

[2023] PBRA 50

## Application for Reconsideration by Chubb

### Application

1. This is an application by Chubb (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 3 February 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration.

### Background

4. The Applicant received a sentence of imprisonment for public protection on 8 September 2006 following conviction on two counts of rape (to which he pleaded not guilty) and committing an offence (other than kidnap or false imprisonment) with intent to commit a relevant sexual offence (to which he pleaded guilty). He was also convicted on two counts of driving whilst disqualified but these attracted no separate penalty. The tariff was set at six years less time spent on remand and expired in February 2012.
5. The Applicant has been released and recalled three times on this sentence. The most recent recall took place on 1 March 2022. The Applicant had been released on 25 January 2022 following a direction made by the Parole Board on the papers on 13 December 2021.
6. The Applicant was 26 years old at the time of sentencing and is now 43 years old. This is his first parole review since the third recall.

### Request for Reconsideration

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7. The application for reconsideration is dated 24 February 2023 and has been drafted by solicitors acting for the Applicant.
8. It argues that the decision was procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding irrationality or error of law.

### Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in March 2022 to consider whether to direct his release. If release was not directed, the Parole Board was asked to consider whether the Applicant was ready to be moved to open prison conditions.
10. The matter proceeded to an oral hearing on 3 February 2023 before a single-member panel. The Applicant was legally represented throughout the hearing. The panel heard oral evidence from the Applicant, his Prison Offender Manager (**POM**) and his Community Offender Manager (**COM**).
11. The panel did not direct the Applicant's release or make a recommendation for open conditions.

### The Relevant Law

12. 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 (as amended)*

13. 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)).
14. 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)).

15. 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**.

### *Procedural unfairness*

16. 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.

17. 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.

18. 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)**

19. The Respondent has submitted representations dated 14 March 2023. These will be referenced in the **Discussion** section below.

### **Discussion**

20. It is submitted that the decision is based on incorrect facts. While error of fact is not, of itself, a ground for reconsideration, the decision would nonetheless be unfair if it contains errors which are so significant as to fatally undermine the fairness of the hearing itself.

21. The first error refers to the summary box on the decision cover sheet which refers to the index offences as "*Two counts of rape and false imprisonment*".

22. The Applicant was, in fact, convicted of common assault and battery with intent to commit as sexual offence (as well as the two counts of rape). The relevant statutory provision here is section 62 of the Sexual Offences Act 2003. This section does refer to kidnapping or false imprisonment but only insofar as sentencing is concerned. The

Applicant's PNC record describes the conviction as "*Commit any offence other than by means of kidnap/false imprisonment [with intent] to commit relevant sexual offence*".

23.The Respondent has confirmed the same.

24.There is clearly an error of fact in the summary box on the decision cover sheet. However, the analysis of the offending (albeit an analysis adopted from earlier decisions) and the remainder of the decision itself makes no reference to kidnap or false imprisonment. I conclude that the error on the cover sheet amounts to nothing more than a regrettable and avoidable slip which has not been material to the decision. As such, there is no procedural unfairness here.

25.It is next submitted that the panel did not explore the Applicant's recalls. While the application concedes, correctly, that this was not in itself procedurally unfair, it points to a paragraph in the decision which it argues was not in the dossier.

26.Paragraph 2.1 of the decision states:

*"Police were called to the same road where [the Applicant] had committed one of his index offences, by a female who was found in a distressed state in a telephone box, claiming that [the Applicant] has approached her wanting sex. The female denied being a sex worker and was reported to be upset by [the Applicant's] advances."*

27.The Applicant states this is incorrect information.

28.The Respondent states that the information can be found in the Offender Assessment System (**OASys**) report dated 2 December 2022 within the dossier, and that the event appears to have happened during the Applicant's second recall.

29.Section 2.8 of the OASys report of 2 December 2022 contains the following passage:

**"2ND RECALL OFFENCE**

*[The Applicant] states denies any wrongdoing. He states he had been to [a] house nearby and had stopped ... to roll a cigarette. He states he did not notice the female in the phone box. He claims to have only remained by the telephone box for a matter of minutes but admits that when the Police approached and asked what he was doing he decided to cycle away. When questioned about this decision he stated that it was because he was doing nothing wrong and so did not feel he should have to answer. However, having rode away, [The Applicant] described thinking about how his actions must have looked and, being fearful of being wrongly accused of soliciting a sex worker, decided to return to the female to explain about his previous sexual conviction and this being the reason he rode away as opposed to doing*

*anything untoward... [The Applicant] states his reason for approaching this female again was the same as the previous occasion, in that he wanted to explain himself. He denies the female was in a "distressed state" as described by the arresting officer. [The Applicant] has maintained this stance despite professionals and the parole board being sceptical and repeatedly questioning his actions."*

30. The information in this paragraph is consistent with the panel's summary within its decision. The Applicant's stance is set out in this paragraph. It is a matter for the panel to determine what oral evidence it needs to supplement the written evidence in the dossier. In any event, the information here appears, at most, to be peripheral to the panel's reasoning which is set out clearly within its decision.

31. Finally, the application stated the Applicant felt that the panel rushed through the hearing. Provided that the panel is able to elicit all the evidence it needs to make a decision, it may do so as expeditiously as it wishes. The Applicant was legally represented throughout the hearing, and if it was felt that the proceedings were conducted too swiftly, then representations could, and should, have been made to that effect at the time.

## Decision

32. The panel's decision is not procedurally unfair and the application for reconsideration is dismissed.

**Stefan Fafinski**  
**23 March 2023**