

[2023] PBRA 151

## Application for Reconsideration by Flaherty

### Application

1. This is an application by Flaherty (the Applicant) for reconsideration of a decision of a panel (the panel) of the Parole Board dated 3 July 2023 (the panel decision) making no direction for the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration may be made in eligible cases 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 (i) panel decision, (ii) the application for reconsideration, (iii) the email dated 9 August 2023 from the Public Protection\_Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that he offers no representations in response to the Applicant's application for reconsideration and (vi) the Applicant's dossier containing 432 pages.
4. The grounds for seeking reconsideration are that:
  - (a) The panel decision is irrational as it "*makes no sense based on the evidence of risk that was considered and no other rational panel could come to the same conclusion*" (Ground 1).
  - (b) The panel decision was also irrational because of the matters set out in the application for reconsideration which show additional or alternative reasons why reconsideration should now be ordered (Ground 2).

### Background

5. On 19 December 2017, the Applicant received an extended determinate sentence of 10 years comprising a 7 years' custodial term and 3 years' extended licence period for 2 offences of reckless arson and 1 offence of simple arson; a concurrent sentence of 3 years' imprisonment for 3 offences of burglary and 1 offence of attempted burglary; and a concurrent sentence of 18 months' imprisonment for breach of an antisocial behaviour order (ASBO).
6. These index offences involved two burglaries and an attempted burglary at charity shops. The Applicant set fire to two premises totally destroying them. He then burgled a shop in a shopping precinct which was then set alight causing severe damage to the premises and destroying the stock.



7. The Applicant had previous convictions for a number of offences of burglary for which he received custodial sentences in 2005 and 2008. He also received sentences of 3 years' imprisonment for a bomb hoax in 2009 and another sentence of 3 years' imprisonment for threats to kill in 2011. He also has convictions for wasting police time, misuse of the public telephone system and harassment. The judge who sentenced the Applicant for the index offences described the Applicant's record of previous convictions as "*highly unusual and alarming*".
8. The Applicant had experienced a chaotic way of life.
9. According to the Applicant, he was brought up in an area in which he was regularly exposed to violence, weapons and drug use. The Applicant admitted engaging in anti-social behaviour with peers and setting fires in order to impress others and to avoid rejection.

### **Current Parole Review**

10. A three-member panel of the Board comprising a judicial member, psychiatrist and a psychologist convened for an oral hearing via video-link on 19 June 2023 at which the Applicant was legally represented.
11. The panel heard oral evidence from:
  - a) The Applicant's Prison Offender Manager (POM);
  - b) the Applicant's Community Offender Manager (COM);
  - c) the Prison Psychologist (the Psychologist); and from
  - d) the Applicant.

### **The Applicant's Period in Custody**

12. In January 2019, the Applicant was admitted to a medium secure personality assessment and intervention custodial unit. He has been assessed as suitable for a Psychologically Informed Planned Environment (PIPE) Unit, which he joined in January 2020 and where he remained until he deselected himself with the approval of the staff in December 2022. He explained that he wanted to test himself on a normal location and he has moved to the main wing of the prison where the evidence was that he had settled well.
13. The Applicant, who has been an enhanced prisoner since May 2020, has only accrued one proven adjudication and that was in May 2021 for being in possession of 18 boxes of vapes. He also received a negative behaviour entry in March 2023 when a blanket taken from the visitors hall was found in his cell. The adjudication that followed was dismissed after he explained that he had bought it from another prisoner not knowing where it came from. In addition, the CCTV evidence proved that he was not the thief.
14. There has been intelligence which includes reports of the Applicant being a victim of bullying, threats and assaults but there are also reports of him making threats to other prisoners and staff, selling medication and disruptive behaviour.

15. As a full-time employee, the Applicant has been a Red Band prisoner for 2 years and is an autism mentor and equality mentor.

### The Evidence Before the Panel

16. The evidence is that in custody the Applicant engaged with the mental health team and there have been no ACCTs in over 2 years. In addition, he has worked with the drug and alcohol relapse prevention team.

17. He has undertaken the Fire Intervention Prison Programme (FIPP) between September 2021 and May 2022 on a one-to-one basis. The evidence of the POM was that the Applicant had not completed all the follow-up work recommended in the post intervention report, but that this work need not necessarily be done in custody.

18. The evidence of the POM was that the Applicant needed to complete work on building relationships with professionals before he was released. They explained that the Applicant struggles with starting and ending relationships.

19. The POM thought that it was likely that he would commit an offence to get back into prison if he was not coping in the community explaining that he had made those threats before. The POM's evidence was that they were not confident that he would tell the staff if he was not coping and thinking of offending or that the staff would spot the warning signs.

20. The Applicant's evidence was that he had spent much of his life in custody and that he felt safe there as he had nothing outside prison and so prison was always the better option for him. He explained that he was scared of getting out and that he would need a lot of support. His evidence was that *"I can manage if I get to know someone I can be open and honest with about my feelings"*. Although he felt ready for release, *"it brings about a lot of anxieties, nervousness and uncertainties as he has a daily routine and struggles with transition."*

21. According to the Applicant, his mental health had always been a big struggle for him and that he requires constant prompting to take his medication.

