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**[2024] PBRA 215**

# Application for Reconsideration by Ashton

## Application

1. This is an application by Ashton (the Applicant) for reconsideration of a paper decision dated 16 August 2024 not to direct his 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.

3. I have considered the application on the papers. These are the paper decision, the dossier (consisting of 186 numbered pages), and the application for reconsideration.

## Background

4. The Applicant received an extended sentence comprising a custodial period of three years with an extended licence period of three years on 29 October 2019 following conviction on nine counts of engaging in sexual activity with a girl aged 13 – 15 to which he pleaded guilty. This sentence is consecutive to an eight year determinate sentence for causing grievous bodily harm with intent and false imprisonment.

5. The Applicant was 19 years old at the time of sentencing and is now 24 years old.

6. Key dates relevant to his sentence are reported to be:

    a) Parole eligibility date: January 2025;
    b) Conditional release date: January 2026; and
    c) Sentence expiry date: January 2033.

## Request for Reconsideration

7. The application for reconsideration has been submitted by solicitors on behalf of the Applicant and pleads grounds of both procedural unfairness and irrationality.

8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

## Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 12 March 2024 to consider whether or not it would be appropriate to direct his release. This is the Applicant's first parole review.

10. The case was reviewed by a single member Member Case Assessment panel (MCA panel) on 16 August 2024. This panel made no direction for release on the papers.

11. This decision was made under rule 19(1)(b) and, by operation of rule 19(6) was a provisional decision. Rule 20(1) permits a prisoner who has received a provisional negative decision on the papers to apply in writing for his case to be determined by a panel at an oral hearing. Rule 20(2) provides that any such application must be served within 28 days of receipt of the provisional decision.

12. With no such application having been received, the Parole Board wrote to the Applicant on 17 September 2024 to advise that the decision remained provisional but the 21-day reconsideration window had opened.

**The Relevant Law**

13. 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 MCA decisions.

*Parole Board Rules 2019 (as amended)*

14. 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)).

15. 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)).

16. 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.

*Procedural unfairness*

17. 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.

18. 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.

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

*Irrationality*

20. 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 (CA) 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.

21. In *R(DSD and others) v Parole Board* [2018] EWHC 694 (Admin) the Divisional Court applied this test to Parole Board hearings in these words (at [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*."

22. In *R(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 the Divisional Court in *R(Secretary of State for Justice) v Parole Board* [2022] EWHC 1282(Admin).

23. As was made clear by Saini J in *Wells,* 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.

24. 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.

25. 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.

**The reply on behalf of the Respondent**

26. The Respondent has advised that no representations will be submitted in response to this application.

**Discussion**

27. Submissions on behalf of the Applicant primarily argue that the decision was both procedurally unfair and irrational because the panel did not consider post-programme reports or a psychological risk assessment (PRA).

28. In the panel's view, the Applicant's review could be safely concluded on the papers because he had outstanding treatment needs. The Applicant (in legal representations submitted prior to the paper review) had advised that he would be commencing an intervention in August 2024 with the hope of completing it by December 2024. The panel considered that it would be premature to direct the matter to an oral hearing at the time of its review (August 2024), given the time necessary for the Applicant to complete the intervention, undergo a period of consolidation and a PRA to be produced.

29. The Applicant argues that there was a justification to adjourn and direct the relevant reports. It is submitted that the panel could not assess the Applicant's risk without a PRA and post-programme reports and therefore the panel did not consider all the possible information that might have been available to it, amounting to procedural unfairness.

30. In my view, the panel made a justifiable decision on the evidence before it at the time of the review. The Applicant had just started an intervention for which he had been identified as suitable after having engaged with other therapeutic work in custody. It would have been several months before he could complete it and for professionals to take a view on its efficacy. It was not procedurally unfair for the panel to conclude as it did when it did.

31. Moreover, if the Applicant had felt poorly served by the negative paper decision, it was open to him to take advantage of the 28 day window afforded for an application for an oral hearing to be made (together with representations on potential directions and timeframe within which that oral hearing should take place). He did not do so.

32. Although the panel gave the Applicant credit for engaging well with other therapeutic work in custody, he had nonetheless still been assessed as needing an accredited intervention and it was not unreasonable for the panel to have concluded that this intervention was risk reduction work that was necessary to be completed successfully in custody prior to release.

33. It is also argued that it was irrational for the panel to conclude the review without directing reports. In my view, it was not irrational for the panel to conclude that the Applicant was not suitable for release while an accredited intervention was still in progress. Neither was it irrational for the panel to conclude his review at that point.

34. There is a distinction to be drawn between adjourning for follow-on reports if a parole review takes place shortly after an intervention has been completed (or, indeed, if a prisoner is close to the end of any such intervention) and a case such as this, where, at the time of the review, the Applicant had hardly (if at all) started a programme.

Parole reviews cannot be allowed to drift for ever, and it is not within the panel's remit to engage in sentence planning.

35. In summary, I am not persuaded that there are any sustainable arguments to support a finding of procedural unfairness or irrationality in the Applicant's parole review.

**Decision**

36. For the reasons set out above, the application for reconsideration is refused.

**Stefan Fafinski**
**08 November 2024**