

[2024] PBRA 210

Application for Reconsideration by Middleton

Application

1. This is an application by Middleton (the Applicant) for reconsideration of a decision of an oral hearing panel. The date of the decision was the 24 September 2024. The panel did not direct release but recommended a transfer to an open prison.
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 dossier now consisting of 588 pages, the decision of the oral hearing panel, the application for reconsideration drafted by the Applicant's legal advisers and the response from the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated the 2 October 2024.
5. The grounds for seeking a reconsideration are set out below.

Background

6. The Applicant is serving a sentence of life imprisonment. The index offence was wounding with intent to cause grievous bodily harm. The sentence was a mandatory life sentence in circumstances where the Applicant had committed a second serious offence. The Applicant was aged 28 at the time of sentence, he was 50 at the time of this parole review. He had been recalled on two earlier occasions having been released by the Parole Board.
7. The facts of the index offence related to an incident in the street. The Applicant had a verbal exchange with the victim. There was a break in the exchange, followed by the Applicant pursuing the victim and striking him with a broken bottle. The victim fell to the floor and was then punched repeatedly by the Applicant.

Current parole review



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

8. The Applicant was convicted of a further offence in 2021. The offence was attempting to cause grievous bodily harm. The victim was a partner. The violence was serious and sustained and involved punching and kicking and holding a razor to the neck of the victim. The Applicant was sentenced to three years and six months custody.
9. The parole panel consisted of an independent chair, and two psychologist members of the Parole Board. Evidence was given at the hearing by a prison instructed psychologist, the Prison Offender Manager (POM) and the Community Offender Manager (COM). The Applicant also gave evidence.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 24 September 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)

11. 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)).
12. 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)).
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**.

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)** Saini J 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. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
20. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board 2019 EWHC 2710**.

Procedural unfairness

21. 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.
22. 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.

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

Error of law

24. 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.

25. 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.

Other

26. 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.

27. 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.*"

Reconsideration as a discretionary remedy

28. 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 Secretary of State

29. The Respondent made no representations.

Discussion

Ground 1

30. The Applicant's legal adviser, argues that the panel failed to give sufficient weight to the views of a prison psychologist, a POM and the COM, all of whom were recommending that the Applicant could be safely released. It is argued on behalf of the Applicant that the panel failed, as they are required to do, to give clear reasons why they departed from the opinions of the expert witnesses.

Discussion

31. In their decision letter, the panel noted that the Applicant having been recalled, had engaged with further behavioural work while in custody. That work was specifically aimed at addressing the Applicant's risks relating to domestic violence and the factors which underpinned domestic violence incidents. The panel accepted that the Applicant had completed programme work and was able to articulate learning from the behavioural programmes that he had undertaken.

32. Despite acknowledging that there was no further core risk reduction work that needed to be undertaken. The panel determined that the Applicant's risk could not be safely managed in the community. The panel's reasons for departing from the views of the professional witnesses were set out in the decision.

33. At paragraph 4.4 the panel noted that the risks of serious harm relating to the Applicant were "varied", including general violence and violence against partners, both of which were exacerbated by the possession and use of weapons. Also noted were instances of reckless behaviour in connection with alcohol and driving, placing road users at risk. The panel also noted the fact that the Applicant's offending behaviour was closely related to issues of poor emotional management, feelings of low self worth, difficulties with conflict resolution, problems with assertive communication and difficulties in relationships. Additionally, alcohol had been used as a maladaptive coping mechanism, which had historically increased risk.

34. The panel's concern, as noted in paragraph 4.5 was that in the past, the Applicant had completed programme work in prison and had expressed insight into his risk factors to earlier Parole Board panels. Despite these reassurances the Applicant had later relapsed into excessive alcohol use on several occasions.



35. The panel were therefore concerned about the Applicant's ability to consistently apply the skills that he had developed in completing the behavioural interventions. The panel determined that this change and commitment required further testing and assessment before final release into the community.
36. The panel also took the view that the Applicant's ability to abstain from excessive alcohol use in the community (a substantial risk factor) was a matter which required testing before final release into the community. The panel also took the view that testing was needed in connection with how the Applicant would deal with stress outside the prison environment and how he would apply skills to manage stress in the community.
37. A final matter of concern, was the ability of the Applicant to be open and honest with his probation officer. Again, this was a matter which the panel felt required further testing before finally being directed for release.
38. Having considered these matters, which are set out in the panel's decision, it is clear that the panel accepted that the Applicant had completed valuable behavioural work to prepare for living in the community. The difference in view between the professionals and the panel related to the question of testing the effectiveness of the behavioural interventions in more realistic (but controlled) conditions before final release into the community. For that reason, the panel determined that a direction to transfer the Applicant to an open prison would allow for the testing to take place and would give the opportunity for the Applicant to demonstrate that he had in fact committed himself to controlling his propensity to relapse into alcohol misuse and generally controlling the risk factors relating to violence.
39. In the light of the fact that the panel set out clearly their reasons for departing from the views of the professionals. I am not persuaded in this case that the decision of the panel was irrational in the sense set out above.

Ground 2

40. The legal adviser on behalf of the Applicant indicates that the panel erred in law by placing weight upon historical allegations of violence and harassment (towards partners), leading to the conclusion that there was a "serious possibility" that allegations of controlling behaviour were true.

Discussion

41. The background to this issue is the fact that the Applicant had a history of serious allegations being made by former partners relating to violence or the threat of violence. Within the dossier were police reports of allegations, a medical report from an accident and emergency department, and the imposition of restraining orders. The Applicant's legal adviser, notes that there had been criminal trials which led to acquittals, in particular a trial relating to an allegation of criminal damage.
42. The position relating to allegations is set out in the case of **Pearce**, and in the published Parole Board guidance on allegations. The panel were entitled to reflect upon the totality of the evidence within the dossier and to reach a conclusion as to whether there was a pattern of behaviour demonstrating violence in domestic circumstances. In the light of all the evidence within the dossier, I am not persuaded



that there was an error in law by the panel in coming to a conclusion that there was a “*serious possibility*” that the allegations made by the partners were true. For that reason, I do not find that an error of law occurred, or that the decision of the panel, relating to the allegations led to irrationality or procedural unfairness.

Decision

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

HH Stephen Dawson
29 October 2024