

[2022] PBRA 70

## Application for Reconsideration by Hilling

### Application

1. This is an application by Hilling (the Applicant) for reconsideration of a decision of a panel of the Parole Board after an oral hearing on 1 April 2022. The outcome of the decision letter dated 19 May 2022 was neither to direct release nor to recommend transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the emailed Application by the Applicant via his partner, the dossier, and copies of the adjournment notices following the hearing which were not in the dossier. I also asked for and received the written concluding submissions on behalf of the Applicant that were written by the Applicant's legal representatives and considered by the panel before it made its decision.

### Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP) after being convicted of the offence of wounding with intent to do grievous bodily harm. The Applicant and his co-defendant entered a property at night and subjected the victim to a protracted ordeal during which they demanded money. The victim suffered serious injuries, including being stabbed on several occasions. The Applicant was 22 when sentenced in 2011, having started his criminal career at the age of 13. At the time of the oral hearing, he was 33 years old.
5. The Applicant was given a tariff or minimum custodial period of 3 years and 338 days. He was progressed to open conditions in June 2015 but absconded. While unlawfully at large he committed a further offence of sending a malicious communication, for which he was convicted following his capture. He has served that further sentence. Following a period of stability and undertaking offence focused interventions, the Applicant was released by a panel of the Parole Board in August 2018. He was recalled and returned to custody in October 2018 for failure to comply with conditions of the licence while in Approved Premises. A panel of the Parole Board in 2019 considered his recall and noted that the Applicant, recognising his lack of positive progress since return to custody, was not applying for release or



for recommendation for open conditions. That panel agreed, and the Applicant remained in closed conditions.

6. The current review is the Applicant's fifth review overall and the second since his recall. His application was for release.

### **Request for Reconsideration**

7. The application for reconsideration is dated 19 May 2022.

8. The grounds for seeking a reconsideration are as follows:

#### **(a) Irrationality**

- The Applicant states "*It is irrational and unfair makes no sense based on the evidence of risk that was considered. No other rational panel and professionals could all come to the same conclusion*".
  - All witnesses agreed that the Applicant can be safely released into the community. The Applicant states that '*managing risk in the community cannot be based on the grounds of future predictions of negativity as that is based on an assumption and is prejudiced of past events and rehabilitation has been done.*'
  - Outstanding allegations, if charged, were summary-only offences and should be time barred, as they were alleged to take place over 6 months ago. (The implication being that the panel should not take them into consideration in its decision or give appropriate weight to them in its decision).
9. The Application was from the Applicant, via his partner. Noting that he had been represented during this review and at the hearing, I asked the Applicant if they wished to instruct their legal representative for any further particulars, indicating that I would be willing to give a short extension of time for lodging any further particulars if that was the case. A quick response was received from the Applicant indicating that they were not instructing legal representatives for this reconsideration and that I was to proceed on the basis of the original application.
  10. I considered whether the Applicant's use of the word 'unfair' in his application meant that he was also applying for reconsideration on the grounds of procedural unfairness. However, have read his application I do not consider that the issues that he raised can be a ground for procedural unfairness. I have considered the issue of 'prejudice' as the Applicant states it which is a prejudice in favour of giving weight (he submits too much weight) to past behaviour. That falls clearly in the ambit of irrationality.

### **Current parole review**

11. The referral from the Secretary of State is dated October 2020 and is, in summary, to consider whether the Applicant should be released on licence or failing that whether to recommend transfer to open conditions, and to advise the Secretary of State on any continuing areas of risk that need to be considered. The case was

directed to an oral hearing in March 2021 by a single member of the Parole Board. A three member panel convened to hear the case. Following the hearing, the panel chair adjourned briefly for further information and having received this, the panel concluded on the papers.

12. The hearing was a face to face hearing in the prison, held on 1 April 2022. The decision letter is dated 19 May 2022. The panel consisted of three independent members of the Parole Board. The panel considered a dossier of 598 pages (including the information supplied after the brief adjournment). The dossier contained mandatory information such as details of the index offence, former offending, trial Judge's sentencing remarks, pre-sentence report, and more up-to-date information about custodial behaviour. A psychological risk assessment dated January 2021 was in the dossier as well as police evidence relating to further allegations. There was also a Victim Personal Statement dated November 2020, and updated reports from the Community and Prison Offender Managers along with a risk management plan.
13. Oral evidence was taken from the forensic psychologist who was the author of the psychological risk assessment, and from both the Prison and Community Offender Managers. The Applicant was represented by legal representatives, and they provided written concluding submissions on his behalf after the panel (and the representative) had been sent further information directed after the hearing.

## The Relevant Law

14. The panel correctly sets out in its decision letter dated 19 May 2022 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.

### *Parole Board Rules 2019*

15. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).
16. 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*

17. 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."*

18. 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.
19. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### Other

20. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
- (a) The progress of the prisoner in addressing and reducing their risk;
  - (b) The likeliness of the prisoner to comply with conditions of temporary release
  - (c) The likeliness of the prisoner absconding; and
  - (d) The benefit the prisoner is likely to derive from open conditions.
21. 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.*"

### The Reply on behalf of the Secretary of State

22. The Secretary of State replied on 7 June 2022 and stated that they wished to make no representations with respect to the Application.

### Discussion

23. The decision not to recommend transfer to open conditions is not eligible for reconsideration. However, for the avoidance of doubt I will state here that the panel, in making its decision with respect to whether to recommend open conditions, did apply the correct test.

