

[2021] PBRA 107

## Application for Reconsideration in the case of KEEGAN

### Application

1. This is an application by Keegan (the Applicant) for reconsideration of a decision made on 4 June 2021 by a panel comprising of 3 independent members of the Board that it was necessary for the protection of the public for the Applicant to remain in custody and therefore no direction was made for his release.
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, which are the decision of 4 June 2021, the application for reconsideration dated 28 June 2011, the response on behalf of the Secretary of State and the Applicant's dossier totalling 363 pages.
4. The panel conducted an oral hearing on 13 May 2021 in which it considered a dossier of 349 pages which included in addition to the mandatory documents a Police report dated 2 January 2021, a Prison Security report dated 27 January 2021 and the Crown Prosecution Service case papers relating to a charge of failing to provide a breath sample on 1 September 2020. There was no material considered by the panel which had not been disclosed to the Applicant.
5. At the oral hearing, oral evidence was given by the Applicant's Prison Offender Manager (POM), his Community Offender Manager (COM) and the Applicant.
6. The oral hearing Panel also considered legal representations from the Applicant's solicitors which sought a direction that the Applicant should be released. The Secretary of State was not represented and made no representations.

### Background

7. On 30 July 1997, the Applicant, who had been convicted of a murder committed in February 1996 when he was aged 27, received a sentence of life imprisonment with a minimum term set at 16 years less time spent on remand, and this expired in March 2012. The Applicant is now 52 years old.



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8. The Applicant's previous convictions included a significant number of violent offences which were alcohol related.
9. He was released twice during his sentence in 2013 and in 2017 before being released again in June 2020 after an oral hearing conducted by a panel of the Board. The Applicant was then directed to live at certain specified designated accommodation (DA) and to provide breath tests on returning to the DA.
10. On 28 August 2020, the Applicant returned to the DA and gave breath tests which gave readings of 36 and 32 with the first reading being over the legal drink-drive limit. He was reported to have refused to sign for the higher reading, but he agreed to sign for the lower reading. He told the panel that there had been a problem with the testing machine at the DA *"which had been agreed by the staff at the [DA] and therefore [he was] not willing to say [he] had been over the legal drink drive limit"*.
11. He was also upset because earlier on that evening, he had had dinner with friends. The Applicant believed that during the dinner he had been drinking alcohol-free wine which he had taken with him to the dinner. On checking with his friends, the Applicant found that he had actually been drinking regular wine.
12. On 1 September 2020, the Applicant was involved in a road traffic accident and the Police reported that he had then gone to the nearest pub and bought an alcoholic drink. The Applicant refused to take a breath test or have his fingerprints taken when he arrived at the police station. Indeed, he had to be forcibly taken to the fingerprint room by seven officers. On arrest, he was found to have a bottle of "poppers" in his pocket. On 19 January 2021, the Applicant pleaded guilty to failing to provide a breath sample on 1 September 2020 and he was sentenced to 12 days custody which has now been served.
13. Earlier on 1 September 2020, the police had been called to a suspected incident of domestic violence involving the Applicant's conduct to his girlfriend (AB). Officers described the Applicant as being drunk. The Applicant was recalled, and the panel had to consider the appropriateness of his recall. It decided the recall was appropriate having considered the evidence of the Applicant. In essence, the panel found, among other matters, that the Applicant displayed aggressive and non-compliant behaviour towards police officers when challenged despite knowing that he was on a life licence and that there had been concerns about his use of increasing amounts of alcohol during his time at the DA. The panel did not consider his aggressive approach to police officers to be appropriate or necessary even if he did not think that he should be placed in handcuffs. The panel concluded that *"the pattern of [the Applicant's] behaviour supported concerns about [his] increasing risk"*, and *"the panel therefore agrees that [his] recall was appropriate"*. The panel noted that the Applicant's COM *"at the time of his recall had concerns that [he was] not engaging with [alcohol treatment facilities] and [he was] minimising the amount of alcohol [he was] drinking and the extent of the problem it posed"*.

