

**[2024] PBRA 106****Application for Reconsideration by McKeon****Application**

1. This is an application by McKeon (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 25 April 2024 making no direction for release and no recommendation for open conditions following an oral hearing on 24 April 2024.
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 application for reconsideration; the decision of the panel; the dossier and observations by the Secretary of State (the Respondent).

**Request for Reconsideration**

4. The application for reconsideration is undated but it is accepted that it was made in time.
5. The grounds for seeking a reconsideration are that the hearing was procedurally unfair; the decision of the panel not to release was irrational; the panel got the test for release wrong and there are errors of fact in the decision.

**Background**

6. On 4 December 2009 the Applicant was sentenced to imprisonment for public protection with a tariff of 8 years for sexual offences committed against two young children. The Applicant denied the allegations and was convicted by a jury. He continues to deny the offences. The Applicant was released on parole on 7 December 2021 and was recalled on 29 July 2022 after an allegation of rape had been made against him. That allegation was investigated by the police but no further action was taken on it.

**Current parole review**

7. This was the first parole review following recall.



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8. The panel hearing took place on 24 April 2024. The two member panel consisted of an independent member and a judicial member. Evidence was given by the prison offender manager and the community offender manager.

### The Relevant Law

9. The panel correctly sets out in its decision letter dated 25 April 2024 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.

#### *Parole Board Rules 2019 (as amended)*

10. 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)).
11. 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.
12. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28.

#### *Irrationality*

13. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd -v- Wednesbury Corporation* 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
14. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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.*"
15. In *R(on the application of Wells) -v- Parole Board* 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was "*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 regard 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*". This test was adopted by a Divisional



Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

16. As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.
17. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
18. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

### *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;
  - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
  - (f) the panel was not impartial.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.

### *Error of law*

22. 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.



23. 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.
24. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.
25. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

### The reply on behalf of the Respondent

26. The Respondent made observations by letter dated 22 May 2025 (typographical error) helpfully commenting on some of the assertions made by the Applicant in his application.

### Discussion

27. The Applicant complains that despite requests made to probation and to his solicitors he had not been provided with a copy of his dossier. Further he complains that he had only spoken to his solicitor shortly before the hearing and requested her to apply for an adjournment which she did not do. Further the Applicant complains that his solicitor told the panel that she had gone through all the reports with him and that that was not true. As a result the Applicant complains that the hearing was procedurally unfair. The Respondent has confirmed that some of the documents from the dossier were supplied to the Applicant but that he asked for the latest Part C and that was not provided to him.
28. The panel dealt with this at the beginning of their decision when they say: *"[The Applicant] highlighted during the hearing that he had not seen a copy of his dossier but his legal representative explained that she had gone through all reports with*



*him and she was content that he had an understanding of the reports and that a fair hearing could still take place without him having a physical copy of reports."*

29. On the basis of what the panel were told they were entitled to continue with the hearing. Adjournments should always be avoided unless they are necessary and on the basis of the information from the solicitor it was not necessary and the solicitor was not requesting an adjournment.
30. The panel was entitled to assume that the solicitor was acting on instructions. The Applicant contends that the solicitor was acting in contravention of his instructions.
31. In order to resolve such a dispute the Applicant would need to waive privilege and a statement be obtained from the solicitor and I would have to decide what happened. To do that fairly might require an oral hearing which would be exceptional as part of a reconsideration application. Such a procedure is inappropriate for reconsideration which is designed to deal with applications speedily so if successful they can be quickly referred back for a further hearing. This avoids the often lengthy procedure of an application to the High Court. As is set out above reconsideration is a discretionary remedy. If the Applicant wishes to pursue this complaint he should do so to the High Court.
32. The actions of the panel were not procedurally unfair on the information that they had and accordingly I do not uphold that ground for reconsideration.
33. The Applicant further complains that the hearing was procedurally unfair in that the judicial member questioned him as if he was in a Crown Court hearing and complains that it was "*more of an interrogation than a Parole hearing*". There is no prescribed way in which questioning should take place in a parole hearing and sometimes it may be necessary to question in a similar way to being in Court. The Applicant was represented and I would have expected his lawyer to have intervened if the questioning had been oppressive. She did not complain and the mere fact of robust questioning, if it took place, would not render the hearing procedurally unfair. Accordingly I do not uphold that allegation.
34. The Applicant in his application complains of a number of factual errors in the decision. I have considered them all and, while it is not possible for me to say whether there were errors, I do not consider that they are the sort of errors which would have affected the outcome of the hearing. Accordingly they cannot amount to grounds for a reconsideration.
35. Part of the Applicant's written submissions argues his case for release and goes through evidence which would have been considered during the hearing. It is not my function to re-hear the application or decide whether I agree with it. It is for me to decide whether any of the grounds for reconsideration have been made out. Having considered the Applicant's arguments on why the panel should have released him, I do not consider that the decision of the panel was irrational and that no reasonable bench could have reached that decision.
36. The Applicant had been recalled because of an allegation of rape which was not substantiated and the panel have not taken that into account but they have had to go on and consider whether the Applicant meets the test for release. They did not



consider that he did and have given their reasons for that. Those reasons are justified on the evidence the panel heard and the contents of the dossier.

37.The Applicant complains that the panel used the wrong test for release. There is no evidence to support that complaint. The panel set out the correct test in their decision and there is no basis for suggesting that they did not apply it.

38.Having considered the complaints of the Applicant both individually and cumulatively I do not consider that there is any error of law in the decision; I do not consider that it is irrational and I do not consider that the hearing was procedurally unfair.

## Decision

39.For the reasons that I have given the application for reconsideration is refused.

**John Saunders**  
**30 May 2024**