

[2020] PBRA 157

## Application for Reconsideration in the case of Cunliffe

### Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision made by a panel of the Parole Board (the OHP) dated 16 September 2020 directing the release of Cunliffe (the Respondent).
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. This is an eligible case.
3. I have considered the application on the papers which I received on 12 October 2020. They consisted of the dossier, the OHP's decision and detailed representations made on behalf of the Applicant and the Respondent.

### Background

4. The Respondent is now 29 years of age. Since childhood he has suffered from a degenerative eye condition and is now registered as blind. On 11 February 2007, aged 15 and following a trial, he was sentenced to detention at Her Majesty's Pleasure for an offence of murder. The trial judge set a minimum term of 12 years which expired on 14 August 2019.
5. The murder of which the Respondent was convicted attracted a great deal of local and national publicity. The trial judge found that the Respondent had been involved in another violent attack the week before and had boasted about his involvement in the murder. The judge accepted that the Respondent had not intended to kill.
6. In May 2015 the Respondent made an application to the High Court for the minimum term imposed to be reduced on the ground that he had made exceptional and unforeseen progress since sentence. The court refused that application finding that he had made good and unforeseen progress, but it could not be said to have been exceptional. A similar application was made in April 2019. The court reached the same conclusion, finding that the Respondent had made good progress across a wide range of areas during the course of his sentence, but that progress could not be described as exceptional.
7. In January 2018, following an oral hearing and a recommendation from a panel of the Parole Board, the Respondent was transferred to open conditions. In



3rd Floor, 10 South Colonnade, London E14 4PU



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



@Parole\_Board



0203 880 0885

November 2018 the Applicant referred the case to the Parole Board to consider whether or not it would be appropriate to direct the Respondent's release. The panel that was convened to conduct the referral was chaired by a High Court Judge and senior member of the Parole Board, the two other panel members being a psychologist and an independent member.

8. The proceedings before the Parole Board that culminated in the release decision of 16 September 2020 had a protracted history. It is necessary to consider that history in a little more detail.
9. The first of four hearings conducted by the OHP took place on 17 December 2019. At that hearing the OHP heard evidence from the Respondent's Offender Manager (the person responsible for his management in the community), his Offender Supervisor (the person responsible for his custodial management), a Prison Psychologist, a witness who had employed the Respondent for some time and who was offering him accommodation on release, and from the Respondent himself.
10. Following that hearing, in fact just four days later, an event of particular significance occurred. In the decision letter dated 16 September 2020 the OHP described how at the conclusion of the first hearing, they had concluded that on the evidence the Respondent met the test for release and accordingly a release decision had been drafted. Before that decision had been made known or issued to the parties, the OHP received information of an incident that had occurred at the establishment where the Respondent was resident on the night of 21 to 22 December 2019 ("the December incident") as a result of which he was transferred back to closed conditions. It suffices for present purposes to say that a group of prisoners gathered late at night in the Respondent's room. They were noisy and there was some violence, but it was not suggested that the Respondent was involved in that violence. It was believed some alcohol had been taken and that those involved should take a breathalyser test. The Respondent refused. He gave different accounts of what happened.
11. The OHP decided that it was necessary in the interests of public protection to adjourn the hearing of the referral in order that it could determine what had happened in December and review the Respondent's risk assessment in the light of its findings. It determined that it was able to proceed in this way because their decision, although made, had not been communicated to the parties. It is not suggested that the OHP were not entitled to proceed in this way.
12. The second hearing took place on 1 April 2020, following the Respondent's return to closed conditions. The OHP heard evidence from the Respondent, his Offender Manager, his Offender Supervisor, a former Offender Supervisor and the Prison Psychologist. At that hearing the panel investigated the December incident in detail. It was not possible to conclude all the available evidence on that day.
13. At the third hearing on 17 April 2020, the taking of evidence was concluded with further evidence from the Respondent's Offender Supervisor. Submissions were made. The OHP decided to adjourn the case for six months to enable the Respondent to carry out further work which the professional witnesses indicated needed to be completed before he could be safely released. They had all recommended that this work should be undertaken with the Respondent



remaining in open conditions. The OHP set out in writing its conclusions on the evidence it had heard and set out its reasons for adjourning the case. It recommended to the Applicant that the Respondent should be returned to open conditions to carry out and complete the recommended work. In this event, as he was entitled to do, the Applicant did not accept the OHP's recommendation and the Respondent was in due course returned to closed conditions to carry out the work.