14. The Applicant's POM gave evidence to the panel explaining that there had been positive reports about the Applicant since recall with no adjudications or negative entries. She explained that ordinarily she would have recommended that the Applicant should complete a training course addressing decision making and better ways of thinking to address risks leading to his recall, but because of the difficulty in obtaining access to this programme during the pandemic, she suggested alternative work in the form of him completing workbooks which do not replace the training course but are helpful.
15. The POM had been present at the Applicant's previous hearing when he was adamant that he would not drink any alcohol if released. The Applicant stated that he did not know why he decided to drink alcohol on 1 September 2020, but he said that he had made the decision to do so *"on the spur of the moment"*.
16. The POM noted that the Applicant had a new partner and she considered having a stable relationship to be a protective factor for the Applicant, but the relationship should be monitored. She explained that the Applicant and his partner were drinking alcohol together and she was not satisfied that *"the relationship is entirely protective [for the Applicant] as having a partner drinking alcohol, even if it is not to excess could make [his] abstinence even more difficult."*
17. According to the POM, the Applicant's *"key and active risk factors are the misuse of alcohol and problems with thinking skills"*, but she did not consider that the Applicant could do any further work to address these matters in closed conditions. She supported his release but considered his engagement in the training course addressing decision making in the community would be an essential part of that release plan. The POM accepted that it was very difficult to assess the Applicant's level of internal skills and that he needed to demonstrate his ability to manage his risk. She noted that since his last period in custody, the Applicant had been responding well to staff and making efforts to help others.
18. When, as has been explained, the Applicant in his evidence stated that when he went together with friends for dinner, he had thought that he was drinking alcohol-free wine which he had brought with him when he drank regular wine which he said was his first alcoholic drink since his release, the panel stated that it found it *"surprising that [he] did not realise that [he was] drinking alcohol and that there was no effect on[him]"*.
19. When asked about his conduct on 1 September 2020, the Applicant explained that he refused to provide a breath test as he would only take it if his handcuffs were removed and that he made that decision *"out of stupidity and stubbornness"* as he thought the decision to handcuff him was *"unnecessary and disproportionate."*

20. The Applicant explained in evidence that he had had a problem with alcohol and that he used to be an alcoholic, but that he had come a long way since then but his problem with alcohol was with the company with whom he associated. He believed that he now had the skill to prevent any further relapse, but the panel were "unclear" as to how he had addressed his drink problem since recall. The panel considered that the Applicant has *"an ongoing lack of insight and understanding into the importance of alcohol as a risk factor in[his] case"*. He admitted that he did not attend meetings of an alcohol support group, as when he attended, he thought *"the members were all lying about their abstinence"*. He said that he did not go to another support group meeting as he was not experiencing cravings for alcohol and sometimes, he considered that avoidance of other drinkers was a better strategy.
21. According to the Applicant, if he were to be released now, he would not want as much freedom as he had had on his previous release, but he needed to keep busy as the busier he was, the less likely he was to offend.
22. The Applicant's COM supported his release, but as she had only taken over the Applicant's case in late March 2021, she had based her assessment on that of her predecessor. She considered that it would be beneficial for the Applicant to complete work on thinking skills, but this could be done in the community, and she hoped that as this was his third recall, he would appreciate the consequences of a further breach of the licence.
23. She also explained that she appreciated that the Applicant had *"made promises about engagement and compliance in the past which [he] had not upheld"*, but she considered that he has *"demonstrated motivation to change and she would like to give[him] the opportunity to prove [himself]"*.
24. The panel agreed with the COM's *"professional opinion"* that the Applicant poses *"a high risk of serious harm to the public (strangers, acquaintances, and casual acquaintances with whom you drink alcohol, as well as any road users if you are drinking and driving) and a medium risk to known adults"*. It notes that if the Applicant *"were to relapse into drinking alcohol and struggle with [his] emotions, that risk would increase [and] the risk of [him] causing serious harm whilst under the influence of alcohol is significantly more imminent"*.
25. In making its decision on whether to direct the release of the Applicant, the panel considered relevant factors, including the recommendations for release given by the POM and the COM as well as the present Risk Management Plan (RMP).
26. It concluded that *"given its assessment of [the Applicant's risk] and its identification of outstanding core risk work, the panel is therefore not satisfied that it is no longer necessary for the protection of the public that the Applicant should remain confined"*. Accordingly, it made no direction for his release. As will be explained, a

significant issue on this application is whether the panel was entitled to refuse to release the Applicant because of the "outstanding core risk work".