22. The Psychologist explained that she was unable to recommend release and she explained her concerns about *"[the Applicant's] anxieties about transition, [his] sensitivity to rejection, [his] concerns about his ability to cope; [his] historic concerns about compliance; and how pushing boundaries as a red band raised doubts about future compliance"*. The Psychologist agreed with the POM that *"losing [the Applicant's] red band status would adversely affect his capacity to cope"*. Although the Psychologist accepted that the Applicant had made progress since completing the PIPE unit - a regime designed and supported by psychologists to help people recognise and deal with their problems - her concern related to the Applicant's ability to apply those skills constantly and his over reliance on professional support. I will refer to these points as *the Psychologist's conclusions*.

23. The Psychologist's evidence was that the Applicant had told her at the end of his interview with her that he had not been open about *"things"*. She stressed



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that it was *"critical [that the Applicant] builds up relationships with professionals before release which would require at least 6 months with IIRMS [Intensive Intervention and Risk Management Service] whilst in custody or a progressive regime"*. She explained that *"there was a risk of a quick deterioration if [the Applicant] was released before this work had been done"* and that she believed that the recommendations of the specified programme described in paragraph 17 above should be completed before the Applicant is released.

### **The Manageability of the Risk Posed by the Applicant**

24. The Psychologist considered that the Applicant presented *"a high risk of violent offending, including intimate partner violence, which would be imminent if he entered into a relationship due to his ongoing emotional instability, lack of robust release plan, lack of personal support and difficulties coping"*.
25. The most recent probation service assessment report shows that the Applicant *"is assessed (based on various risk factors such as his age when he was first convicted, the number of convictions, and his current age) as a high probability of reoffending, medium probability of non-violent offending; and a medium probability of violent offending"*.
26. In the event of the Applicant reoffending, his *"risk of serious harm to the public is assessed as high to the public; high to known adults (although no individuals were identified at the current time, being person with whom he was in conflict or against whom he had a grievance) and medium to staff"*. Harm included psychological and emotional harm.
27. The panel considered these assessments, which will hereinafter be referred to as *'the specified risk assessments'*, represented a reasonable indication of the Applicant's level of risk.

### **The Risk Management Plan (RMP)**

28. The COM had prepared a RMP which at the time of the panel decision was incomplete as there was not then an offer of a placement in a PIPE approved premises (AP).
29. There would be warning signs of escalating risk which might not be apparent and those signs would include a deterioration in his mental health with *"low mood and paranoid thoughts, non-compliance with medication, social isolation/withdrawing from others, feeling victimised/rejected/abandoned; grievance thinking/violent rumination; exposure to stressors and difficulty coping; lack of engagement with professionals; anti-social peer associations; alcohol/substance misuse; and relationship problems."*
30. A successful RMP would have to be reliant on a number of internal and external controls, but the Applicant was very anxious about being in the community and he would need a considerable amount of support but *"an essential element of the plan would be a developed and trusting relationship with professionals"*.



## The Conclusions of the Panel

31. The panel took into account all the written and oral evidence as well as the closing submissions of the Applicant's legal representative and the progress the Applicant has undoubtedly made in custody following his period in the PIPE unit and his completions of the specified programme referred to in paragraph 17 above. I will refer to these matters as *'the Applicant's positive factors'*.
32. The panel concluded that the Applicant needed to remain confined for the protection of the public and his release was not directed.
33. The factors which influenced the panel in reaching that conclusion after taking account of the Applicant's positive factors were that:
- (a) The panel noted that none of the 3 professional witnesses considered that the Applicant's risks *"were manageable in the community"* and the panel found the recommendations of the 3 professional witnesses to be *"well-reasoned"*;
  - (b) the specified risk assessments set out in paragraphs 24 to 26 above showing the level of risk posed by the Applicant;
  - (c) the view of the panel was encapsulated in the Psychologist's conclusions set out in paragraph 22 above;
  - (d) the fact that the Applicant *"contemplates release with great trepidation [and] it is unlikely he will achieve the extent and depth of support he feels he needs in the community"*;
  - (e) the Applicant *"has no developed relationships with professionals [and] has no family to help him [so that] all this is likely to heighten his anxiety and stripped on the status and structure to which he is accustomed in prison and lacking adequate coping strategies, he is at risk of committing further offences to engineer recall to custody, as he himself admits"*;
  - (f) *"all the professionals were of the opinion that risk of harm would be imminent and that warning signs may not necessarily be apparent"*;
  - (g) the panel considered whether a satisfactory transition into the community could be achieved by the Applicant spending 6 months in a PIPE AP with the support available there and from IIRMS. The panel agreed with the POM that *"[the Applicant] had the potential to destabilise quickly before he had built up professional relationships and that he found it difficult to do so"*;
  - (h) the Applicant *"has a problem being open and honest with professionals"*;
  - (i) there is *"uncertainty [concerning the Applicant's] ability to apply consistently the skills he learned away from a structured environment"*;
  - (j) the panel *"was not satisfied that any deterioration and emergence of live risk factors would be noticed and addressed under the [RMP]"*.
  - (k) *the Applicant's "failure to cope with the stresses and challenges in the community could have devastating consequences"*;
  - (l) *"Having undertaken an independent and robust risk assessment, the panel reached the conclusion that [the Applicant's] risks are not manageable in the community under the proposed [RMP]"*;
  - (m) the panel attached significance to *"the very serious nature of the index offences"* committed by the Applicant; and





(n) the Applicant had a disturbing criminal record. The Judge who sentenced the Applicant for the index offences described the Applicant's record of previous convictions as "*highly unusual and alarming*".

