him to consider instructing a privately commissioned independent psychological assessment in this case.

"[The Applicant] and his legal representative had considered that the psychological assessment completed by the prison was fair at the time of the report being published.

"Prior to the hearing taking place a three-way meeting had been held with [the Applicant], his POM and psychologist to discuss the next steps for [the Applicant]. [The Applicant] was advised to consider OPD in the community, seek GP advice for erectile dysfunction and speak with his POM regarding sexual fantasies. [The Applicant] has a very positive working relationship wit his POM and has been completing New Me MOT with her.

"[The Applicant] has struggled in the past to speak about fantasies. [The Applicant] had further meetings with his prison offender Manager and disclosed that his fantasy would be to engage in a threesome with two women. [The Applicant] explained that he would either watch or participate through oral sex. (Given [the Applicant's] erectile dysfunction this did not seem to be out of the ordinary). However, as the hearing progressed, and evidence was heard from the POM and the client regarding this area of interest.

"At the point of the psychologist giving her evidence, she stated that this was completely new information to her and that she would need to speak to [the Applicant] directly regarding this in order to make a further assessment as to how the fantasy linked to risk (if at all). The psychologist was clear that she would need "further discussions" with [the Applicant]. As a result of further questioning the psychologist began hypothesising (without further assessment) that the fantasy could be linked to being submissive/passive and that rape is an overcompensation.

"The psychologist stated that there were limitations to her assessment.

"Following this evidence, the instructing solicitors discussed the case with [the Applicant] and made an application to adjourn for the following reasons, firstly the assessment of the psychologist was changing within the hearing and was procedurally unfair to [the Applicant] and his case, secondly the psychologist stated in her evidence that a further assessment was required and finally that the psychologist had stated that in her view the there were "significant limitations" to her report. The instructing solicitor highlighted that [the Applicant] is also considering the necessity of an independent report and the cost implications.

"The panel stated that they would not make a decision on the adjournment request until all witnesses had given evidence.

"[The Applicant's] Community Offender Managers gave evidence highlighting that that there had two meeting with [the Applicant] and that there had been a high number of changes to the allocated COM in this case since the last review.

"The COM giving evidence stated that she had heard new information in the course of the hearing, and that it would be helpful to have an updated psychological assessment.

"Instructing solicitors submitted closing submissions in writing after the hearing, seeking an adjournment of this case and additional closing submissions.

"We submit that is procedurally unfair for additional information to be sought though the course of the hearing which would have a significant impact on the report writer's assessments. Professionals cannot be expected to make on the spot assessments when significant information is heard on the day, during a hearing. It is procedurally unfair to [the Applicant] and his case for the application for an adjournment to be refused on multiple occasions, especially when professionals agreed it was necessary.

"It is to be noted that denial is not a bar to release, and that [the Applicant] was released previously by a panel of the parole board. [The Applicant] has continued to undertake New Me Mot, since his last review, which recommended a move to open conditions. [The Applicant's] behaviour has not declined, and he has continued to work on a 1-2-1 basis with his POM.

"As a result, the risk assessment undertaken by the parole board is flawed for the reasons set out above and constitutes as irrational and undermines the ability to consider release and progression to open conditions. Due to the above points, we would submit that the panel was unable to meet the terms of this referral.

"The decision goes against the evidence and the cogency of the arguments put forward by all attending on the day."

6. The grounds submitted by the Applicant himself fall into 3 parts:

   a. A handwritten letter addressed to the Parole Board apparently signed by the Applicant himself.
   b. A second handwritten document enclosed with the letter beginning with the words *"The decision reached…."*
   c. A third handwritten document referring specifically to paragraphs in the DL said to provide grounds for the application and including a copy of the DL with handwritten marginal notes against certain paragraphs.

7. The grounds set out in full at paragraph 6 above contain no reference to those referred to in paragraph 7 and the same is true in reverse. In addition, the third document appears to be in a different hand to the others.

Current parole review

8. This case was referred to the Parole Board in February 2023 following the Applicant's recall.

The Relevant Law

9. The panel correctly sets out in its DL the test for release.

Parole Board Rules 2019 (as amended)

10. 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)).

11. 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)). This is an eligible sentence.

Irrationality

12. 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*."

13. 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.

