

[2023] PBRA 99

## Application for Reconsideration by Anslow

### Application

1. This is an application by Anslow (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated 23 March 2023, following a video-link oral hearing on 17 March 2023. The decision of the Panel was not to direct release nor to recommend the Applicant be transferred to open conditions. The hearing had begun on 6 August 2021 but after oral evidence, including from his Community Offender Manager (COM) and from the Applicant, the hearing was adjourned for further investigations. A series of directions, listings, hearings and adjournments followed, including further oral evidence, on 11 March 2022, from a Prison Psychologist, COM, Prison Offender Manager (POM) and the Applicant. Yet further directions and enquiries followed before the review was finally concluded on the basis of evidence already received and the papers. Representations had been received from the Applicant's current Legal Representatives who had taken over conduct of his case by mid-October 2022.
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. This is an eligible case.
3. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier (consisting of 511 pages).

### Background

4. The Applicant was sentenced on 23 June 2003 to life imprisonment having been convicted of rape and sexual assault on a female under the age of 16. A minimum term of 7 years 7 months and 18 days was specified with a Tariff Expiry Date of 12 January 2011.

### Request for Reconsideration

5. The application for reconsideration is dated 9 April 2023 and submitted by the Applicant's Legal Representative. It seeks reconsideration on the grounds that the decision is procedurally unfair and is irrational.



6. The grounds for seeking a reconsideration, are set out in considerable detail in 21 pages of closely argued submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to procedural unfairness and irrationality are dealt with below.
7. The Applicant submitted:

Procedural Unfairness

- i. The Panel failed to follow its own adjournment notice.

By way of background, the Application provides in great detail and, it would seem, accurately the convoluted history of this review involving numerous adjournments, SHRF applications and directions. Particular problems appear to have emerged between September and December 2022 much of which related to failures to provide COM reports focussed on an acceptable, comprehensive Risk Management Plan (RMP). A direction had been made on 14 November 2022, apparently without reference to an SHRF submitted on 11 November 2022, directing the report by 13 December 2022. It appears that the SHRF did not reach the Panel Chair until 29 December 2022, after the Christmas break, when he responded only to say the case would be further discussed in the New Year and a decision made. A review date was fixed as 23 January 2023 but a further adjournment followed, on 23 February 2023, with directions for new Legal Representatives to submit representations. The wording of that direction was;

*"The panel intended to conclude the case on the papers but before doing gave [the Applicant] legal representative an opportunity to make further submissions. The panel was subsequently notified by [the Applicant's] previous solicitors that [the Applicant] has withdrawn his instructions. The panel delayed in finalising the decision in order to provide an opportunity for any new representatives to contact the Board but at the date of this notice, no contact has been made.*

*If [the Applicant] has instructed a new representative, any submission should be made within 14 days of the date of this notice, alternatively [the Applicant] is at liberty to submit representations in person if he wishes. If he does they should be made within 14 days of the date of this notice."*

This reconsideration application notes that representations were received on 14 March 2022 but appeared largely to be addressing the lack of directed information and the need for further enquiries with the possibility of a case conference or even an option for the Applicant to be released with no fixed address. The representations do not, in any way, appear to address the potential conclusion of the review at that stage or the evidence previously given, all of which was prior to their being instructed. The Legal Representatives had, they said, addressed the requirements of the unresolved directions.



The application submits that, with this background, the Panel had proceeded to a decision, itself exhibiting some confusion about the progress of the case or even acknowledging that the Applicant's new Legal Representatives had been in place and in communication with the Board since mid-October 2022 seeking information as to the progress of the case, the Legal Representatives not having been made aware, of the conflicting directions of adjournment notices in December 2022 and February 2023. The application submits that the comprehensive RMP had still not been produced despite the direction for production by 13 December 2022 never having been revoked, Nonetheless, the Panel had decided that a decision had to be made.