## Request for Reconsideration

27. The application for reconsideration is dated 28 June 2021 and the grounds for seeking reconsideration are that:

- a) It was irrational for the panel to decide that before the Applicant could be safely released into the community, there was further core risk reduction work required for the Applicant to complete in custody notwithstanding that no further work had been recommended by the professionals to be completed by the Applicant prior to release (Ground 1). And that:
- b) The panel was irrational in concluding that the Applicant could not be safely managed in the community in the light of the contrary views of the professionals (Ground 2).

## The Relevant Law

28. The panel correctly sets out in its decision letter dated 10 May 2021 the test for release.

### *Parole Board Rules 2019*

29. 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)).

30. 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*

31. 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."*

32. 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

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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.

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

34. 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 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.*”

### **The reply on behalf of the Secretary of State**

35. The Secretary of State declined the invitation to comment on the Grounds for Reconsideration.

### **Discussion**

36. In dealing with the grounds for reconsideration, it is necessary to stress two 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 or her 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.

37. The second matter of material importance is that when considering whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the Panel in making decisions relating to parole.

### Ground 1

38. This Ground is that it was irrational for the panel to decide that before the Applicant could be safely released into the community, there was further core risk reduction work required for the Applicant to complete in custody notwithstanding that no further work had been recommended by the professionals to be completed by the Applicant prior to release.

39. Having heard the evidence and seen the witnesses, the panel made several findings which are relevant to the issue of whether it was irrational to require the Applicant to undergo outstanding core risk reduction work in custody before he could be released into the community. These findings, which mainly relate to the Applicant’s conduct when previously released, show why the panel was entitled to consider it



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was necessary and/or reasonable to impose that requirement. These findings will now be set out in no particular order of importance.

40. First, the panel had *"noted that [the Applicant's] previous recalls related to substance misuse [and] there had been a recurrent concern amongst previous panels and professionals that you underplay your problem with alcohol"*. This finding shows why the panel was entitled, if not obliged, to consider with special care the issue of whether if released into the community the Applicant would have difficulties caused by his alcohol consumption.
41. Second, there was the panel's conclusion that evidence showed that the Applicant had consumed alcohol before his most recent recall and in particular that he had made the decision to drink alcohol on 1 September 2020 after making what the panel described as *"[his] own assessment"* which included the fact that he was *"happy and in a good mood"*. The panel was entitled to conclude in relation to that decision by the Applicant that *"there must be a concern that you favour your own risk assessment over that of professionals, as you did on that day, and that without you accepting the significance of alcohol for you, and demonstrating the ability to control drinking or preferably abstain, the panel is not satisfied you will be able to use internal controls to manage that aspect of your risk"*. The panel concluded, with emphasis added, that *"this is a clear indication that [he has] **further work** to do to improve his internal controls so as to manage his risk and [the Applicant's POM] agreed with that view"*. This was a conclusion open to the panel.
42. Third, the panel justified the need for this work when it *"concluded that completion of work on improving your thinking skills is **core risk reduction work**, as evidenced by your behaviour on licence"* (emphasis added). The Applicant's behaviour in the community includes his refusal to take the breath test as explained in paragraph 12 above; significantly, he has now belatedly accepted that he *"made that decision out of stubbornness and stupidity"*.
43. Fourth, further justification for the need for the Applicant to complete core risk reduction work is to be found in the conclusion of the panel that whilst the Applicant *"took the [training course addressing thinking skills] during the first part of your sentence, this was now many years ago and [his] behaviour on licence has clearly highlighted deficits in [his] thinking"*. That was a reference to his behaviour explained in paragraphs 12 and 13 above at the police station when the Applicant had to be forcibly taken to the fingerprint room by seven officers and his aggressive attitude to the police officers as well as his refusal to take a breath test.
44. Fifth, the panel explained after referring to the Applicant's refusal to take the breath test and his recall that it *"was not provided with sufficient evidence of [the Applicant] building those thinking skills and applying them in a consistent manner, for it to be able to be satisfied that that aspect of [his] risk has reduced since recall"*.
45. Sixth, as a result of these findings, the panel was entitled to conclude that the further work required of the Applicant prior to his release into the community was core risk reduction work because the panel explained the significance of the outstanding core risk work was that it was so important that it prevented the panel from ordering the release of the Applicant when it concluded that *"given its assessment of your risk and its identification of **outstanding core risk work**, the*



