

[2023] PBRA 32

## Application for Reconsideration by Smith

### Application

1. This is an application by Smith (the Applicant) for reconsideration of a Member's Case Assessment (MCA) decision on the papers, dated 30 December 2022, not to direct 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)) 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 MCA Decision Letter;
  - b) The Prisoner Application Form (the Application) signed by a solicitor and dated 31 January 2023;
  - c) The dossier, consisting of 189 numbered pages, the last document being the MCA Decision Letter; and
  - d) A communication on behalf of the Secretary of State dated 8 March 2023 in the following terms:

*"We have reviewed the attached application for reconsideration submitted to the Parole Board on behalf of [the Applicant] and we wish to provide representations to the following matter:*

*The panel didn't have up to date information with regards to [the Applicant] having completed [the specified programme].*

*In regard to this matter, Public Protection Casework Section (PPCS), on behalf of the Secretary of State, have contacted the Offender Management Unit who have confirmed that [the Applicant] isn't due to complete [the programme] until 11 March (2023). His Prisoner Offender Manager has also confirmed that the post programme review isn't due until 24 April (2023).*

*PPCS, on behalf of the Secretary of State, make no further representations in response to the reconsideration application on behalf of [the Applicant]."*

### Background

4. The Applicant is now 35 years old. In 2018, when he was 31, he received an extended term of imprisonment (5 years with 1 year extension) for sexual assault by penetration on a female child under 13. The victim was the child of his



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



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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then partner, with whom it seems he is still in a relationship. The victim was 8 years old at the time of the single incident alleged, in 2016. He denied, as he still denies, his guilt, but a jury convicted him. His Parole Eligibility Date was 27 March 2021. He had two previous convictions for public order offences.

5. This is the Applicant's second parole review. His Conditional Release Date is 26 September 2023. His Sentence Expiry Date is 26 September 2024.

### **Request for Reconsideration**

6. The application for reconsideration is dated 31 January 2023.
7. Although 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, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration, the Application contains a number of irrelevancies. For example, it advances reasons for querying the validity of the conviction. As an earlier Parole Board oral hearing panel pointed out, the Parole Board must accept the conviction as a fact. Again, the Application asserts that *"it is in the interests of the public that [the Applicant] is placed in an environment where he can be supervised, monitored and indeed support as apposed (sic) to simply being released because his licence term has expired."* This ignores the fact that the Parole Board is, as the Decision Letter points out, bound to apply the single test set out both the Decision Letter and below.
8. The Application takes issue with the decision not to direct an oral hearing. The correct application for that decision to be reviewed is under Rule 20, not Rule 28. This is not a mere technicality: under Rule 20 a duty member's discretion to direct an oral hearing is unfettered; under Rule 28, which controls what I can do, the only power I have is to direct a fresh MCA hearing, and the grounds upon which I can do so are restricted to those set out above.
9. One of the grounds for reconsideration raised is that the MCA panel acted on out-of-date information, in that the MCA panel said (at Paragraph 2.6. of the Decision Letter) *"He is also yet to undertake [the programme] and remains on the waiting list for this,"* whereas it is asserted in the Application that the Applicant has *now* (i.e., as of 31 January 2023) completed the core risk reduction programme previously recommended. It should, perhaps, be noted that the evidence before me is that neither at the time of the decision in issue, nor indeed at the date of the Application, had the Applicant completed the programme. I discuss the principle of this ground below.
10. It is difficult to discern from the Application what other grounds are advanced for seeking a reconsideration, apart from those mentioned above. However, doing the best I can, I identify the following:

- (1) The panel did not make much of the fact that the Applicant has developed a particular strategy relating to dispute and problem management following his involvement directly with the mental health unit which has considerably improved his well-being and resulted in a diagnosis.



- (2) Although the Community Offender Manager has concerns relating to alleged collusion between the Applicant and his partner (the mother of the victim), there is no evidence of any actual breach of the restrictions placed upon him and social services have not raised any concerns.
- (3) The Risk Management Plan (RMP) proposed involves his residing in a hostel under supervision, which will impose its own restrictions and conditions and will allow further interaction with social services.
- (4) There has been only limited and somewhat biased commentary as to the nature of the relationship between the Applicant and his partner as well as the victim herself.

### Current parole review

11. As mentioned above, this was the second consideration of the Applicant's case following his parole eligibility date. The Decision Letter following the oral hearing in July 2021 is included in the dossier. The Application states that the Parole Board invited representations as to a renewed dossier by 6 October 2022. The file was then submitted for a Member's Case Assessment on 30 December 2022, with the result that there was no direction for release, which was the only matter which the Secretary of State invited the Board to consider.
12. The MCA member decided the case on the papers, which did not include any representations from either the Secretary of State or the Applicant.

### The Relevant Law

13. The MCA panel correctly sets out in its decision letter 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.
14. 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.
15. 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)

16. 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)).

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)).

### *Irrationality*

18. 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."*

19. 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.

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

21. 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."*

### *Procedural unfairness*

22. 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 focuses on the actual decision.



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

*Other*

25. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.
26. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.
27. 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 it. 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**

28. The Secretary of State has provided the response set out above.

### **Discussion**

29. Applying the law as set out above to the grounds for reconsideration that I have been able to discern, neither separately nor together do they pass the test laid down.

30. The fact, which is apparently accepted by the Secretary of State, that the Applicant had started the programme in question by the time of the MCA member's decision and the completion date was in sight, may (I stress *may*) be grounds for an application to set aside the MCA member's decision under Rule 28(A). It is not for me to advise the Applicant, or his legal representative, but it may (again I stress *may*) be that the time for an application to set the decision aside on the basis of an error of fact starts with this Decision Letter. That would be a separate application, with separate criteria and different procedures, from the application for reconsideration that I am considering. I cannot embark on an enquiry on the basis of an application that has not been referred to me for decision, indeed, has not yet been made.

31. The question for me is whether this fact affords a ground for reconsideration under Rule 28. In my judgement it does not. There is no suggestion of illegality. It is neither irrational nor procedurally unfair as defined above: see in particular Paragraph 27. The panel acted on the information and evidence presented to it. There is no suggestion that the panel did not take into account all of the evidence available to it: only that it did not have up-to-date evidence.

32. The other grounds advanced all amount to a disagreement with the MCA panel's assessment of the evidence, which is not a ground for reconsideration. The reconsideration process is not intended to enable me to substitute my assessment of the evidence for the panel's.

### **Decision**

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


**Patrick Thomas KC**  
**2 March 2023**

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

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 [info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)

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 0203 880 0885

