

[2023] PBRA 49

## Application for Reconsideration by Gibbons

### Application

1. This is an application by Gibbons (the Applicant) for reconsideration of a decision of an oral hearing, dated 6 February 2023, not to direct his release but to recommend a transfer to open conditions.
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 Decision Letter dated 07 February 2023.
  - [the Applicant's] Representations: these are handwritten, but perfectly legible, and clearly and logically set out.
  - The Dossier, which now runs to 590 numbered pages, the last document being the Decision Letter.

### Background

4. The Applicant is now 35 years old. In 2010, when he was 23, he received a sentence of imprisonment for public protection for attempted murder. He was drunk. The victim was his partner's brother. The Applicant was looking for a fight. He stabbed the victim more than 15 times. He maintained he intended to frighten the victim, not kill him. The tariff was 11 years less time spent on remand. The tariff expiry date was 9 February 2021.
5. The Applicant had a long history of violent behaviour without provocation against a range of victims, including males and his then partner. He used weapons on other occasions. An oral hearing panel in 2021 identified among his risk factors being under the influence of drugs and alcohol and coping with feelings of paranoia.
6. In 2020 the Applicant progressed to open conditions. This was during the pandemic, and it does not seem that he had any overnight stays in his hostel accommodation before his release. He was released on 29 December 2021. Two weeks after release he tested positive for cocaine and opiates. He tested positive on two further occasions, for which he received warning letters and a



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direction to work with the substance abuse team. He also provided negative drug tests, when he knew he would be tested. His Community Offender Manager (COM) considered his compliance to be superficial. He was told he could start work after his mid-day sign-in had been removed, which could happen after a successful month in the community. After a fourth positive drug test his supervisors decided his risk could not be safely managed in the community and he was recalled.

7. The Applicant maintained, and still maintains, that if he had been permitted to start work shortly after release he would not have been bored and would not have used drugs. He admitted taking Class A drugs on a daily basis, except at weekends when he was with his family. The panel considered that he had not had the opportunity to be fully tested and prepared for release when last in open conditions.

### **Request for Reconsideration**

8. The application for reconsideration is dated 23 February 2023.

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

- (1) The Applicant accepts that he is an addict, but that does not make him a danger. Prolonging his recall is irrational, because it ignores the changes he has made in the last 12 months alone.
- (2) All the professionals supported re-release, and it is irrational to ignore their joint conclusions. The Applicant has insight. He spent his tariff deconstructing and then rebuilding his identity. He has spent recall coming off his prescribed medication, because he learns from his experiences.
- (3) It is irrational to suggest that the Applicant's risk increased as a result of his return to drug abuse, because he had been prescribed methadone and had succeeded in coming off that after recall. He believes this has removed the problems which led to his recall.
- (4) The panel took into account the opinions of his previous COM, who did not give evidence and could not be questioned by his solicitor.
- (5) At the time of the index offence the Applicant was paranoid to a degree, but on release in 2021 he was not paranoid and requested support repeatedly. There was therefore no offence-paralleling behaviour. He struggles with addiction but is not angry as he was then. Any concerns about his being paranoid were only raised after recall, and are being used to justify it after the event.
- (6) Being unable to have overnight stays at the hostel before release did not affect the Applicant's understanding of boundaries or expectations. He did not understand in advance that he had to earn the right to undertake employment, but overnight stays would not have added to his understanding.



- (7) The panel ignored the total absence of anger and aggression from the Applicant's behaviour since the index offence. To do so is irrational.
- (8) It is irrational for the panel to conclude both that the Applicant's risk of serious harm could not be managed in the community, and that his risk of serious harm had sufficiently reduced so that he could be managed in open conditions.
- (9) There were no further offences or concerns about the Applicant's conduct while he was on licence. Concerns about paranoia were only raised after his recall in order to defend the recall decision. It is not rational to decline to release him after his success in open conditions previously and his having gone above and beyond everything that was expected of him.
- (10) The Applicant had a plan to succeed on release, which was scrapped once he was in society.
- (11) The Applicant's behaviour on licence did not parallel the behaviour that led to the index offence. He is a violent drunk, and he no longer drinks. It is irrational to find that he any longer poses a risk of serious harm.

