

[2023] PBRA 123**Application for Reconsideration by Wong****Application**

1. This is an application by Wong (the Applicant) for reconsideration of a decision of an oral hearing panel dated 24 May 2023 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, (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 decision letter;
 - Reconsideration representations on behalf of the Applicant; and
 - The dossier, which now runs to 273 numbered pages, ending with the decision letter.

Background

4. In September 2017, when he was 30 years old, the Applicant received an extended determinate sentence of 12 years', consisting of an 8-year custodial term and a 4-year extension period. The parole eligibility date was 5 January 2023, the conditional release date is in September 2025, and the sentence expiry date is in September 2029. The Applicant is now 35 years old.
5. The index offences were aggravated burglary with intent to cause grievous bodily harm and unlawful wounding. With four co-defendants the Applicant broke into a dwelling while armed with knives and an imitation firearm. The burglars stabbed one man. There were two other men in the house who called the police. The burglars tied them up, but the police arrived and arrested all five offenders. The motive was the enforcement of a debt.
6. The Applicant had significant previous convictions, including three offences of carrying a bladed article, the first in 2006. At the time of the index offences, he was on licence from a 7-year sentence of imprisonment for wounding with intent to cause grievous bodily harm.



Request for Reconsideration

7. The application for reconsideration is dated 13 June 2023.
8. The grounds for seeking a reconsideration are as follows:
 - (1) Irrationality – any necessary risk reduction work can be done in the community. It is not available in open conditions, where the Applicant now resides. His risk of serious harm is not imminent.
 - (2) Procedural unfairness – the panel was invited to adjourn the decision to enable the Applicant to re-start releases on temporary licence (RoTLs) and form a good working relationship with his Community Offender Manager (COM) and declined to do so. The panel did not mention this in the decision letter and did not explain why it did not grant the request. The reason for the request was that the only way the Applicant could access any form of accredited intervention was by way of one-to-one work with his COM during RoTLs.
 - (3) Procedural unfairness – at the close of the oral hearing the panel asked the COM to provide an updated Risk Management Plan (RMP) and additional licence conditions. A timetable was set down for this: I have not been told what the timetable was. However, this appears in the decision letter:

"A short adjournment was agreed for the purpose of an updated risk management plan, and additional licence conditions. However, the documents had not been received by 24 May 2023 and the decision was finalised. Furthermore, the panel were satisfied that given the issues raised in Section 4 of this document, an updated risk management plan and licence conditions would not be able to effectively manage his risk should he be released."

9. I have made enquiries through the Parole Board Reconsideration secretariat in order to find out what happened in regard to Paragraph (3) above. I will set out the result of those enquiries in the **Discussion** section below.

Current parole review

10. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release on 25 May 2022. This was his first review.
11. The oral hearing took place on 4 May 2023. The panel consisted of two independent members and a psychiatrist member of the Parole Board. The panel considered the dossier, then consisting of 260 pages, and heard evidence from a prison-based psychologist, the Prison Offender Manager (POM), and the Applicant. A probation officer (CB) is described as an observer in the decision letter, but appears to have given evidence as the COM, having met the Applicant for the first time on the morning of the hearing. The Applicant was legally represented. The Secretary of State was not.

The Relevant Law

12. The panel correctly sets out in its decision letter the test for release.



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13. 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.
14. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

15. Under Rule 28(1) of the Parole Board Rules 2019 (as amended), 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)).
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)).

Irrationality

17. 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."

18. 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.
19. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

20. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"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 respect 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

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; and/or
 - (e) the panel was not impartial.
23. The overriding objective is to ensure that the Applicant's case was dealt with justly.

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

24. The Respondent has indicated that he does not wish to make any representations on this application.

Discussion

25. I will focus on Ground (3). Inquiries by the Parole Board secretariat disclose that:
- (1) CB sent the material that the panel had requested to the Parole Board Caseworker, the POM and the Offender Management Unit (OMU) on 18 May 2023.
 - (2) CB should also have sent it to the Public Protection Casework Section (PPCS) Caseworker, whose responsibility it is to obtain and upload reports.
 - (3) Someone from OMU did upload the material to the Public Protection Unit Database (PPUD) but marked it (for some unknown reason) as non-disclosure, and it did not go into the dossier.

26. There was therefore a breakdown in communication between the COM and the panel, resulting in the panel not seeing what the COM sent. I am not concerned to attribute blame for this. The panel gave a carefully considered conclusion (Section 4 of the decision letter), saying that it was satisfied that, given the issues raised in that Section of the document, an updated risk management plan and licence conditions would not be able effectively to manage the Applicant's risk should he be released.
27. I do not question the panel's judgement about that. What is questionable in this instance is not whether justice was done, but whether it was seen to be done: an important element in dealing with a case justly. The Applicant feels, and an informed observer would consider he is entitled to feel, whether rightly or wrongly, that material potentially relevant, and potentially favourable, to his case has not reached the panel and therefore has not been considered by it. Whatever the reasons for that, it was not the Applicant's fault.
28. I therefore conclude that there is in this case an element of procedural unfairness which vitiates the panel's decision.
29. In the circumstances it is neither necessary nor desirable for me to consider the other grounds set out in the Representations.

Decision

30. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, that the decision, reached in the way it was, was procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

HH Patrick Thomas KC
12 July 2023