

**[2023] PBRA 65****Application for Reconsideration by Mascoll****Application**

1. This is an application by Mascoll (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated the 2 February 2023 not to direct his release. I note that the Applicant didn't receive the Decision Letter until the 9 March 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2023) (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 2 February 2023;
  - b) A request for reconsideration from the Applicant in the form of written representations dated the 15 March 2023 from his legal representative; and
  - c) The dossier, numbered to page 528, of which the last document is the Decision Letter, the panel had a dossier of 515 pages.

**Background**

4. The Applicant is now 57 years old. In 1992, when he was 26 years old, he received a mandatory life sentence following his conviction for murder. The Applicant stabbed the victim in the stomach following an argument. The Applicant has maintained throughout his sentence that he is innocent of the murder. Denial is not a barrier to consideration of release by the Parole Board and panel's assess cases on the basis that the prisoner in a case was properly convicted by the courts.
5. The sentencing court determined that the Applicant must serve a minimum of 10 years and 1 day in custody before being eligible to be considered for release by the Parole Board. The Applicant reached that date in 2001 but was not first released until 2004. He was recalled in 2009 after being charged with an assault against his partner, although that allegation was not proceeded with by the police.



6. The Applicant was re-released in 2009 and was then recalled to custody in 2010 for failing to reside as directed. In 2011, the Applicant was re-released and he was recalled six years later due to poor compliance, poor behaviour and a further offence of violence committed against his partner. The Applicant was re-released in October 2019 before being recalled for a fourth time in February 2020 following concerns about compliance with licence conditions and an alleged further offence.
7. The panel's review of the case was the second referral made by the Secretary of State to the Parole Board since the applicant's fourth recall to custody. The Secretary of State's referral asked the panel to first consider whether or not to direct the Applicant's release and then, if it was not minded to direct release, to go on to provide advice to the Secretary of State about the Applicant's suitability for a place in an open prison.
8. An oral hearing took place on the 30 January 2023 via a video link. The panel heard evidence from the Applicant, his probation officer, the official supervising him in custody, a psychologist employed by the prison service, a psychologist instructed by the Applicant's legal representative and from another professional involved in the Applicant's case. In its Decision Letter of the 2 February 2023, the panel declined to direct the Applicant's release but did recommend to the Secretary of State that the Applicant should be moved to an open prison.
9. The panel heard evidence which suggested that the Applicant needed to do more prior to any future release because he had failed in the community on four previous occasions. Difficulties were identified in the Applicant's intimate relationships and he had stated in his evidence to the panel that his failures in the community had been because of problems he had with his relationships. The Applicant told the panel that he hoped to be released and that any move to an open prison would be "*just another delay*" to his release. He said that he would comply with licence conditions and would engage with professionals.

### Request for Reconsideration

10. The application for reconsideration is that the panel's decision was irrational and/or procedurally unfair, in that:
  - a) The decision concerning the liberty of the Applicant or his continued detention was made on the basis that a period in open conditions may be a better option for him. The panel failed to properly examine the efficacy of the proposed risk management plan or inform the parties that it considered the release plan to be inadequate; and
  - b) The panel did not evidence its careful consideration of its findings concerning the Applicant's '*repeated pattern of resorting to old habits of behaviour in the community*'.



## The Relevant Law

11. The panel correctly sets out in its decision letter dated 2 February 2023 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, although I note that the panel had marked the case as a sentence of imprisonment for public protection (IPP) and not a life sentence.
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*
13. Under Rule 28(1) of the Parole Board Rules 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)).
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**.

### *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.

*Procedural unfairness*

19. 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.

20. 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.

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

*Other*

22. 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 (the Respondent)**

23. No response has been filed by the Respondent.

**Discussion**

24. In its Decision Letter, the panel stated that it did not "*see the possibility of immediate release into the community as sustainable in terms of likely success. Thought has therefore been given to a method of making the management of [the Applicant's] risk for release a more gradual and sustainable process with a strong safety factor built in with additional support and guidance on a daily*



*basis ... it may be that the next step would be most effective if he can be reintroduced to society and his contacts and family from a position of safety and support as would be provided by time in open conditions".*

25. In reading the entire Decision Letter, it seems that the panel's focus here was that it had accepted that the Applicant was now making better decisions in his life but it questioned whether he would be able to sustain this if released. The panel stated *"Staying stable in prison is not necessarily a sound indicator of the ability to translate those changes into the more stressful conditions of family life in the outside world. Perhaps this is an argument indicating a need for a more gradual approach than direct release which has failed in the past making steady steps gradually to test the durability of the observed changes"*.
26. The panel concluded that it had *"carefully considered the repeated pattern of resorting to old habits of behaviour in the community and the resulting breakdown of supervision this causes resulting in repeated returns to custody. [the Applicant] clearly needs a highly structured and supported route out of prison into the outside world. Having the opportunity to start with escorted leave into the community, followed by day releases, leading to possible working access to the outside world into paid employment and allowing increasing periods of unescorted periods of leave into supported accommodation in the community might allow the transfer from prison to the outside world to be taken at a pace which allows [the Applicant] to be fully in control of his increasing engagement with life as a free man. There is no suggestion that he would not co-operate or that he is an abscond risk and the panel therefore proposes that he is allowed to progress to open conditions..."*
27. In my view, the panel was focussed on what might need to happen to make any future release a success and therefore it had in its mind the need for a gradual transition via the open estate. That is often a necessary step in a custodial sentence but, in terms of any Parole Board assessment, it must be a decision based on an assessment of risk.
28. It is here, I feel, that the panel fell into error. It had noted the detail of the risk management plan should release be directed and it had stated that it didn't see the possibility of release as *"sustainable"*. Its reasoning was focussed on likely failure as opposed to establishing evidence as to why that likely failure would mean that the Applicant did not meet the test for release or why his risk could not be managed in the community.
29. Panels must first consider the test for release before moving on to consider whether a place in an open prison can be recommended. The panel may well have done this in its mind, however, its reasoning within the Decision Letter is focussed on the likelihood of the Applicant failing on licence and its preference for him to first move to an open prison.
30. I have no doubt that the panel undertook its assessment of the Applicant's case with great care, however, I agree with the Applicant's submission that decisions on refusing release cannot be based on a view that a move to open conditions may be better for him.



## Decision

31. Accordingly, applying the test as defined in case law, I consider that the decision of 2 February 2023 is procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

**Robert McKeon**  
**14 April 2023**