14. The fourth and final hearing took place on 3 September 2020. The OHP on that day heard evidence from a former Offender Supervisor, an experienced Prison Officer from another establishment where the Respondent had been resident, a Facilitator of the work carried out by the Respondent, from his Offender Manager, from the Prison Psychologist, from another Psychologist instructed on behalf of the Respondent, and from the Respondent himself. Further submissions were made. Throughout these hearings, the Respondent was legally represented as was the Applicant.

## The Relevant Law

### *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)).

### *Irrationality*

16. 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."*

17. 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.
18. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: see **Preston [2019] PBRA 1** and others.



## The Application for Reconsideration

19. The Applicant submits that I, as the Reconsideration Assessment Panel, should find the OHP's decision to have been irrational because, in light of the December incident, there was insufficient evidence that there had been a sufficient reduction in the Respondent's risk to justify release.
20. The following five grounds are put forward on behalf of the Applicant:
- (a) The Applicant submits that while accepting that the OHP found that the Respondent had lied to prison and probation staff and to the panel when denying he had drunk any alcohol during the December incident, the OHP erred in finding that his eventual admission that he had taken some alcohol was some evidence that he was prepared to be more open and willing to take some personal responsibility for his conduct. It is submitted that insufficient account was taken of the fact that the Respondent was only prepared to be more open with selected professionals and not with his Offender Manager and the Prison Psychologist.
  - (b) The Applicant observes that the Prison Psychologist had expressed concerns regarding the Respondent's tendency to feel he was being treated unfairly. This tendency, submits the Applicant, revealed itself again in how the Respondent responded to his treatment by staff during and after the December incident, in that he refused a lawful request and showed anger. In the Applicant's submission this indicated an absence of risk reduction and a lack of compliance which, it is submitted, the OHP failed to take sufficiently into account.
  - (c) It is submitted that in reaching the conclusion that a period of consolidation (putting into practice lessons learned) was not necessary, the OHP failed to pay sufficient regard to the evidence of an increase in risk demonstrated by the December incident which presented the Respondent with an opportunity to demonstrate his learning and compliance. Further, it is submitted, his conduct amounted to evidence of offence paralleling behaviour revealing a lack of risk reduction as well as an inability to manage risk.
  - (d) It is submitted that the Respondent's denial of any wrongdoing in respect of the December incident parallels his denial of the index offence and further that the OHP failed to properly consider the "*similarity and pattern of behaviour*" to be found in the Respondent's conflicting accounts and the impact this may have on his risk if released. The Applicant submits that the OHP's failure to consider this similarity and pattern of behaviour renders the release decision irrational.
  - (e) It is submitted that the OHP failed to sufficiently explore and adequately explain how the test for release is met notwithstanding the absence of work in the community. It is submitted that the OHP failed to explore how the absence of this significant protective factor might increase risk.

## The submissions on behalf of the Respondent



3rd Floor, 10 South Colonnade, London E14 4PU



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21. The response to this application by solicitors representing the Respondent can be summarised as follows:

- (a) The Applicant was represented throughout the proceedings. It is submitted that the impact of the December incident did not feature significantly in final submissions made on behalf of the Applicant to the OHP at the conclusion of all the evidence.
- (b) The stance taken by the Applicant, in not accepting the unanimous recommendations of all the professional witnesses that the Respondent should be returned to open conditions during the six month adjournment following the hearing on 17 April 2020, deprived the Respondent of the opportunity of being tested in less secure conditions.
- (c) There was clear support for release from all the professional witnesses save for the Prison Psychologist who clearly found it difficult to reach a firm recommendation.
- (d) The OHP properly applied the statutory test for release.

## Discussion

22. I begin by setting out briefly my general approach to the determination of this application.

23. First, the case of **R (ex-parte Wells) v The Parole Board [2019] EWHC 2710 Admin** provides helpful guidance on my approach. It is guidance I am bound to follow. Rather than ask the simple question was the decision being considered irrational, **Wells** suggests that the better approach is to test the panel's ultimate conclusions against the evidence before it and ask whether its conclusions can be safely justified on the basis of that evidence while giving due deference to the panel's experience and expertise.