24. I will deal with each part of the grounds for reconsideration separately.
25. *'The recommendations of the witnesses'*: It is the case that the Prison and Community Offender Managers and the psychologist all favoured release on licence, although the Prison Offender Manager did not say so in specific terms. The reasons for the witnesses' recommendations are well summarised in the letter.
26. 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 (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.
27. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 271**.
28. The panel, having explained in its decision letter the recommendations of the witnesses, then explores these reasons. I agree with the Applicant that the panel should take into account the recommendations of all witnesses, as well as all the evidence before it. The panel noted the evidence of the Prison Offender Manager of good engagement and behaviour, the evidence of the psychologist that no further offence focused work was required in custody (but could be undertaken in the community on release) and the Community Offender Manager's assessment that the allegations of assaults in June 2021 were *'situational'* and that the risk management plan was capable of managing risk.
29. The panel explains its own conclusions about the opinions of the witnesses. In relation to custodial behaviour, the panel disagreed that the Applicant's custodial behaviour was evidence of sufficient progress, citing examples of assault and poor behaviour as reported in the dossier. The letter further states that in the opinion of the panel the behaviour is of an *'offence paralleling'* nature, in other words, that reflect the risk factors prevalent in the Applicant at the time of the index offence. The panel also states its concerns about the custodial behaviour as echoing behaviour that led to the Applicant's recall. The letter further explains why it disagrees with the COM's suggestion that allegations of assault in June 2021 (currently still under police investigation) were *'situational'* in nature – i.e. because the Applicant was in a custodial setting. The decision letter points out that the allegations were of a serious nature, spanned three days and were therefore not an immediate response to a situation. The panel disagrees with the assessment of witnesses that the imminence of serious harm was low should the Applicant be released, citing in the decision letter the problems of this custodial behaviour and the emotional dysregulation behind it.
30. The letter also evidences why the panel had concerns that the recommended release plan was not sufficiently robust. It was not reassured by the relatively short time

the Applicant would spend in Approved Premises on release and did not consider that it was long enough to stabilise the Applicant. The panel was particularly concerned with what it considered to be the untested nature of his intimate relationship and the recommendation that the Applicant would move to her home to live with her and her children following his short stay in the Approved Premises.

31. In my view the panel fully explained the reasons behind its disagreement with the witnesses, and there is no error in its approach. A panel must make its own assessment of progress, risk and management of that risk and that is what it did, taking the evidence before it into account.
32. The Applicant complains, in effect, that the panel placed too much weight on past behaviour and made '*assumptions*' about future behaviour. It is an accepted principle in assessing risk that past behaviour can be a good predictor of future behaviour. But any panel must not focus solely on past behaviour, otherwise it would never be able to assess change or any evidence of reduction in risk. The paragraph below explores the panel's approach to past and future behaviour, using in particular its consideration of allegations that the Applicant is currently still facing.
33. The panel's approach to outstanding allegations: Outstanding allegations are a matter that a panel must consider very carefully, because they are not findings (such as proven adjudications) or convictions. The panel had earlier asked for police reports with respect to three outstanding matters and further information from the prison about outstanding or pending adjudications. All these matters pertain to a period of three days in June 2021, when the Applicant was alleged to have engaged in a course of conduct which was aggressive, including assaults on prison officers and criminal damage. Also noted by the panel was an alleged assault on a prison officer in January 2021.
34. There is a small error in the decision letter where they occasionally refer to the allegations as '*charges*'. From the information before me, no charges have to date been laid. It appears that a decision to charge (or not) remains outstanding. In this particular case I do not consider this error as anything other than loose phrasing and not pertinent to the decision.
35. The panel explored these outstanding matters with the Applicant during the hearing. The decision letter indicates that the Applicant accepted the allegations of assault and poor behaviour. In his application (as well as the legal representative's concluding submissions) the Applicant accepts that there are outstanding matters, and argues they are of a summary nature (implying that if convicted, they would not lead to a custodial sentence) and in any event should be out of time for a charging decision. I also note the detailed evidence in the dossier provided by witness and police statements.
36. The panel has to consider risk as a whole. It therefore has to take into account all behaviour, positive and negative, in order to arrive at its assessment. Where there is sufficient evidence of poor behaviour, whether or not a matter has been charged and whether or not the matter would lead, if convicted, to a non-custodial sentence, are not the only things that the panel must take into consideration. In this case, the panel's concerns included the serious nature of the allegations and poor behaviour (which included disobeying rules and a '*dirty*' protest, and three alleged assaults).

The decision letter also is clear about the panel's concerns about what that behaviour might say about continued risk of harm and reoffending should the Applicant be released. The panel, as indicated in the decision letter, was concerned that the behaviour (accepted by the Applicant) indicated that the Applicant still struggled to manage their emotions and engaged in risk-related behaviours when frustrated. The panel was further concerned about offence paralleling behaviour with respect to those matters. It is acknowledged that since that difficult time for the Applicant (June 2021), his behaviour has been more settled. The panel made no findings on the outstanding matters but took detailed evidence into account that goes to the facts and behaviours surrounding these matters. It was also entitled to take into account the detailed police evidence in the dossier.

37. In my opinion there is no error in the manner in which the panel approached these outstanding allegations. I do not consider that its considerations were '*assumptions*'. The panel carried out a careful exploration of whether there was evidence of outstanding risks, taking into account the fact that prior to release the Applicant had engaged in what was suggested by the witnesses to be sufficient work to address risk factors. They took into account both the matters relevant at the time of the index offence, the more recent issues associated with the Applicant's recall as well as their custodial behaviour since return to custody.

## Decision

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

**Chitra Karve**  
**8 June 2022**