

[2023] PBRA 163**Application for Reconsideration by Brown****Application**

1. This is an application by Brown (the Applicant) for reconsideration of a decision of an oral hearing panel dated 31 July 2023 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 the oral hearing decision, the dossier consisting of 506 pages, and the application for reconsideration.

Background

4. The Applicant received a sentence of life imprisonment on 27 June 2002 following conviction for having an imitation firearm with intent to commit an indictable offence, and attempted robbery. He also received concurrent sentences for attempted robbery (three years) and theft (12 months). His tariff was set at three years less time spend on remand and expired in June 2005.
5. The Applicant was 42 years old at the time of sentencing and is now 64 years old.

Request for Reconsideration

6. The application for reconsideration is dated 10 August 2023. It has been drafted by the Applicant. It submits that the decision contained an error of law, was procedurally unfair and was irrational.
7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2021 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Secretary of State whether the Applicant should be transferred to open conditions.



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9. The case proceeded to an oral hearing via videoconference on 13 July 2023. The panel consisted of three independent members. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**) and a Security Intelligence Manager. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the release decision that is open for reconsideration.

The Relevant Law

11. 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

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. 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."

16. 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.

17. 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

18. 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.
19. 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.
20. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Respondent

21. The Respondent has submitted no representations in response to this application.

Discussion

Ground 1 – Error of law

22. The Applicant first submits that the decision contained an error of law.
23. It goes on to cite two claimed errors of fact in the decision.
24. It is first said that it was incorrect for the panel to say that he was in custody for a very serious offence involving a "*deadly weapon*" as his conviction related to having an imitation firearm (which, by implication was not '*deadly*').
25. Next, it is said that it was incorrect for the panel to say that the Applicant had "*a previous conviction for rape*" when it was for aiding/abetting attempted rape.
26. While I accept that an imitation firearm is not capable of causing or being able to cause death (and therefore not '*deadly*' in the ordinary meaning of the word) I do not find that the panel's mistaken use of the adjective was material to its decision. In particular, the panel states that it was satisfied that the Applicant's violent behaviour has been addressed.

27. The Applicant's submission on the second is not accurate. The panel's decision clearly states he has a previous conviction for "*rape (aid and abet)*". His liability as an accessory is correct. Although this conviction relates to attempted rape rather than rape, he was nonetheless involved in an incident in which the principal acted in a way that was more than merely preparatory to committing rape, with the intention of committing rape.
28. I accept that the panel omitted the word '*attempt*' from its conclusion. However, it did state the offence correctly in its analysis of the offending (albeit that was replicated from the decision of an earlier panel from July 2020). However, I do not find that this omission had any bearing on the panel's decision which is primarily based on reports of ongoing sexualised and inappropriate behaviour. The Applicant does have a relevant conviction in relation to his involvement in a serious sexual offence and it is unsustainable for him to argue that I should interfere with the decision not to release him on the basis that he aided and abetted an attempted rape rather than an actual rape.
29. In any event, errors of fact are not, of themselves, errors of law. There is no error of law here and the ground fails.

Ground 2 - Procedural unfairness

30. The second ground is argued under the heading of procedural unfairness. It is submitted that if the panel had followed correct procedures, then the factual inaccuracies complained about in the first ground would not have been made and this would have led to "*a very different outcome*".
31. I disagree. As set out above, I cannot see how the panel's conclusion would have been different if it had recorded the matters relating to the imitation firearm and aiding and abetting the attempted rape more accurately. There is no evidence that persuades me that the Applicant was not given a fair hearing, and this ground also fails.

Ground 3 - Irrationality

32. Finally, it is submitted that it was irrational for the panel to conclude that the Applicant presented an imminent risk of serious harm. His COM took the view that his risk was imminent, and it is not unreasonable for the panel to have followed that view. The legal test of irrationality is essentially that the panel's decision not to release the Applicant was so illogical that every other panel would have decided otherwise and released him. The evidence suggests there was no support for release from any of the witnesses. The Applicant's POM concluded that he needed to undertake further risk reduction work in closed conditions before progression to open conditions could be safely considered. The COM said he needed to undertake risk reduction work on sexualised behaviour in custody. The Applicant may disagree, but disagreement is not enough to establish irrationality in law. The legal test sets a high bar which this case does not meet. Accordingly, this ground fails.

Decision

33. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
14 September 2023