14. The **DSD** case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *"more modern"* test set out by Saini J in **R (Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

15. In the **Wells** case Saini J set out *"a more nuanced approach"* at paragraph 32 of his judgment when he said: *"A more nuanced approach in modern public law is 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".*

16. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

17. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a judge dealing with a judicial review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

18. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

19. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

20. The giving of reasons by a decision maker is *"one of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

21. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said: *"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

22. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

23. 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.

24. 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.

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

Other

26. 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.

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.*"

The reply on behalf of the Secretary of State

28. The Respondent has offered no representations in respect of this application.

Discussion

29. Panels are frequently presented with differing opinions on the suitability of a prisoner for release by the professional witnesses. In this case, the Prison Offender Manager (POM) recommended release whereas the two Community Offender Managers (COM) and the psychologist instructed by the Respondent, did not.

30. In those circumstances it would be surprising indeed if a decision reached by a panel which gave effect to the recommendations of 3 of the 4 professional witnesses not to direct release could be said to have been irrational.

31. Essentially the issue in this case concerns the evidence of the prison psychologist who indicated during her evidence that information relevant to the possible risk of serious harm presented by the Applicant had only recently come to her attention and that she would need further time to consider how – if at all - that material might affect her recommendation in the case.

32. Following that evidence the Applicant's legal representative asked that the hearing be adjourned so that the witness – and perhaps the following witnesses – the 2 COMs – might need to reassess their evidence and conclusions in the light of this recently obtained information.

33. The panel indicated that it would prefer to decide the question of a possible adjournment after hearing the evidence of the 2 COMs. Having done so it rejected the application for an adjournment and proceeded to issue the DL the subject of this application.

34. In order to follow the way in which the hearing developed I asked to be provided with the recording. I was sent a recording. The recording lasted for 3 hours 36 minutes and concluded at the end of the evidence of the prison psychologist. It seems that the hearing broke off for lunch at that time and reconvened later to hear the evidence of the two COMs and any final submission to be made on behalf of the Applicant together (possibly) with the panel's decision on the question of the possible adjournment of the hearing referred to in the previous paragraph.

35. Unfortunately, it seems that for whatever reason this last part of the hearing was not recorded. I therefore asked for and was supplied with notes made by the Chair of the hearing. Perhaps understandably the notes did not help me to follow the hearing and the way it developed in respect of the central issue in this application concerning the question of adjourning the hearing so that the new information discussed by the psychologist could be explored and possibly result in a change in her – and perhaps those of the 2 COMs - opinion on the suitability of the Applicant for release and the appropriate conditions to be attached to such a direction.

36. The DL deals with the topic which gave rise to the question of possible adjournment at paragraphs 2.27 2.30 and 3.21, concluding that although the two COMs had only been appointed very recently and although the psychologist had expressed surprise at, and interest in, the possible impact of the recent disclosure by the Applicant of some sexual fantasies, the weight of the evidence of the two COMs and the current stance of the psychologist led to the conclusion (without the matter being set out expressly) that an adjournment would not assist the panel and that it was necessary for the protection of the public that the Applicant remain in custody.

37. Hearings in which the professionals are divided in their opinions are not uncommon and it would be very rare for a finding of irrationality to result from a DL. In truth this application is based on an alleged procedural irregularity, namely the decision of the panel not to grant the adjournment sought, together with the claim that that refusal was "*irrational*".

38. I have considered the case through the prism of the principles set out above at paragraphs 12-25 by the courts and taking into account the fact that I have not got access to some of the material relevant to the application because of the absence of a recording of the evidence of the COM's and the closing submissions on behalf of the Applicant.

39. A number of matters relating to the panel's decision not to recommend release are of some concern:

    a. The absence of a clear record of the hearing which does not contain the evidence of the 2 COM's or the closing submissions of the legal representative – in particular her application for the case to be adjourned for further inquiries to be made following the recent disclosures to the psychologist by the Applicant. This part of the hearing was relevant to the question of whether the decision not to grant an adjournment was "*irrational*" or whether the failure to grant one might amount to a "*procedural irregularity*".
    b. Although the DL refers to the receipt of the written submissions it deals with the application for an adjournment in a fairly summary way in its introductory paragraphs:

> *"It is also noted that following the evidence provided by the prison psychologist the legal representative met with [the Applicant] confidentially. On return the legal representative requested an adjournment. The request was to direct the prison psychologist to provide an updated PRA following the evidence taken thus far and to access whether an independent PRA report would also be appropriate.*
>
> *"The panel decided to take forward the oral hearing before making a decision regarding an adjournment. The legal representative agreed. Evidence was then taken from the COM's; the information is outlined below. This led to the panel deciding that an adjournment was not appropriate because it had heard full evidence to enable an assessment of risk of harm."*

    c. The same can be said of the psychologist's evidence that the recent disclosures of the Applicant would merit further investigation and might point the way towards possible future work to be completed, whether in closed or open prison or in the community.

