

**[2024] PBRA 221****Application for Reconsideration by Smith****Application**

1. This is an application by Smith ("the Applicant") for reconsideration of the decision of a Panel of the Parole Board ("the Panel") which on 27 September 2024, after oral hearings on 14 May 2024 and 24 September 2024, declined to direct his release. The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. 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)) 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.
4. I have considered the following documents for the purpose of this application:
  - The dossier provided by the Secretary of State ("the Respondent") which now contains 672 numbered pages;
  - The Panel's decision letter ("DL");
  - The Application for Reconsideration ("the Application") submitted on behalf of the Applicant by his solicitor dated 18 October 2024.

**Background**

5. The Applicant is now aged 46 years of age. On 13 September 2004 he was sentenced to life imprisonment for an offence of rape ("the index offence"). The minimum term was set at 3 years and 10 months and the Tariff Expiry Date was 13 July 2008.
6. The victim of the index offence was his partner's mother who is 10 years his senior. The Applicant had previously had a sexual encounter with her and it was through her that he met and formed a relationship with his partner ("SS"). On the day of the offence the Applicant forced his way into the victim's flat whilst under the influence of drugs and alcohol and physically assaulted and raped her.



7. He reported that he was annoyed at her interference in his relationship with SS (in that she would flirt with him) and told a previous Parole Board Panel that he wanted to punish her because he believed she was trying to keep her daughter to herself.
8. The Applicant had numerous convictions for acquisitive and vehicle-related crime against a backdrop of longstanding alcohol and drug misuse and a history of poor compliance. He also had convictions for numerous violent offences including the possession of weapons and two convictions for battery in 2003 committed against SS and his one-year-old son. The index offence was committed around three weeks after the Applicant's release from prison in relation to these battery matters.
9. The Panel found that the factors that have an impact on the Applicant's risk of re-offending included a willingness to use violence and weapons; sexual entitlement; drug and alcohol misuse; offending for revenge; jealousy; poor emotional management; a willingness to use violence in relationships to control a partner; wanting to uphold a reputation; problematic personality traits; a lack of victim empathy and pro-criminal attitudes and associates.

### **Current parole review**

10. This was the Applicant's first review since his recall to custody in August 2022 following his release on licence from open prison conditions in February 2022, which was referred to the Parole Board by the Respondent in September 2022 to consider whether or not it would be appropriate to direct his release or, if not, whether he should be transferred to open conditions.
11. The hearing was conducted over 2 days and the originally allocated Panel comprised two independent members of the Board who were joined on the second day by a specialist psychiatric member.
12. Over the course of the two hearing dates the Panel heard evidence from two Prison Offender Managers (POM), two Community Offender Managers (COM), a forensic psychologist and the Applicant who was represented throughout by a solicitor and sought a direction for release.
13. The dossier contains a report, dated April 2024, from a forensic psychologist instructed on behalf of the Applicant which recommended release. However, on reviewing further evidence, the psychologist revised her opinion, did not attend the second day of hearing and the legal representative no longer relied upon her report.

### **Request for Reconsideration**

14. The Application for reconsideration is said to be based on the grounds of irrationality, procedural unfairness and/or an error of law and various reasons are put forward in support. However, unhelpfully, the application does not make clear which factors are said to support which of the grounds for reconsideration. I will consider the Applicant's submissions below but find that none of them rely on or point to an error of law.

### **The Relevant Law**

15. The test for re-release on licence is correctly set out by the Panel in its decision. Indeed, the test is automatically set out in the Board's template for oral hearing decisions.

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

16. 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)).
17. 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)).
18. 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**.
19. In this case the Applicant is serving an indeterminate sentence of life imprisonment, and a decision was made by the Panel at an oral hearing not to direct his release on licence. It is thus eligible for reconsideration.

#### *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 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- 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.*"
22. 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).**

- 23.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.
- 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.
- 26.The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

*Procedural unfairness*

- 27.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.
- 28.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.
- 29.The overriding objective is to ensure that the Applicant's case was dealt with justly.
- 30.It is for me to decide whether I consider the procedure adopted by the Panel in conducting the Parole hearing was unfair to either of the parties.

**The reply on behalf of the Respondent**

- 31.In helpful representations dated 24 October 2024 the Public Protection Casework Section (PPCS) on behalf of the Respondent confirmed that, contrary to the Panel's recording at DL 2.21 that the Applicant had attracted an adjudication in November 2022 for being verbally abusive to a member of staff, it was a negative entry that was recorded in respect of this incident.

32.The Respondent offered no other representations in response to the Application.

## Discussion

33.In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration is entitled to substitute his/her view of the facts in place of those found by the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.

34.The second matter of material importance is that when deciding whether a decision of the Board was irrational, due deference has to be given to the expertise of the Board in making decisions relating to parole.

35.Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel.

36.I move now to consider the grounds put forward by the Applicant.

37.The majority of the reasons put forward by the Applicant in support of a reconsideration relate to the incident which took place between him and SS just prior to midnight on 28 August 2022 leading to him being charged with assault and recalled to prison.

