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**[2024] PBRA 143**

# Application for Reconsideration by Eminson

## Application

1. This is an application by Eminson (the Applicant) for reconsideration of the decision made by an oral hearing panel dated 14 June 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 332 pages), and the application for reconsideration (dated 3 July 2024).

## Background

4. The Applicant received an extended sentence comprising a custodial period of nine years with an extended licence period of six years on 11 February 2016 following conviction after trial on three counts of rape of a female aged 16 years or over.

5. The Applicant was 34 years old at the time of sentencing and is now 42 years old.

6. Following a Parole Board hearing, he was released on licence on 22 March 2023. His licence was revoked on 5 September 2023, and he was returned to custody on 12 September 2023. This is his first recall on this sentence. His sentence expiry date is reported to be August 2030.

7. It is reported that he was recalled to custody after he came to police attention in connection with a series of domestic abuse allegations.

## Request for Reconsideration

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

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

## Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release. This is the Applicant's first parole review since recall.

11. The case proceeded to an oral hearing before a single-member panel on 11 June 2024. Oral evidence was taken from the Applicant, together with his Prison Offender Manager (POM) and Community Offender Manager (COM). The Applicant was legally represented throughout the hearing. Following the hearing, the panel also received an email (dated 11 June 2024) noting that various allegations were to be filed with no further action, but there remained an ongoing investigation into an allegation of controlling and coercive behaviour.

**The Relevant Law**

12. 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)*

13. 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)).

14. 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)).

15. 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*

16. 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.

17. 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.

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

*Irrationality*

19. 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.

20. 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*."

21. 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).

22. 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.

23. 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.

24. 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**

25. The Respondent has submitted no representations in response to this application.

**Discussion**

26. The application raises a number of points in support of its contention that the decision was irrational and procedurally unfair.

27. Many of these points are disagreements with the way in which the panel interpreted the evidence before it. It is for the panel to decide how best to weigh and evaluate the evidence before it: that is its job, and it may form whatever conclusions it wishes upon the evidence provided that its overall decision is not irrational (in the legal sense set out above). Other points simply reiterate evidence from the hearing.

28. There are some points that potentially have merit, however, and I will deal with those individually.

29. It is argued that there is no more risk reduction work that the Applicant can do in custody. While that may be so, it does not follow that completion of all available risk reduction work means that a prisoner must be released. If that were the case, then there would be no need for a parole hearing. The panel was concerned that, despite having completed such work, the Applicant displayed a range of negative behaviours prior to recall and had admitted substance misuse after release. Completing a programme is not the same as demonstrating evidence of having internalised the learning from that programme.

30. The application also refers to a letter that had allegedly been written by the Applicant to his ex-partner when he had bail conditions not to contact her. The Applicant denies having done so. The panel acknowledges the full situation regarding the letter within its decision and it does not form a material part of its conclusion.

31. The application further notes that the Applicant has a pending investigation for alleged controlling and coercive behaviour. It suggests that the claimant has not been truthful about the matter, noting that other possible charges have been dropped. It is not for me, or the panel, to form a conclusion on the veracity of the complaint; however, it is not unreasonable for the panel to have given some weight to pending charges for a relevant matter.

32. The application also notes that the Applicant's position is that he is no longer in a relationship with the complainant in the matters leading to recall. The panel's risk assessment is that the Applicant has risk factors relating to violence, sexual entitlement, and problems managing his emotions within relationships. These are not restricted to the complainant. The panel is rightly assessing the risk to current and future partners.

33. Finally, it is argued that all of the professional witnesses agreed the Applicants risk could be managed and therefore that decision was 'completely irrational'. This view fundamentally misunderstands the panel's purpose.

34. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm if they failed to do just that. As was observed by the Divisional Court in *DSD*, they have the expertise to do it. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that, following

*Wells*, it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions.

35. In this case, the Applicant's POM and COM were both supporting release. The panel disagreed. It was perfectly entitled to do so. The decision letter sets out comprehensive reasons for doing so. These reasons are soundly based on evidence as well as being rational and reasonable or at least not so outrageous in the sense expressed above.

36. Although not specifically submitted as part of the Application, I also find that the reasons given by the panel in supporting its conclusions were clear and thorough and therefore the panel has discharged its procedural obligation to give reasons.

37. Therefore, I do not find that the panel's decision was irrational.

38. Turning to procedural unfairness, it is argued that 'it is clear express procedures were not followed'. The application does not explain which express procedures were not followed. It is therefore far from clear. It is not for me to make the Applicant's argument, and, as an entirely unfounded argument, it must fail.

39. Finally, it is argued that if 'the evidence [had been] considered properly' the Applicant could have been released. I am entirely satisfied that the panel did consider the evidence properly. The fact that, having done so, it reached a different conclusion to the Applicant and his legal representative, is not a reason for me to interfere with it.

**Decision**

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

**Stefan Fafinski**
**30 July 2024**