*panel is therefore not satisfied that it is no longer necessary for the protection of the public you remain confined”.*

46. Finally, the panel considered whether this outstanding core risk reduction work could be provided in the community and, if so, when it could be provided. It concluded that *“it was not clear from the evidence provided to the panel when you will be able to complete that programme in the community if released”*. In other words, the Applicant would have to remain in custody to complete this work.
47. In all the circumstances, the Panel, as the designated fact finder, was entitled to conclude there was a need for the Applicant to complete the outstanding core risk reduction work especially because of his conduct on 1 September 2020 set out above and the absence of any evidence to show that his risk has reduced since recall. In the light of the absence of evidence as to when this core risk reduction work could be completed in the community, the panel was entitled to conclude that it was not then safe to release the Applicant into the community and to refuse to release him.
48. A further or alternative reason why the panel was entitled to refuse to release the Applicant is, as has been explained above, that due deference is due to the Parole Board as a specialist body with the consequence that it is not correct to overturn a decision of the Panel unless 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 to refuse to release the Applicant.
49. In this case, there was no error or indeed one of an egregious nature on the part of the Panel in deciding to refuse to release the Applicant in the light of the material before the Panel and the matters set out above.
50. In any event, reconsideration cannot be ordered of the decision to refuse to release the Applicant because the panel’s decision does not reach the high threshold of being “irrational” as explained in paragraph 31 above. That is because the panel’s decision that the Applicant should not be released because he needed to have carried out core reduction work before his release falls a long way short of reaching the high threshold required for a finding of irrationality as it was not *“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”*.

## Ground 2

51. This Ground is that the panel was irrational in not ordering the release of the Applicant in the light of the contrary views of the professionals. The Applicant’s COM and POM recommended his release and believed his RMP was robust enough to manage his risk and that he should be released.
52. The panel was not obliged to rubber-stamp the views of the Applicant’s COM and/or POM as it had to carry out its own independent inquiry, which is precisely what it did. This led to the conclusion that the Applicant could not be released into the community as he was required to carry out core risk reduction work before he could be safely released.



53. The reasons for that decision have been set out above when considering Ground 1 and those reasons apply with equal force to show that the panel was entitled to make the decision under challenge.

54. A further or alternative reason why Ground 2 must be rejected is that it is important to repeat that due deference is due to the Parole Board as a specialist body with the consequence it is not correct to overturn a decision of the Panel unless 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. No such errors have been identified.

55. In any event, as with Ground 1, a further reason why reconsideration cannot be ordered of the decision to refuse to release the Applicant on the ground that that decision was "irrational" is because the threshold for finding that the decision was irrational is a high one as the decision under challenge had to be "*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.*" The Applicant's case falls a long way short of reaching that threshold especially in the light of the matters set out in paragraphs 39 to 46 inclusive above.

### **Decision**

56. For the reasons I have given, I do not consider that the decision under challenge was irrational and accordingly this application for reconsideration is refused.

**Sir Stephen Silber**  
**30 July 2021**