24. Secondly, a panel whether it be an oral hearing panel or a reconsideration panel, is required to explain clearly its reasons and ensure as best it can that its stated reasons are sufficient to justify its conclusions. Where an oral hearing panel arrives at conclusions based on the evidence it has considered and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct a reconsideration unless it is manifestly obvious that there are compelling reasons for interfering with the panel's decision.

25. Thirdly, the reconsideration mechanism is not a process where I am required to indicate whether or not I would have reached the same or a different conclusion from that of the OHP.

26. Fourthly, it follows from the foregoing that the question that lies at the heart of my determination of this application is whether I am satisfied that the conclusions reached by the OHP are (a) adequately explained and (b) justified by the evidence they considered.



27. This was on any view an extremely serious and troubling case which stretched over four hearings and a period of nine months. The OHP considered a very substantial amount of evidence. That included the dossier that ran to some five hundred pages along with other documents and materials. The OHP heard live evidence from ten witnesses, including the Respondent's Offender Manager and his Offender Supervisor, a former Offender Supervisor, three other staff members from establishments where the Applicant had been resident and two Psychologists, as well as the Applicant himself. The Applicant's Offender Manager gave evidence in three of the hearings as did the Prison Psychologist.
28. Before dealing with the Applicant's specific complaints and to place the OHP's final decision to release in context, it is in my judgment important to keep in mind the position that was reached at the conclusion of the first hearing in December 2019. The OHP had considered the dossier and heard evidence from five witnesses including the Respondent. In written submissions made to the OHP in December 2019 on behalf of the Applicant it was: (a) acknowledged that there was a consensus amongst risk qualified staff that the Respondent had completed all core risk reduction work and that he had been suitably tested in open conditions, (b) recognised that at the next hearing report writers would be able to provide further evidence of the Respondent's position, (c) accepted that the Respondent was anxious about the prospect of release, which, it was submitted, was understandable given his age when his sentence began, and (d) that in the event of a forthcoming release decision a robust and supportive risk management plan would need to be in place. The highly experienced OHP concluded that the Respondent met the test for release. A decision was written, sent to the Secretariat of the Parole Board but was not, for reasons which are now clear, made known or issued to the parties.
29. In these circumstances it was inevitable that the facts, circumstances and aftermath of the December incident were going to be critical. The level of its importance to the Respondent's prospects of release was, if anything, underscored by the OHP's decision to adjourn the review for six months as recommended by the professional witnesses. The opinions of some of the professional witnesses on the central issue of release changed and changed again as the adjournment period unfolded. By the time the point had been reached when the OHP were required to make its final and binding decision in September 2020, all the professionals from whom the OHP had heard, with the single exception of the Prison Psychologist, supported release. Furthermore, the Respondent had had the benefit of a further period in custody and the benefit of further intensive work.
30. With all these matters in mind, I turn to consider each of the five grounds put forward in support of the Applicant's case for reconsideration. In doing so I find there is a degree of overlap, for example in grounds (c) and (d) and will endeavour to avoid repetition wherever possible.

**(a) In the first ground the Applicant submits that it was irrational of the OHP to regard as evidence of greater openness the lies that the Respondent told to the OHP and to some (but not all) of the professionals with whom he was dealing.**

31. As a starting point, it is important to bear in mind that the OHP concluded that the Respondent changed his story and had lied to them and to people at the prison.



They make very clear that a consequence of this adverse finding meant that they had to consider the extent to which they could thereafter rely upon his evidence. They heard a lot of evidence on this issue. The view that was generally held amongst the witnesses was that in admitting he had taken some alcohol (having hitherto consistently denied it) he was being more open and, more importantly, was taking some personal responsibility for what had happened. This was the professional opinion with which the OHP finally agreed. Having reached that conclusion, the OHP contrasted that with the evidence that he had not opened up in the same way to two of the professionals; it was this that the OHP found to be worrying but not decisive.