In considerable detail, the application lists the chronology of the adjournments and directions and submits that this confusion when combined with a misunderstanding of the involvement of the current Legal Representatives constituted procedural unfairness (and made the decision irrational).

ii. The Panel failed to properly consider representations made on behalf of (the Applicant) and failure to supply sufficient reasons.

This section outlines the basis of the submissions as to the case, at that stage, which dealt with unresolved housing issues, the theoretical possibility that release could be ordered on the basis of "no fixed abode", that a further direction could be directed to deal with the unresolved comprehensive RMP or that a case conference could be convened to clarify outstanding issues.

The Panel's decision, it submitted, concluded the case on the basis of a flawed interpretation of the nature of the representations, without properly addressing the need for the provision of a RMP which, it was submitted, was "*central to the decision of the Board*" and without convening a case conference which would have clarified the directions and clarified outstanding issues.

iii. The Panel failed to properly consider the Referral from the Board.

Notwithstanding the specific requirement of the Secretary of State (SoS) referral that:

(Paragraph 3) "*If immediate release is not directed, the Board is asked to consider whether the offender is ready to be moved to open prison conditions. If, having paid due regard to directions issued by the Secretary of State under section 239(6) of the Criminal Justice Act 2003, the Board decides to make such a recommendation, it should comment on the degree of risk involved.*"



The decision letter failed to address, in any way, consideration of open conditions, other than formally to indicate that there was “*no direction for release and no recommendation for open conditions.*”

iv. The Panel failed to address the allegation which led to the return of the Applicant to custody.

Within the decision, the Panel concluded that it was unable to form a firm view whether the allegation was, fully truthful, partially truthful or malicious, failing formally to make that decision on the required basis of balance of probabilities. This, it was submitted, made flawed any decision as to the Applicant’s truthfulness and the Panel’s assessment of risk and manageability.

### Irrationality

The Application does not specifically specify separate grounds for assertions of irrationality but includes passages, including:

- a. *“There is a requirement for the Panel to give sufficient reasons for its decisions....to give reasons to explain its logic and how its conclusion follows from the evidence put before it...that there should not be an “unexplained gap or leap” as per the case of R v Wells.”*
- b. (Paragraph 30) *“The process followed by the Board is procedurally unfair and the final conclusions reached by the Board within the final decision irrational. There are gaps in the information given by the Board as to its case management and its ultimate decision making. Gaps which make no sense, given the content of the December 2022 adjournment notice.”*

8. In relation to each of the two reasons, considerable detail is given. As indicated in Paragraph 6 above, all aspects of the submissions have been fully considered.

### **Response from Secretary of State (the Respondent)**

9. The Respondent, by e-mail dated 14 April 2023, indicated that no representations were made in response to the Application.

### **Current parole review**

10. The Panel considered a dossier, then, of 486 pages.

11. The case was referred to the Board by the Respondent in July 2019 as a recalled indeterminate sentence case and the Board was asked to consider whether to direct release and, if release were not directed, whether the Applicant was ready to be moved to open conditions. The Panel was specifically asked to give full reasons for any decision or recommendation.

12. It was the Applicant’s fifth sentence review. As indicated above, there had been two part-heard oral hearings, the second on 11 March 2022, at which evidence was heard from the POM, the COM, a Prison Psychologist (T) and from the Applicant.



