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**[2023] PBRA 4**

**Application for Reconsideration by Morgan**

## Application

1. This is an application by Morgan (the Applicant) for reconsideration of a decision of the Parole Board dated the 30th November 2022 not to direct release following an oral hearing.

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, the application for reconsideration and the dossier.

## Background

4. The Applicant was sentenced to imprisonment for public protection on 11th May 2012 for four offences of arson. He was required to serve a minimum period of 3 years before he was eligible to be released on parole. The Applicant was transferred to open conditions on the recommendation of the Board in June 2015 but he absconded after a week and remained unlawfully at large for 8 months. The Applicant was first released on licence in November 2017 and was recalled in December 2017. He was re-released in April 2020. His licence was revoked in September 2020 and he was returned to custody in October 2020. During this period the Applicant committed offences against his then partner for which he subsequently received a further sentence of 3 years imprisonment. He was made the subject of a restraining order which he later breached and for which breach he was sentenced to 4 weeks in custody.

## Request for Reconsideration

5. The application for reconsideration is dated 15th December 2022.

6. The grounds for seeking a reconsideration are as follows:
The decision was irrational because the panel decided to refuse the application because the professional witnesses were unable to assist by making recommendations. Further the panel did not explain in their decision letter why they had decided that they did not require a psychological assessment of the Applicant

or did not need further evidence from the CPS which had been referred to by the Community Offender Manager.

**Current parole review**

7. This was the first parole review following the Applicant's recall in September 2020.

8. The oral hearing was on 30th November 2022 and the panel heard evidence from the Community Offender Manager and the Prison Offender Manager. The Applicant had a legal representative at the hearing who submitted written representations after the hearing which were considered by the panel.

**The Relevant Law**

9. The panel correctly sets out in its decision letter dated 30th November 2022 (this cannot be the correct date as it was the date of the hearing) 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.

10. 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. It was applied by the panel in making its decision.

*Parole Board Rules 2019 (as amended)*

11. 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).

12. 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 case is eligible for reconsideration.

13. 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**.

*Illegality*

14. 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.

15. 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.

*Irrationality*

16. 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."*

17. 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.

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

19. The Applicant in his application for reconsideration relies on the alternative formulation of the irrationality test set out by Saini J. in **R(Wells) -v- the Parole Board [2019] EWHC 2710 (Admin)**. I have considered it and applied it in this case together with the test set out in para 16 above. Saini J. does not suggest his formulation is a different test, it is the same test as set out in para 16 but formulated in what he considers to be more practical and structured terms. The decision in **DSD** was a decision of a Divisional Court and the Parole Board use that test in reconsideration cases. It is useful to use the Saini test as a further check but it is not different in substance.

20. I have not included the procedural unfairness test as it is correctly not relied on by the Applicant as a ground for reconsideration. I have considered the illegality test as the application could in my view have included a suggestion that the test applied by the panel was unlawful.

21. 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**

22. The Secretary of State has made no substantive response to the application. This is regrettable as the application relates principally to how the panel should respond to his new policy that professional witnesses employed by the Secretary of State should not make recommendations relating to release to the Board.

**Discussion**

23. I have carefully considered the application for reconsideration. The arguments are clearly set out and well argued in the application. The principle complaint relates to the way the panel treated the refusal of the professional witnesses to give an opinion on whether the Applicant could be safely released. While there had been a suggestion at an earlier stage in the proceedings that at least one of the witnesses would have been able to make a recommendation in accordance with the Secretary of State's policy, by the time the witness came to give evidence, the situation had changed and no recommendations were expressly made. At 4.2 of the decision letter as part of the Conclusion the panel say '*The Panel was not impressed by Mr. Morgan's explanations and attitudes and, in the current circumstances where professional witnesses are unable to assist by recommendations, it judged that their evidence did not justify progress at this stage.'* The Applicant argues that this implies that had recommendations to release been made the result may well have been different. In those circumstances it is suggested that the panel should have made the witnesses give their recommendations.

24. I do not consider that to be right nor do I consider it to be necessary. The panel had no power to compel the witness to make a recommendation and it would have been unfair to pressure the witness to answer a question which the witness was not permitted by the Secretary of State to answer. We are all waiting to see what the High Court will determine as to whether the policy is lawful but until that happens it seems to me that it is quite possible for the Board to continue to make decisions without recommendations which are both rational and fair. The Board will not and should not simply accept recommendations made by the professional witnesses. Having a recommendation is a useful way to frame the evidence but it is the reasons that are given for the recommendation that really matter together with an assessment of the witness' competence. It is for the Board to decide whether a prisoner meets the test for release and in order to do that it has to consider whether the reasons given for any recommendation are persuasive or not. In this case the panel asked the witnesses the relevant questions to ascertain whether it was safe to release the prisoner. It was the answer to those questions which would have led to a recommendation being made and in what terms. It is clear from the very detailed account of the evidence given in the decision letter that if a recommendation had been given to release there would have been a number of caveats included with it. The Applicant had made progress but there were a number of worrying features about his case which had to be taken into account in deciding

whether to release him. I think the decision letter would have been better without the phrase complained of, but it probably reflects the frustration of panel members at the introduction of this particular restriction by the Secretary of State which can make a hearing more difficult to structure.

25. I am, however, satisfied that it made no difference to the decision and that it did not render the decision irrational. The panel gave its reasons for refusing parole and it was justified on the evidence to reach that decision.

26. I have also considered whether it amounted to a mistake in law. I have concluded that there has been no mistake of law which has in any way influenced the decision of the panel.

27. Further complaint is made that the decision letter does not set out why the panel did not adjourn for a psychological report or to get further information from the CPS referred to by the Community Offender Manager in her report.

28. In relation to both matters the Applicant did not support an adjournment and set out to persuade the panel that they did not need to adjourn. The Applicant succeeded and the panel concluded that it did not need to adjourn. It was not necessary for the panel to set out in its decision letter why it reached that conclusion. The decision letter needed to set out why the application for release was refused and set out briefly the evidence that led the panel to that conclusion. That is so that the decision can be understood by the Applicant and anyone else who is interested. The decision letter in my view met that requirement.

**Decision**

29. Refusal –For the reasons I have given, I do not consider that the decision was irrational or unlawful and accordingly the application for reconsideration is refused.

**John Saunders**
**5 January 2023**