10. All of these grounds relate to irrationality, except for (4), which is a suggestion of procedural unfairness.

### **Current parole review**

11. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release or a recommendation for open conditions. The Applicant asked for a decision to release. This was the first review after the Applicant was recalled.

12. The panel consisted of an independent member and a psychiatrist member of the Parole Board. The oral hearing took place on 24 January 2023. The panel had a dossier containing 576 pages, to which were added, after the hearing, written submissions from the Applicant's legal representative. The following witnesses, in addition to the Applicant, gave evidence: two COMs, the Prison Offender Manager (POM), a Progressive Regime keyworker, and a psychologist commissioned on behalf of the Applicant. The Applicant was represented by a solicitor throughout. The Secretary of State was not represented.

### **The Relevant Law**

13. The panel correctly sets out in its decision letter 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.

14. 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.



15. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

*"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."*

#### *Parole Board Rules 2019 (as amended)*

16. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

17. 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)).

18. 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*

19. 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."*

20. 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.

21. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
22. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: "*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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion.*"

#### *Procedural unfairness*

23. 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.
24. 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.

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

#### *Other*

26. 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)**, and is now set out in the decision letter template. 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 reply on behalf of the Secretary of State (the Respondent)**

27.The Respondent has decided not to reply to the application.

### **Discussion**

28.It is important for the Applicant to appreciate that the reconsideration process is not one in which I can substitute my judgement for that of the panel that heard his case. I can only look at the issues he raises, and decide if they amount, taken individually or together, to grounds, as defined above, for holding the panel's decision to be either irrational or procedurally unfair.

29.In particular, perfectly understandable complaints that the panel came to different conclusions about aspects of the evidence, including the weight to be attached to some of it, to those which the Applicant would have preferred cannot be grounds for reconsideration.

30.This applies, in my view, to Grounds (1), (3), (5), (6), (7), (9), (10) and (11). The Applicant holds the firm opinion that he is only dangerous when affected by alcohol and/or paranoia. Since there was, in his eyes, no evidence of either while he was on licence, and he is very conscious of the changes he has made, he argues that his risk of serious harm has not increased.

31.The panel was, as the Decision Letter demonstrates, fully aware of the matters that the Applicant raises. The panel considered that the behaviour that led to recall was indicative of an increase in his risk of serious harm as it showed him not taking responsibility for his actions, with a lot of blaming others including family pressures, the approved premises and professionals. The panel found evidence of a lack of insight into the purpose of supervision and the need for public protection.

32.The panel found direct parallels with the index offence, which was committed because the Applicant's partner did not meet his expectations. On licence, the panel said, he demonstrated a rigidity of expectations and when release did not meet his expectations, he resorted to maladaptive coping strategies.

33.The panel was not obliged to share the Applicant's confidence that frequent (and unapologetic) consumption of Class A drugs did not increase his risk. All the panel's findings criticised by the Appellant were open to the panel on the evidence, and cannot be categorised as irrational.

34.As to Ground (2), 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



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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.

35.As to Ground (4), panels of the Parole Board are entitled to take account of material provided by witnesses that appears in the dossier, but is not supported by oral evidence. There is no indication that the Applicant's extremely experienced legal representative raised any objections to the evidence of the previous COM being considered. Indeed, her written submissions stressed the good relationship the Applicant had with his previous COM, and how well he worked with his new COM.

36.Ground (8) indicates a (perfectly comprehensible) lack of understanding that what the Parole Board has to decide is different when it is considering the test for release and the test for open conditions, because the circumstances in which the Applicant would be living are different. In the community, the Applicant was subject only to the controls of his licence conditions. The result was that he was able to resume regular intake of Class A drugs. In open prison, he is subject to the prison regime, and his progress into the community can (now that covid restrictions are over) be gradual and carefully monitored for the protection of the public. He has, as he points out, been successful in open conditions, as the panel considered he had not in the community.

## **Decision**

37.For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Patrick Thomas**  
**28 March 2023**