38.The Applicant's trial took place in the Magistrates Court on 20th October 2022. As there appears to be some lack of clarity as to the course which the trial took it is appropriate to set out in full the Court record as helpfully obtained by the COM as follows (dossier p.162):

*"It would appear that the trial started, but that the evidence did not come out sufficiently strongly to support the Prosecution's case. The Court note indicates that the complainant attended Court but gave evidence for the defendant, or in any event that strongly supported the defence case. She appears to have stated that the black eye reported was a previous injury not caused by the defendant, and that he did not assault her.*

*Further evidence from prosecution witnesses appears not to have identified the defendant carrying out any criminal activity or sufficiently strongly implicated him, and the Crown appear to have offered no further evidence near the end of their case – although defence would have had a strong submission of "no case to answer".*

39.It would appear therefore that, despite the Applicant's assertion to the contrary, the victim, SS, did attend court and was called by the prosecution to give evidence.



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Also, as the Applicant correctly reports, an independent witness who had initially indicated that he wished to retract his statement, also attended to give evidence.

40. Thereafter prior to the close of the prosecution case and, quite properly, the prosecutor appears to have considered the sufficiency of the prosecution evidence adduced and taken the view that it would not be appropriate in the interests of justice for the prosecution to proceed any further and, accordingly, offered no evidence on the assault charge so that a not guilty verdict was entered.
41. While the Panel's account of the trial at DL 2.16 is not entirely in accordance with the Court note, the Panel was clearly aware of the central issue that the Applicant had not been convicted of the alleged assault.
42. Nevertheless, the Panel was under a duty to consider all the evidence before it in relation to this matter which was clearly relevant to its risk assessment and the statutory test for release. It had the benefit of CCTV and mobile phone footage, the police evidence and the Applicant's oral and written accounts of the incident including his frank acknowledgement (dossier p.648) that anyone who saw the CCTV evidence would find his behaviour towards SS to be absolutely disgusting and disgraceful.
43. The Panel directed itself appropriately in accordance with the case of *Pearce [2023] UKSC 13* and the relevant Parole Board guidance and gave detailed consideration to the relevant evidence in relation to this incident as well as an earlier incident of alleged domestic violence also involving SS from June 2022. The Panel did not feel able to make a finding in relation to the earlier incident but, applying the appropriate evidential test, found that the Applicant did assault SS on the 28 August 2022 giving clear reasons for its decision.
44. The Applicant submits that the Panel should not have taken into account the independent witness statement on the grounds that it had been "*disregarded by the court*". This is not correct since the Magistrates were not asked to come to any view about this statement as the prosecution ultimately decided to offer no evidence. Accordingly the Panel was entitled to give such weight as it felt appropriate to the witness statement.
45. The Applicant also refers to a witness statement from SS which was understood to be provided although no indication is given as to where this appears in the dossier and I note that it is recorded at dossier p.217 that she refused to provide a statement or support a prosecution.
46. At DL 2.3 the Panel records that the Applicant was also staying with SS without permission on a frequent basis. The Applicant denies this and submits that, as this was not "*referred to in reports*", he did not have the opportunity to respond. If this information does not appear in the dossier then, presumably, it was given in oral evidence which the Applicant will have had the opportunity to address and if, which is not suggested, it was given after the Applicant had given evidence, he could have been recalled upon his solicitor's request in order to deal with the issue. I find no procedural unfairness here.

47. As is confirmed in the representations from the Respondent, the adjudication referred to at DL 2.21 was, in fact, a negative entry. However, the importance of this entry for the Panel's assessment of the Applicant's risk lies, in my view, more in its substance than in the manner in which it was dealt with within the prison system, since, as recorded at dossier p.162, on 8 November 2022 the Applicant was verbally abusive and aggressive towards prison staff and exhibited "*Extremely appalling behaviour from someone on enhanced regime.*"
48. The Panel expressed its concern about the Applicant's lack of openness and honesty and found that he had provided contradictory evidence, for example, in his account of the alleged flirtatious behaviour of the victim of the index offence. The Applicant in this regard is simply seeking to put forward further evidence in support of his own account. In my view, the Panel's finding represents an exercise of judgement based on its consideration of the relevant evidence, which is a matter peculiarly for the Panel alone.
49. Finally, the Applicant suggests that the Panel gave insufficient weight to the professional opinions in this case. In fact, while the POM did support release neither the prison psychologist nor the COM supported re-release (although they did recommend a move to open conditions).
50. In addition, in its conclusion the Panel provided detailed reasons for its finding that the Applicant did in fact have outstanding areas of risk and needed to undertake further work in closed conditions.
51. The Panel did consider the release plan to be robust and that the licence conditions were strengthened by the imposition of both a GPS and alcohol tag. However, it also found that the management of the Applicant's risk would be heavily reliant on external measures and it was not confident he would be open and honest with professionals.
52. It is not suggested that the Panel failed to provide adequate reasons for its decision and, indeed, noting that the Applicant is assessed as posing a high risk of serious harm and has an extensive history of intimate partner violence against SS and others, it found that he posed an ongoing risk in relationships which could not be safely managed in the community in reliance upon external controls alone.

## Decision

53. I am satisfied that the Panel set out its concerns and conclusions with considerable clarity and took proper account of the evidence and views of the professionals, which it analysed with care in reaching the conclusion that the Applicant did not meet the public protection test for release.
54. Accordingly, I find that the Application is without merit and, for the reasons I have given, I do not consider that the decision is irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

**Peter H. F. Jones**  
**18 November 2024**