32. In my judgment, this a conclusion which the OHP were perfectly entitled to reach on the evidence. I find it impossible to characterise this as a conclusion that could not be justified on the evidence. In my judgment, the OHP were perfectly entitled to find that an admission by the Respondent that he had been drinking was some evidence of openness albeit that it was not an admission he was at that point prepared to make to all of the professionals. The OHP went on to fully explain its reasoning.

**(b) The Applicant in this ground submits that the OHP failed to take sufficient account of evidence given by the Prison Psychologist, that the Respondent's failure to recognise his tendency to feel that he was being treated unfairly, which had been a feature of his response to the index offence and the December incident, revealed a lack of reduction in risk and a lack of a willingness to comply.**

33. In my judgment, this submission appears to give insufficient weight to the evidence surrounding and the OHP's discussion of, the issue of unfair treatment. This included, as I read the decision letter, a careful analysis of the concerns voiced by the Prison Psychologist. When considering risk factors in the decision letter, the OHP began with those relevant at the time of the index offence when the Respondent was 15 years old. It then considered current risk factors, one of which was the Respondent's inability to manage his emotions which in turn it found were linked to feelings of unfairness. This was, suggested the OHP, possibly attributable to the unfortunate deterioration in the Respondent's eyesight which resulted in a number of problems including difficulties at school. The decision goes on to consider this risk factor in the context of the December incident, describing this issue as "*concerning*". The issue of unfairness was returned to later in the decision in the context of the real progress the OHP found that the Respondent had made as a result of the work he was doing 1-2-1 during the extended adjournment period.

34. The OHP were clearly very well aware of the potential importance of this issue in the context of the Respondent's emotional development generally, future risk and his response to the December incident. The view taken of it by the OHP did not indicate to them that complaints of unfairness when aged 15 and similar complaints when aged 27, arising as they did in very different circumstances, assisted them when assessing future risk and compliance in the way, or to the extent, that the Applicant submits they should. There was a body of evidence and professional opinion to weigh in the balance. These were all matters for the OHP



to assess. In my judgment, the OHP reached a conclusion upon this issue that was logically justifiable and consistent with evidence they were prepared to accept.

**(c) The Applicant submits that the OHP erred in concluding that a period of consolidation was not necessary, by failing to properly consider the risks arising from the December incident, which it is submitted demonstrated offence paralleling behaviour and consequently an absence of risk reduction.**

35. As for a period of consolidation, it was the Prison Psychologist's opinion (not shared by other professional witnesses) that further consolidation work should be done in custody before release aimed at dealing with the Respondent's feelings of unfairness. It was a matter for the OHP to balance that opinion against the views of others, while bearing in mind that the Prison Psychologist had accepted that the learning imparted to the Respondent over the long adjournment period had, in the opinion of other professional witnesses, brought about a change in his attitude for the better.
36. It is submitted that the OHP's conclusion in this regard failed properly to consider the evidence and risk arising from the December incident. I cannot accept that submission. That incident was at the very heart of the OHP's ultimate decision. While noting that the work done by the Respondent seemed to have achieved the aims of the long adjournment, it was inevitable that the OHP would have to go on to consider whether or not it was better to wait and see whether by remaining in custody an opportunity might arise that required the Respondent to put to the test his learning, or whether that learning could only realistically and sensibly be tested in the community. The OHP had before them a prisoner who had spent the entirety of his youth in custody. They found he had for over 13 years behaved well and done all that was required of him up to the December incident. It is perfectly plain that the OHP considered with great care all the relevant facts of, and the circumstances surrounding, the December incident and reached the conclusion that a period of consolidation was on the facts of this case not required. I am unable to find that that conclusion was not justified.
37. It is further submitted in this ground that the Respondent displayed offence paralleling behaviour in the December event which demonstrated a lack of risk reduction and an inability to manage his risks.
38. The OHP did not by any means treat the December event as just a "blip". They plainly recognised that it went to the very heart of their decision. It noted that over a period of 13 years from the age of 15, the Respondent's progress through his sentence had been very good, if not, exceptional. It regarded the further period in custody during the adjournment period as being very constructive. It treated the December event as a warning sign that his risk might be increasing. Taking into account his false story regarding his drinking that night, the OHP indicated that this meant it had to look at everything the Respondent had said with considerable care and some scepticism. It was in that context that they considered the relevance and significance of offence parallelism. In so doing it noted that as far as the December event was concerned there was no evidence that the Respondent was drunk or involved in any actual violence. It contrasted that with the index offence when the Respondent was 15 years old, very drunk and on the verdict of the jury involved in extreme violence. It noted that over the





course of his sentence there was no evidence he had been drunk and very little evidence of actual violence, and what there was had occurred a long time ago. The OHP set alongside these matters that it had real concerns about the December conduct, noting in particular the refusal of a lawful request for a breath test and his failure to remove himself from a group situation; matters which were obviously potentially relevant to risk and compliance.

