

[2024] PBRA 2

## Application for Reconsideration by Wall

### Application

1. This is an application by Wall (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 30 November 2023 not to direct release and not to recommend a transfer to open conditions following an oral hearing on 22 November 2023.
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 application for reconsideration, the decision, and the dossier.

### Background

4. On 21 March 2007 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for three counts of damaging property being reckless as to whether life would be endangered. The minimum term was set after an appeal at 3 and a half years. He also received a determinate sentence totalling 3 and a half years for handling stolen goods, making off without payment and dangerous driving which was to be served concurrently to the sentence for public protection. The offences were very serious.
5. The Applicant progressed to open conditions on two occasions in February 2012 and May 2013 but absconded on both occasions. He was released on licence in September 2014 but was recalled in May 2016 having committed further offences for which he received a five year sentence. The Applicant was re-released in December 2019 but was recalled after four months, by which time he had committed further offences.

### Request for Reconsideration

6. The application for reconsideration is dated 14 December 2023.



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7. The grounds for seeking a reconsideration are that the decision not to release was irrational and 'ultimately' unfair. The grounds are:
- (a) The decision to refuse to accept the evidence of the Community Offender Manager (COM) & Prison Psychologist was irrational;
  - (b) The Applicant provided a detailed release plan which was not included within the dossier.
  - (c) The panel have failed to consider the accredited coursework undertaken by the Applicant.
  - (d) The panel also failed to properly adopt the law in respect of recommending a progressive transfer to open conditions.
8. Except for 7(a) the Applicant fails to identify which of these grounds relate to irrationality and which to procedural fairness which would be helpful in future.

### Current parole review

9. This is the second parole review since the Applicant was last returned to custody.
10. The panel heard evidence from the Applicant, a prison psychologist, the Prison Offender Manager (POM) and the COM. Reference was made during the hearing to the Applicant's personal resettlement plan and this was added to the dossier after the hearing.

### The Relevant Law

11. The panel correctly sets out in its decision letter dated 30 November the test for release and the issues to be addressed in making a recommendation to the Secretary of State (the Respondent) for a progressive move to open conditions.

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

12. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).
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**.
14. It follows that the application for reconsideration of the refusal to release is eligible but in so far as the application complains of the failure to recommend a transfer to open conditions it isn't, but I will briefly deal in this decision with that part of the application.

#### *Irrationality*

15. 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."*

16. 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.

17. The test for irrationality in parole cases is that no reasonable panel could have reached the decision reached in the instant case.

#### *Procedural unfairness*

18. 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.

19. 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.

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

21. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and

- (d) the benefit the prisoner is likely to derive from open conditions.

### **The Reply on behalf of the Respondent**

22.The Respondent has made no submissions in response to this application.

### **Discussion**

23.I shall deal with the grounds for reconsideration individually. Having done that I shall consider them cumulatively to decide whether together they make a case for reconsideration.

24.The first ground is that the Applicant complains that it was irrational not to accept the evidence of the COM and the psychologist who supported release. A panel does not have to accept the evidence of the professionals even when it is unanimous. It is the panel that needs to decide whether the test for release has been made out. What a panel has to do is explain why it does not agree with the evidence of the professionals as in the absence of explanation the rejection of their evidence may be found to be irrational. In this case the panel have made clear why they have rejected the evidence in support of release. Everyone agreed, including the Applicant, that he had outstanding work to do. The issue was whether that work should be carried out in the community or in closed conditions. No-one supported a transfer to open conditions. The panel did not consider that that work could be safely carried out in the community. They considered that his previous behaviour when he was released on two occasions and was recalled having committed further offences meant that the work should be completed in closed conditions. The panel also concluded that while the risk management plan was robust, the Applicant did not have sufficient internal controls to comply with it. They relied on his behaviour when previously released on licence and his behaviour in custody to support this view. The panel were in my judgement entitled to come to that view and their decision can certainly not be described as irrational in the sense that I have defined it.

25.In the second of his grounds the Applicant complains that a detailed release plan prepared by him was not included in the dossier. I assume that it is asserted that this was procedurally unfair as a ground for reconsideration. I cannot see how it can be said to be irrational. This ground is in my view misconceived. The plan was referred to in evidence and no doubt the Applicant's legal representative ensured that the contents were adduced in evidence. The panel asked for it and it was added to the dossier and there is no reason to conclude that they did not consider it. I have read it and it is an impressive document, but it clearly did not succeed in changing the views of the panel. It was not the panel's obligation to ensure that the document was included in the dossier before the hearing. If the Applicant's representative realised that it was not in the dossier no doubt he could have asked for it to be added before the hearing or got copies to the panel during the hearing. I do not see that the failure to have the document in the dossier at the time of the hearing rendered the hearing in anyway unfair in the light of the steps taken by the panel to ensure they had sight of it before they made their decision.

26.The third ground is that 'the panel have failed to consider the accredited coursework undertaken by the Applicant'. As a matter of fact the panel in para 2 of their decision

does refer to coursework carried out by the Applicant. The work is referred to in the reports in the dossier and in the document submitted by the Applicant and added after the hearing. No doubt reference was made to the coursework by the Applicant's representative in his submissions. It is not necessary for a panel to refer to every piece of evidence that it has heard and taken into account in making its decision. Decisions would be even longer than they currently are if that were the case. The important thing is that the Applicant should be able to understand the reasons for the panel's decision. There is no basis for the submission that the panel have failed to take the course work into account.

27. The fourth ground is that 'the panel failed to properly adopt the law in respect of recommending a progressive transfer to open conditions'. As stated at para 13 above a failure to recommend a transfer to open conditions is not eligible for reconsideration. In any event no-one recommended or said that it was appropriate for the Applicant to move to an open prison. His previous history of absconding made it an unlikely recommendation and even more unlikely that the Secretary of State would accept it. The reasons given by the panel are quite adequate to explain why open conditions would not be appropriate.

28. I have finally considered whether all the grounds taken together make out a case for reconsideration. In my view they don't.

## Decision

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

**John Saunders**  
**04 January 2024**