

[2023] PBRA 182

## Application for Reconsideration by Islam

### Application

1. This is an application by Islam (the Applicant) for reconsideration of a decision of an oral hearing which took place on 7 September 2023 not to direct release or recommend a transfer to open conditions.
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 decision letter dated 21 September 2023;
  - The representations on behalf of the Applicant dated 9 October 2023;
  - The dossier, which currently runs to 576 numbered pages, the last document being the decision letter; and
  - A letter dated 12 October 2023 on behalf of the Secretary of State (the Respondent).

### Background

4. The Applicant is now 35 years old. In 2012, when he was 23, he received an indeterminate sentence of imprisonment for public protection for offences against 4 females, including one girl under the age of 16. The offences were of rape, sexual penetration and one kidnapping. The applicant denied the offences at trial and appealed his convictions unsuccessfully. The tariff expiry date on this sentence was in October 2021. The Applicant had previous convictions for making off without paying and assault occasioning actual bodily harm on a woman.

### Request for Reconsideration

5. The application for reconsideration is dated 9 October 2023. The application is founded on irrationality. It is particularised as follows:
  - (1) The panel was wrong to describe the relationship that the Applicant was in at the time of the offending as unhealthy.



- (2) Access to pornography is a very important risk factor. There is no possibility of the Applicant accessing the internet, and thereby pornography, in open conditions. If released his internet use would be monitored.
- (3) He offended at night. In open conditions or on Release on Temporary Licence (RoTL) he will not be allowed out at night.
- (4) Without access to pornography and while being locked up at night the Applicant's risk of offending should not be categorised as imminent.
- (5) Internet monitoring and GPS tagging can be made a part of the licence conditions.
- (6) It was wrong to categorise the Applicant's disapproval of the finding that his parents' address was unsuitable as follow-up accommodation (it is very near a school) as indicative of a sense of entitlement. This, it is suggested, is irrational since the Applicant did not go out intentionally to offend against a child, and he is anxious not to be categorised as a risk to children generally.
- (7) The panel was wrong to comment that a programme assessment was heavily reliant on self-report.
- (8) It is perverse to describe the Applicant as not unsuitable for open conditions, just not ready for it, with his risk not being manageable in that estate.
- (9) The panel was wrong to express the view that the Applicant might "*go too fast*" when he was permitted RoTLs.
- (10) The panel was wrong to take account of the seriousness of the offending, which should not lead per se to an overriding determination regarding step-down versus, at the very least, a recommendation for open or direct release.
- (11) The panel omitted to mention a particular programme as dramatically increasing, rather than reducing, risk.
- (12) The Community Offender Manager (COM) appeared to be unaware of the availability of supportive release accommodation relatively close to the Applicant's support network.

## Current Parole Review

6. The Secretary of State (the Respondent) referred the Applicant's case to the Parole Board for consideration of release, or, in the alternative, a recommendation for open conditions. This is the Applicant's first parole review. He applied for release.
7. The hearing took place by video link. The panel consisted of a judicial member, a psychologist member, and an independent member of the Parole Board. The Applicant was represented by an advocate who asked questions of the witnesses and made submissions. The Respondent was not represented. The COM, two psychologists based in the prison system, the Prison Offender Manager (POM), and a psychologist instructed on the Applicant's behalf gave evidence, as did the Applicant himself. Before the hearing the panel considered a dossier which then consisted of 549 pages.
8. The first hearing took place in May 2022, and was adjourned due to insufficient time.

## The Relevant Law

9. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Respondent for a progressive move to open conditions.
10. 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.
11. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:  
*"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."*

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

12. 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.
13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (rule 28(2)(a)).
14. 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*

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

18. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is 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 respect 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

## The Reply on behalf of the Respondent

19. The Respondent, by an email dated 12 October 2023, made representations in regard to ground (12) only, asserting that since the hearing the COM has stated that she was planning to make an appropriate application for supported accommodation for the Applicant, but did not pursue the matter as the panel declined to direct release.

## Discussion

20. Some of the grounds advanced, for example most of grounds (2) and (3), ground (8), and ground (9) relate to the decision not to recommend a progressive move to open conditions, which cannot be the subject of reconsideration, as I have explained above.

21. The other grounds amount in reality to a disagreement with the panel's assessment of the evidence, a matter made entirely clear by the way in which, for example, grounds (1) and (4) are expressed. Disagreement of this sort is not a ground for reconsideration on the basis of irrationality. Some grounds are premised on the assumption that the Applicant's risk is of offending in precisely the same way as the index offences: grounds (3) (4) and (6). Of course, the seriousness of the index offending is relevant to any risk assessment. The panel did not treat it as determinative, just relevant (ground (10)). I do not understand what relevance there may be to the suggestion that a particular programme increased the Applicant's risk (ground (11)): the submissions of the Applicant's representative after the May 2022 hearing were that the programme had significantly reduced his risk, and it is difficult to see how an assertion that it increased his risk would make release more appropriate. As to ground (12), the panel dealt, as it had to, with the Risk Management Plan put forward, not with one that was not. I cannot on this application take account of evidence obtained since the decision. The rationality of the panel's decision must be judged on the material before it.

22. Neither individually, nor collectively, do the grounds advanced begin to meet the test set out above for irrationality. This application must fail.

## Decision

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


**Patrick Thomas KC**  
**12 October 2023**

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