39. I find that the OHP weighed all these matters carefully in the balance in explaining, in effect, how in its opinion the conduct in December did not necessarily amount to offence paralleling behaviour. Simply for the Applicant to assert that it did, in my judgment falls significantly short of establishing that it was indeed the case.

**(d) The Applicant submits that, while accepting that denial of an index offence is not necessarily sufficient to refuse release, the OHP failed to consider the similarity in the manner in which the Respondent dealt with the index offence and the December incident and the relevance of that to future risk.**

40. The OHP noted that it is well understood that in the appropriate case, a persistent denial of guilt, in the face of a proper and safe verdict of guilt can make a release decision more difficult. Reference is made in the decision to the guidance on this issue that has been provided by the High Court and by the Parole Board itself. The OHP confirmed that they considered and applied that guidance in this case and furthermore made it clear that a denial of guilt is only one of the matters to be taken into account, the obligation on any panel being to consider the whole picture.

41. I do not accept that the OHP failed to consider the suggested similarity in the behaviour of the Respondent following the index offence and the December incident. In my judgment, the reverse is the case. The OHP very carefully considered and contrasted the approach and behaviour of the Respondent in relation to the index offence as a youth and several years later as an adult and drew appropriate and fair conclusions in respect of both which it has fully explained.

**(e) In this final ground, the Applicant submits that the OHP failed to explore how the test for release could be met in the absence of a significant protective factor (namely employment).**

42. The OHP had a body of evidence before it on the issue of future employment. It was clearly the OHP's view that employment remained a significant protective factor for the Respondent. Not only was the Respondent described as a hard worker, the OHP found that the evidence demonstrated that regular work would provide him with pro-social friends, structure and self-respect. Unusually, it is recorded that a former employer had taken the trouble to attend one of the hearings in person, prepared to offer work and accommodation to the Respondent even in that person's own home.

43. The OHP appreciated that there was no confirmed work available, while at the same time concluding that great efforts to secure him work would in all probability be made upon release. Importantly, on the evidence, it was able to add that in its



judgment, if needs be, the Respondent was by that stage sufficiently well equipped to cope without it.

44. I do not accept that there is any failure here to explore how the test for release was nonetheless met in the absence of a confirmed job offer. A careful reading of the decision in my judgment provides a sufficiently clear picture of where this particular issue stood as at the date of the decision. In any event, important as it undoubtedly is, I do not regard a release decision in the absence of confirmed employment as determinative of the outcome of this application.

## Conclusion

45. Having considered all the evidence and the risk management plan, the OHP applied the statutory test and found that it was no longer necessary for the protection of the public that the Respondent remained in prison. It is important to stress that that was the opinion of all the professional witnesses from whom the OHP heard except for the Prison Psychologist whose opinion was that there should be a further period of consolidation before the Respondent's release.
46. The decision to release made in December 2019 had to be reconsidered by the OHP in light of the December incident. What followed was a long and comprehensive examination of the impact of that event and its consequences on the original decision. In my judgment, the result of that examination, the decision letter of 16 September 2020, is a thorough, careful and balanced analysis of a large body of evidence in a very serious and difficult case. I am in no doubt that the conclusions reached by the OHP are more than adequately explained and justified by the evidence they considered.
47. Whether considered individually or taken together, I do not find that any of the grounds advanced on behalf of the Applicant satisfy the test that I am bound to apply. There are, in my judgment, no compelling reasons to interfere with the decision to release.

## Decision

48. For the reasons I have given, the application for reconsideration is refused.

**Michael Topolski QC**  
**23 October 2020**

 3rd Floor, 10 South Colonnade, London E14 4PU

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