

[2022] PBRA 128

## Application for Reconsideration by Mullings

### Application

1. This is an application by Mullings (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 10 August 2022 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 10 August 2022;
  - b) A request for reconsideration from the Applicant in the form of written representations from his legal representative; and
  - c) The dossier, numbered to page 376, of which the last document is the Decision Letter. The panel had a dossier numbered to page 348 at the oral hearing, it then adjourned and considered a final dossier of 357 pages before reaching its decision.
4. I am grateful to the Applicant's legal representative for the care taken in identifying the Applicant's grounds for complaint. It appears that he had made personal written representations, but these were not received in time and so his legal representative has set out, in detail, his position.

### Background

5. The Applicant is now 37 years old. On the 12 December 2008, when he was 23 years old, he received a sentence of imprisonment for public protection following his conviction for rape, attempted rape, possession of an imitation firearm and having an imitation firearm in a public place (the Index Offences). The sentencing court determined that he must serve four years and one hundred and ninety-six days prior to being considered for release by the Parole Board.
6. The Applicant first became eligible to be considered for release by the Parole Board in June 2013. On the 20 June 2019, he was released at the direction of the Parole Board, but he was recalled to custody in April 2020. The Parole Board directed his re-release on 10 March 2021 and he was recalled for a sec-



ond time on 12 July 2021. The Applicant accepted his latest recall, which followed his use of drugs, concerns about his behaviour and his designated accommodation place being withdrawn.

7. Following the recall in 2021, the Secretary of State referred the Applicant's case to the Parole Board to consider whether he should be re-released or, in the alternative, whether a recommendation could be made for his progression to an open prison. The case was considered at an oral hearing by the panel on the 6 June 2022 and evidence was taken from the Applicant, from the official supervising his case in custody and from his Probation Officer based in the community. The Applicant asked the panel to direct his release, however, the panel declined to do so and did not recommend his progression to an open prison.

### **Request for Reconsideration**

8. The application for reconsideration identifies a number of points which the Applicant submits points to the decision being irrational.
9. The Applicant states that he did not commit further offences resulting in his recall and that he has served the equivalent of a two-year sentence as a result of the recall, which he feels is irrational and disproportionate given the nature of the recall.
10. The Applicant believes that he has addressed his drug misuse since being recalled, that risk reduction work can be completed in the community, that a period in open conditions was not considered to be essential, that there was support for his release, that the Risk Management Plan (RMP) would be effective and he says he would comply with the plan.
11. The Applicant complains that the panel conducted its own risk assessment, that it did not have a psychologist member in its number and that a current psychological risk assessment had not been completed.
12. The Applicant's legal representative also indicates that the Applicant wishes to argue procedural unfairness and evidence of an error of law. However, the legal representative has not received the written representations from the Applicant and so cannot further any argument.
13. The Applicant's legal representative suggests that I will comment further on whether the decision is procedurally unfair or whether there was evidence of an error of law. I am afraid it is not my role to present the Applicant's case for him. That would impact on the independence of my decision. I am therefore considering this application on a question of irrationality because that is the basis of the representations before me.

## The Relevant Law

14. The panel correctly sets out in its Decision Letter dated the 10 August 2022 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. During the review, the Secretary of State amended the test for open conditions. The panel adjourned the review following the oral hearing to gather further evidence and to allow for representations to be made.

### *Parole Board Rules 2019 (as amended)*

15. 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)).

16. 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)).

17. 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*

18. 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."*

19. 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.

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

### **The reply on behalf of the Secretary of State**

21. On the 20 September 2022, The Secretary of State indicated that he would not be making any representations.

### **Discussion**

22. Many of the points argued by the Applicant seek to establish why he disagrees with the panel's decision. It is not for me to substitute my own decision in place of the decision made by the panel. Disagreeing with the decision is not sufficient to argue that the decision itself was irrational.

23. The Applicant submits that the panel conducted its own risk assessment but did not include a psychologist member in its number and did not have a current psychological risk assessment. At first glance, there may be merit in this submission in terms of irrationality. However, reading the Decision Letter in its entirety, and noting the written evidence, there is little to suggest that an expert assessment was necessary in this case.

24. Helpfully, the panel sets out in some detail the oral evidence it considered and, in my view, based on all the available evidence, the panel was entitled to reach the decision that it did. Panels have the expertise to make decisions and are required to undertake their own assessment of risk. I am afraid there is nothing to point to irrationality.

25. I have searched in vain not only for a hint of irrationality in the decision-making process, but any reason why this decision cannot be described as meticulously careful and scrupulously fair. Whether considered individually or cumulatively, there is nothing within the Applicant's representations to demonstrate irrationality.

### **Decision**

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

**Robert McKeon**  
**20 September 2022**