13. In its 18-page decision, the Panel dealt in detail with the Applicant's lengthy offending history much of which, including the index offending, had been of serious criminality including an earlier offence of rape of a female under 16. The index offence, which had involved threats with a knife, had been committed whilst on licence from his earlier rape sentence and after re-release following recall.
14. The Applicant had been transferred to open conditions, on a Parole Board recommendation, in October 2013 and was released on 10 February 2017. That release was revoked in June 2019, after over 2 years in the community, following an allegation of further rape.
15. At the first oral hearing on 6 August 2021 the Panel had heard evidence from the Applicant, who had denied the recall allegation, and from the COM who made what was described as "*a vigorous recommendation*" for re-release. The Panel, however, adjourned its decision for a psychological assessment, a Police report dealing with the allegations and the decision not to proceed, and a further COM report dealing, amongst other things, with the Applicant's level of mobility. The subsequent oral hearing, on 11 March 2022, heard continued denial evidence from the Applicant and a further strong COM release recommendation, albeit that, "*when pressed*" she had conceded to being "*conflicted*" as to her belief as to the truth of the allegation. The Psychologist indicated she could not judge whether the complaint had been true but that, if it were true, it would mean that his risk could not be safely managed, but that, if untrue, it could be.
16. It was with this evidential background that the Panel had, it said, concluded (amongst itself) that "on the balance of probabilities", it could not decide whether the allegation was true or false and, before finalising its decision, needed more information as to the level of the Applicant's mobility, as to a move-on plan and available support. At this stage, continued problems had arisen as to the provision of directed information and it was suggested that the Applicant had experienced further mobility deterioration. Specifically, "*a comprehensive (RMP)*" was required. Delays necessitated continued directions including those of which complaint is made.
17. Ultimately, following the submission of the Legal Representative representations, the Panel decision was made without a further hearing either by way of evidence or involving the Legal Representatives. Its formal conclusions included:
- i. There had been sufficient grounds to find that the Applicant was in breach of his licence and that recall was justified.
  - ii. The Panel was unable to firm a view as to the recall allegation but concluded that the Applicant conduct had been deceitful.
  - iii. The risk assessment was "*finely balanced*" "*and if presented with the comprehensive long-term RMP*" would have concluded risk could safely be managed and the public, particularly vulnerable females would not be put at risk.
  - iv. "*Unfortunately, after making efforts over a lengthy period to obtain a (RMP) the Panel has been unsuccessful and, in the absence of a (RMP), the Panel is satisfied (the Applicant) does not meet the release test.*"



## The Relevant Law

18. The panel correctly sets out in its decision letter the test for release, in accordance with the law as it then stood.
19. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. In the case of an extended determinate sentence, in considering whether only risks that might arise before the Sentence End Date or risks that might arise indefinitely after that date, the Panel was required to consider the latter.

## Procedural Error

20. 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 from the issue of irrationality which focusses on the actual decision.
21. 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.
22. The overriding objective is to ensure that the Applicant's case was dealt with justly.

## Irrationality

23. 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."*

24. 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.



25. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
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 uncontroversial 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. 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."*
28. In **R (Wells) v Parole Board [2009] EWHC 2710** it is stated *"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."*

## Discussion

29. I preface my findings by expressing considerable sympathy with the Panel as to the continued lack of compliance with directed reports and confusion as to the operation and provision of applications and information relating to the Applicant's representation.
30. I am concerned about the decision of the Panel finally to conclude this case on paper and without a hearing, whether a continued evidential hearing, or, at the least, a hearing at which full opportunity is given for the current Legal Representatives to examine, with the Panel, the up-to-date position as to outstanding issues and concerns.
31. All in all, however, the result was that Legal Representatives whose involvement had been known to the Parole Board, if not to the Panel, for some months were not kept fully apprised as to progress of the review and the nature of submission requirements from them, leading up to the final decision to conclude by refusing



the release application. Similarly, the Panel, itself, concluded its decision without the opportunity to hear properly argued submissions either as to continuation procedures or the formal merits of the evidence.

32.The referral by the SoS specifically requires the Panel, in the event of release not being directed to consider whether the Applicant is ready to be moved to open conditions. It was further required to give full reasons for any decision or direction made. This was not done.

### Irrationality

33.In the light of my decision relating to procedural error and my decision to direct reconsideration, it is not necessary for me to make any finding in relation to irrationality.

### **Decision**

34.Accordingly, while I do not find there has been an irrational conclusion, I find that there has been a procedural error, for the reasons I have given, leading to a conclusion that the Applicant was not given a fair hearing.

**Edward Slinger**  
**24 May 2023**