34. These factors in this paragraph will hereinafter collectively be referred to as 'the Panel's Reasons'.

## The Relevant Law

### *Irrationality*

35. 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."*

36. 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 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. 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*

37. 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 which are that: "*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 uncontentious 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.

38. 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.*"



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*Needless to say, the letter should summarize 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 craftsmanship."*

## **The Reply on behalf of the Respondent**

39.PPCS stated in an email dated 9 August 2023 that the Respondent makes no representations in response to the reconsideration application by the Applicant.

## **Discussion**

40.In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

41.The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

42.Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

43.Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

44.Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

## **The Grounds for Seeking Reconsideration**

### **Ground 1**

45.This ground is that the panel decision is irrational as it *"makes no sense based on the evidence of risk that was considered and no other rational panel could come to the same conclusion."* This ground does not take account of the alleged errors in the panel decision which will be covered in ground 2 below.

46.This ground entails considering the reasoning of the panel and especially the rationality of the panel's reasons, which I have set out in paragraph 33.

Nothing has been put forward to show that those reasons of the panel



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reach the high threshold of being irrational, namely that those reasons were *"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 [that reasoning]."*

47. After all, the panel's conclusions had the unanimous support of the three professional witnesses, whose expertise has not been challenged or discredited. It is clear that the panel carefully considered the views of the three professional witnesses who each gave evidence and who were subject to questioning by the panel and the Applicant's legal representative. The panel, who had the benefit of hearing the submissions of the Applicant's legal representative, was entitled to rely on this evidence in refusing to release the Applicant.
48. In addition, nothing has been put forward, let alone established to show that it was irrational for the panel to rely on all or indeed any of the other of the panel's reasons.
49. A further or alternative reason why this ground of challenge must fail is that, as has been explained, due deference has to be given to the expertise of the panel in making decisions relating to parole, especially on issues relating to risk.

## Ground 2

50. This ground is that the panel decision was also irrational because of the matters set out in the application for reconsideration which shows additional or alternative reasons why reconsideration should now be ordered in the light of errors in the panel decision.
51. The Applicant's first matter for seeking reconsideration specifies a list of *"new witnesses [who] should be spoken to"* by me as the Board Member dealing with this reconsideration application. The difficulty about dealing with this application is there is no procedure which allows *"new witnesses to be spoken to"* by a Parole Board Member when dealing with an application for reconsideration. Indeed, no procedure has been suggested or relied by the Applicant for allowing or requiring the Parole Board Member dealing with reconsideration to *"speak to"* new witnesses.
52. Furthermore, there is no evidence that these new witnesses would support the Applicant's case that he could be safely released or that these witnesses would or could undermine any reason which shows that the Applicant could not be safely released. The absence of such evidence constitutes additional reasons for my refusal to accede to the Applicant's request to *"speak to new witnesses"*.
53. The application for reconsideration also sets out various alleged errors in the panel decision, but the application fails to allege (let alone establish) why all or each or any of those alleged errors (if proved) would mean that it was irrational for the panel to find that the Applicant could not be safely released. Indeed, I have considered each of the alleged errors relied on by the Applicant and have concluded that these alleged errors whether considered individually





or cumulatively fail to show that it was irrational for the panel to conclude that the Applicant could not be released safely. For that reason, this ground must be refused.

54. Further and/or alternative reasons why this ground cannot succeed are that:

- (a) As a member carrying out the reconsideration, I am not entitled to substitute my view or any other view of the facts in place of those found by the panel, unless it was manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel. In this case, crucially the Applicant has failed to contend, let alone establish, that it is "*manifestly obvious*" that each or any of the matters set out in the application for reconsideration first, constitute errors of fact, second, these matters or any of them were errors of an egregious nature and third these matters can be shown to have directly contributed to the conclusion to release the Applicant. So, ground 2 must be rejected.
- (b) I should add that that I would have reached the same conclusion and rejected the second ground if I had applied the alternative test that reconsideration could only be ordered if the panel have made a mistake which played a material (but not a decisive) part in the panel's reasoning. The Applicant has failed to contend, let alone establish that the matters set out in the application for reconsideration or any of them have played a material part in the panel's reasoning.
- (c) In any event deference is owed to the panel.

55. Each of these matters constitutes an additional and/or an alternative reason for rejecting this second ground.

## Conclusion

56. For all of these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber**  
**23 August 2023**