

[2024] PBRA 36

Application for Reconsideration by Thompson-Edwards

Application

1. This is an application by Thompson-Edwards (the Applicant) for reconsideration of a decision of an oral hearing panel dated 15 January 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 oral hearing decision, the dossier (consisting of 323 pages), and the application for reconsideration.

Background

4. The Applicant received an extended determinate sentence comprising a nine year custodial period with a six year licence extension on 5 September 2013 following conviction for rape. He also received concurrent determinate sentences of five years for assault by penetration and four years for sexual assault (no penetration). He pleaded guilty to all charges. His sentence ends in April 2028.
5. He was released on licence in October 2020 following an oral hearing. His licence was revoked on 19 July 2022, and he was returned to custody on 26 September 2022.
6. The Applicant was 25 years old at the time of sentencing and is now 35 years old.

Request for Reconsideration

7. The application for reconsideration is dated 30 January 2024. It has been drafted by solicitors acting on behalf of the Applicant and is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.
9. The case proceeded to an oral hearing on 26 September 2023 before a single-member panel. It heard oral evidence from the Applicant, together with his Prison



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Offender Manager (**POM**) and Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

10. The panel did not direct the Applicant's release.

The Relevant Law

11. 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)

12. 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)).

13. 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)).

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.

Procedural unfairness

15. 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.

16. 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.

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

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.

Error of law

21. An administrative decision is unlawful under the broad heading of illegality if the panel:

- a) misinterprets a legal instrument relevant to the function being performed;
- b) has no legal authority to make the decision;
- c) fails to fulfil a legal duty;
- d) exercises discretionary power for an extraneous purpose;
- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

22. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

The reply on behalf of the Respondent

23. The Respondent has submitted representations in response to this application dated 7 February 2024.

Discussion

24. The application puts forward a number of points all of which I have considered carefully. By far the most persuasive of these relates to the submission of legal representations on the Applicant's behalf.

25. Following the oral hearing, the review was adjourned for completion of a report concerning the Applicant's suitability for various programmes (**PNA**). Legal representations were invited by 24 November 2023 following the disclosure of the PNA.
26. Although the PNA was not completed by the deadline, legal representations were nonetheless submitted (dated 27 November 2023). The decision notes that these were received by the panel on 30 November 2023.
27. The review was adjourned for a second time for completion of the PNA with a deadline of 15 December 2023. Any further legal representations were invited by 21 December 2023.
28. An undated note within the dossier states that the PNA had yet to be completed.
29. The decision stated that the Applicant's legal representative "*was invited to make any further submissions by 21 December. At the time of writing no further submissions were received*".
30. I take '*at the time of writing*' to mean '*at the date of the decision*': that is, 15 January 2024.
31. However, the dossier does, in fact, contain further legal representations, dated 18 December 2023 which, on the face of it, were not considered by the panel in reaching its decision.
32. It is therefore impossible for me to conclude anything other than that the Applicant was prevented (even if through oversight or administrative error) from putting his case properly and therefore the decision must be procedurally unfair.
33. There is therefore no need for me to engage in the detail of the other points raised by the Applicant, or the responses to those points made on behalf of the Respondent.

Decision

34. For the reasons set out above, the application for reconsideration is granted on the basis of procedural unfairness.

Stefan Fafinski
13 February 2024