

Application for Reconsideration by Johnston

Application

1. This is an application by Johnston (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 24 October 2022 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:
 - a) The Decision Letter dated the 24 October 2022;
 - b) A request for reconsideration from the Applicant in the form of written representations dated the 8 November 2022 on the published form CPD2 from his legal representative;
 - c) The dossier, numbered to page 547, of which the last document is the Decision Letter. The panel had a dossier numbered to page 533. The Decision Letter indicates that the panel had sight of a dossier numbered to page 459, however, having reviewed the Decision Letter, it is clear that this is a typographical error and that the panel did have sight of all 533 pages;
 - d) Material withheld from the Applicant but made available to his legal representative, which the panel had sight of and had been withheld under the Parole Board Rules 2019 (as amended);
 - e) A letter dated the 4 September 2022 from the Applicant to his legal representative (provided to me by his representative);
 - f) A letter dated the 27 September 2022 from the Applicant to his legal representative, received by his representative on the 6 October 2022 (provided to me by his representative); and
 - g) A letter dated the 24 October 2022 from the Applicant to his legal representative, received by his representative on the 1 November 2022 (provided to me by his representative).

Background

4. The Applicant is now 48 years old. On the 21 March 2014, when he was 39 years old, he received an extended determinate sentence, comprising of nine and a half years custody (reduced by the Court of Appeal from 11 years) and



seven years extended licence, following his conviction for attempted rape and two offences of sexual assault by penetration.

5. The background to the Index Offence is that the Applicant hid in his ex-partner's garage overnight and then attempted to rape her the following morning. The Applicant maintains his innocence and was convicted at trial.
6. The Applicant became eligible to be considered for release by the Parole Board on the 11 November 2019. The panel's review of his case was the third review by the Parole Board, with two prior reviews refusing his release. If not released by the panel, he will be automatically released (as is required under the law) in January 2023.
7. The Secretary of State referred the Applicant's case to the Parole Board on 30 March 2021 to consider whether or not his release could be directed. In representations dated the 20 July 2021, the Applicant's legal representative asked that the Parole Board consider his case at an oral hearing. On the 9 August 2021, the Applicant's case was first reviewed by the Parole Board on the papers and an oral hearing was directed.
8. The oral hearing took place on the 14 March 2022 and evidence was heard from the Applicant, the official supervising his case in custody and two psychologists who had produced reports about the Applicant. Some evidence was heard from the Probation Officer in the community, however, that evidence led the panel to adjourn for further information to be produced.
9. The panel reconvened the oral hearing on the 9 May 2022, and prior to this the Applicant had written to the Parole Board with his own views of the case. On the 9 May 2022, the hearing was adjourned at the Applicant's request.
10. The Applicant provided further representations to the Parole Board dated the 7 July 2022 and the 25 July 2022. The oral hearing was to reconvene on the 28 July 2022; however, it was adjourned following an application from the Applicant's legal representative on the 27 July 2022.
11. The panel then awaited further representations and, in the absence of any being received, on the 22 August 2022 the panel indicated that it would seek to relist the oral hearing on the first available date after the 1 October 2022. At around the time of the panel's indication that it would be looking to list the hearing, the Applicant wrote to the Parole Board to say that he was yet to speak with his legal representative, who he believed was on holiday. He expected a meeting to take place with his legal representative after the 23 August 2022.
12. On the 22 September 2022, the panel reviewed the case and issued further directions. It noted that there had been difficulty in securing an oral hearing date and it invited representations from the parties within 14 days as to whether the case should conclude on the papers, pursuant to Rule 21 of the Parole Board Rules 2019 (as amended).
13. In its Decision Letter, the panel observed that no representations had been received by the 10 October 2022, which was beyond the 14 days allowed for



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The panel then concluded the review on the papers on the 24 October 2022 and did not direct the Applicant's release.

Request for Reconsideration

14. The application for reconsideration is that the panel's decision was procedurally unfair, in that:

- a) The oral evidence of the Probation Officer in the Community had not been completed and the Applicant had not had the chance to test that evidence in his own questioning.
- b) The Applicant's letter to his legal representative dated the 27 September 2022 had not been considered by the panel.

15. The application was made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration.

The Relevant Law

16. The panel correctly sets out in its decision letter dated the 24 October 2022 the test for release.

17. 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 oral hearing decisions.

Parole Board Rules 2019 (as amended)

18. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

19. 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)).

20. **Rule 21** sets out procedures that must be followed before a decision can be made on the papers after a direction for an oral hearing. Rule 21(1) provides



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the panel chair with a power to direct that the case be determined on the papers. That power can only be used after new evidence has been received. Provision is made under Rule 21(3) to allow the parties to make representations as to whether the case should or should not be considered on the papers before any direction to do so has been made. Rule 21(6) provides that a direction cannot be made where there is less than 3 weeks to the oral hearing.

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; and/or
 - (e) the panel was not impartial.

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

Other

23. 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.*"
24. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.



The reply on behalf of the Secretary of State (the Respondent)

25. On the 15 November 2022, the Respondent confirmed that he would not be making any representations.

Discussion

26. The three letters provided to me by the Applicant's legal representative (4 September 2022, 27 September 2022 and 24 October 2022) were written by the Applicant to his legal representative and not to the Parole Board. The Applicant provides these letters to me in support of his application for reconsideration.

27. The letter of the 27 September 2022 makes clear that the Applicant did not want his review to be concluded on the papers and that he thought it would be unfair to do so. The Applicant's letter is marked as being received by his legal representative on the 6 October 2022. In the application for reconsideration, the Applicant's legal representative states that the Applicant's letter of the 27 September 2022 was forwarded to the Parole Board on the 7 October 2022. No copy of a covering letter or email has been provided by the Applicant's legal representative but he is clear that he forwarded the letter and so I accept that he did.

28. In its directions of the 22 September 2022, the panel indicated that any representations about whether the case should conclude on the papers should be produced within 14 days, i.e., by the 6 October 2022. Therefore, by the time the Applicant's letter was forwarded to the Parole Board by his legal representative, it was already out of time.

29. I note that the panel had in any event waited beyond the 14-day deadline but by the 10 October 2022 it had still not received any representations from either the Applicant or the Respondent. I therefore asked the Parole Board to review the correspondence in this case to confirm whether the Applicant's letter had been received but had inadvertently not been forwarded to the panel. The Parole Board has confirmed that no correspondence was received.

30. The Applicant complains that the conclusion of his case on the papers without the opportunity to complete the oral evidence of the Probation Officer in the Community was procedurally unfair. Had the panel not made the directions that it did in this case then I would have agreed with that submission. However, the panel noted the pending automatic release of the Applicant, the difficulty in securing a date to reconvene the oral hearing and it invited representations from the parties, making clear that it was considering concluding the case on the papers. This was the proper course of action to take when applying **Rule 21** in this case. No views were received from the parties and therefore the panel was entitled to conclude the review as it did.

31. It was a matter for the Applicant and/or his legal representative to ensure that any representations opposing conclusion on the papers were received in good time. The Applicant clearly knew what the panel was considering because he referenced it in his letter to his legal representative dated the 27 September 2022. The Applicant had previously written letters directly to the panel but on



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this occasion had written to his legal representative, as he was entitled to do. However, the absence of any representations to the panel in accordance with the timescale set by the panel, which was the timescale set out at Rule 21 (3), meant that the panel was then entitled to conclude the review in the way that it did.

Decision

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

Robert McKeon
21 December 2022