

[2024] PBRA 155**Application for Reconsideration by McFegan****Application**

1. This is an application by McFegan (the Applicant) for reconsideration of a decision of an oral hearing panel dated 4 July 2024 not to direct 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 oral hearing decision, the dossier consisting of 269 pages and the application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 25 July 2024. It has been drafted by representatives on behalf of the Applicant. It submits that the decision is irrational.
5. The submission is supplemented by written argument to which reference will be made in the discussion section below.

Background

6. The Applicant was sentenced on 20 June 2019 following guilty pleas to an extended sentence of 4 years custody with an extended licence period of 3 years for an offence of threats to kill. He also received concurrent sentences for assault occasioning actual bodily harm (30 months), assault of an emergency worker (4 months) and affray (12 months). His sentence expiry date is in April 2026.
7. The Applicant was 33 years old at the time of sentencing and is now 38 years old.
8. The Applicant was released on licence on 17 April 2023 but was recalled on 8 September 2023. He returned to custody on 18 September 2023.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of state (the Respondent) to consider whether or not it would be appropriate to direct his release. The case proceeded to an oral hearing on 20 June 2024. The panel consisted of a single member who heard oral evidence from the Applicant, together with his Prison Offender Manager (POM) and Community Offender Manager (COM). 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.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 4 July 2024 the test for release namely that the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

Parole Board Rules 2019 (as amended)

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)).

Irrationality

14. 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.
15. 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.*"
16. 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).

17. 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.
18. 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.
19. 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.
20. 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

21. The Respondent has submitted representations dated 06 August 2024 in response to this application. The response is in relation to the issue of the Programme Needs Assessment raised by the Applicant and is considered in the Discussion section below.

Discussion

22. The first three paragraphs of the unnumbered grounds simply repeat the Applicant's evidence about the restraining order and restate the Applicant's arguments about his lack of knowledge about the terms of the restraining order and his submission that he did not seek to breach the restraining order whilst in the community. The next paragraph is a comment about the Programme Needs Assessment not taking place and the following two paragraphs seek to explain and justify the difficulties the Applicant experienced in abstaining from drugs. These paragraphs are mainly comment and repetition of matters raised at the hearing and set out in the decision letter. The decision letter notes the Applicant's submissions raised during the hearing and reaches conclusions which do not amount to irrationality.
23. The penultimate paragraph submits that the decision letter does not clearly set out what further work needs to be undertaken to address risk. The paragraph also



notes, whether by way of comment or complaint is not clear, that had the Programme Needs Assessment been undertaken there would have been a clear pathway forward. The Respondent's representation of 06/08/2024 dealing with the position regarding that assessment, sets out the position as follows:

"PPCS can confirm a Programmes Needs Assessment (PNA) was completed at HMP Wayland in February 2020 prior to [the Applicant's] recall to custody. As a result of this, [the Applicant's] completed Kaisen. [the Applicant's] current Prison Offender Manager has confirmed there has been no recent PNA completed as his current establishment does not offer accredited offending behaviour courses."

24. That explanation is consistent with the account of the COM as set out in the decision letter which sets out the COM's evidence (paragraph 2.13) regarding the further work that needs to be undertaken by the Applicant. It was understandable that the panel would place more weight on the evidence of the COM rather than the POM as the panel had noted that the former had supervised the Applicant in the community and was aware of the risk management issues. The panel sets out at paragraphs 4.7 and 4.8 of the decision letter the further work which needs to be undertaken by the Applicant. It is not correct therefore to say that the decision letter does not clearly set out the further work to be done. There is no irrationality in the reasoned conclusions set out.
25. With regard to the Applicant's comment/complaint about the Programme Needs Assessment the decision letter noted that the POM confirmed that priority had been given on the Applicant's return to custody, to addressing his drug and alcohol use. The panel does not reject that analysis from the POM and does not suggest that the failure to undertake a Programme Needs Assessment is to be held against the Applicant. There is a clear pathway forward identified by the COM and accepted by the panel in its conclusions. Those conclusions do not raise any question of irrationality.
26. In the final paragraph the Applicant submits that the risk management plan (RMP) which makes provision for GPS and alcohol tags is sufficient to manage any risks including any concerns about undisclosed relationships. I disagree. The panel considered that the RMP was not sufficient to manage the Applicant's risk for all the reasons set out in paragraph 3.6 of the decision letter. That decision was reasoned and rational. The COM assessed that there were deficits in the Applicant's thinking behaviour and attitudes requiring "ongoing intensive treatment". The COM noted that the biggest risk management concern was the Applicant not disclosing relationships. It is a sign of the Applicant's lack of insight identified by the COM that he was not able to appreciate that a GPS tag alone would not protect against the risk when he displayed a lack of openness and honesty with the COM. The panel concluded that the Applicant lacked internal controls to manage problems and situations that challenged his emotions. That conclusion is supported by the evidence that appears in the dossier and the evidence given by the professionals at the hearing. The Applicant may disagree with the panel's decision but that is not enough to establish irrationality in law. This decision is clearly and fully reasoned and does not meet the high bar that is required for the legal test for irrationality.

Decision



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27. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

B Mensah
16 August 2024