40. However, that said, the DL contains the following passages:

> *"2.30. Following [the Applicant] outlining a sexual fantasy to the POM a week before the oral hearing the prison psychologist told the panel that this was a positive development. However, further discussions regarding his sexual fantasies is necessary to assess his risk of harm.* (sic).

"2.37. The COM's and the prison psychologist do not believe an updated PRA would change their views that there is outstanding core risk reduction work to complete in custody."

41. The evidence of the psychologist was clear that the treatment which looked now as though as if it may be necessary to reduce his risk sufficiently to allow him to be in the community would be best dealt with while the Applicant was in custody.

42. I have considered the grounds submitted by the Applicant in person in addition to those submitted on his behalf by his Legal Representative. They are lengthy and in many instances are not grounds of appeal but general complaints. In summary:

    a. The hearing failed to abide by the Member Case Assessment (MCA) directions issued in advance of the hearing by a duty member of the Parole Board.
    b. The Applicant's original COM had left the Probation Service shortly before the hearing and thus the two COM's who attended the hearing made their recommendations more on the basis of their comparative ignorance of the Applicant and his case than on the merits or otherwise of a direction for release.
    c. The psychologist witness failed to address the matters of concern set out by the duty member in the MCA directions.
    d. The same witness mistakenly referred to two previous convictions for rape.
    e. The panel failed to give enough credit to the Applicant for the work caried out since his recall.
    f. The adjournment sought but refused by the panel may have revealed the possibility of a period in a Psychologically Planned Environment (PIPE) within the community to provide support and supervision and the chance for the Applicant to build a meaningful relationship with the COM.

43. As to 42 a. The hearing proceeded with no application being made before or during the hearing for the proceedings to be adjourned on the basis of a failure to comply with the MCA "*directions*". If either the panel or the Applicant or his legal representative had believed there was insufficient information within the dossier there would no doubt have been an adjournment.

44. As to 42 b. It was the case that the former COM had recently left the Probation Service. The comparative ignorance of the witnesses of the Applicant as compared with their predecessor was unfortunate. However, no application was made on the basis that the new COM should have more time to "*get to know*" the Applicant. The application was based on the "*new*" information as to sexual fantasy referred to above.

45. As to 42 c. There is nothing in this ground. The psychologist's evidence was full and properly tested by the Applicant's legal representative. The eventual decision was taken by the panel. The MCA Directions are formulated to assist the Respondent, the prisoner and the Parole Board to come to the eventual hearing as well prepared as is possible. No submission was made at the beginning of the hearing that it should be adjourned so that apparent failures to implement the MCA directions could be addressed. Likewise there is no jurisdiction in the Parole Board, whether at the hearing or on an application for reconsideration, to grant an application for release simply because an MCA direction has not been carried out.

46. As to 42 d. This mistake had no bearing on the general evidence of the witness. The Applicant is a serial convicted sex offender who from 1989 until 2009 was convicted 4 times of sexual offences and failures to comply with the notification requirements resulting from some of those convictions as well as a number of offences of dishonesty.

47. As to 42 e. The DL took into account the work done since recall – see paragraphs 2.16, 2.20.

48. As to 42 f. This is the ground pursued on his behalf by his legal representative in the grounds submitted.

49. As to that ground, namely the decision of the panel following the hearing, not to grant an adjournment, I have come to the conclusion that while it would have been preferable for the DL to set out in more detail why it had decided not to grant the adjournment, the fact was that the benefit of granting the application was far from clear and the possibility that the result of such a postponement would have been a decision to re-release the Applicant was remote – and thus the decision falls far short of being "*irrational*". A differently constituted panel may 'rationally' have come to a different conclusion but that is not to say that the decision made can be categorised as "*irrational*". The Applicant has been back in prison for more than 3 years following his release and only has himself to blame for failing to engage with a professional concerning his sexual fantasies until shortly before the hearing. No doubt he and the professionals will hope that in the period between now and the next hearing significant progress will have been made.

50. Accordingly, this application is refused.

Sir David Calvert-Smith
14 February 2025