

[2022] PBRA 135

## Application for Reconsideration by Taun

### Application

1. This is an application by Taun (the Applicant) for reconsideration of a decision of an oral hearing dated the 22 August 2022 not to direct release and not to recommend progression 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 dossier, the decision letter and the Application for Reconsideration.

### Background

4. The Applicant is serving a sentence of imprisonment for public protection (IPP) for the offence of robbery imposed on 18 September 2007. He entered the property where the victim and her small child were and demanded items of the victim, making threats to hurt her. The Applicant has an offending history that included robbery, possession of offensive weapons and drug offences as well as other offending. He was given a minimum tariff of 2 years, 3 months and 12 days and this expired on 28 December 2009. He has been released on licence on four separate occasions. This review was the review of his fourth recall. The Applicant was 37 years old when sentenced and was 52 years old at the time of the hearing.

### Request for Reconsideration

5. The application for reconsideration is dated 9 September 2022.
6. The grounds for seeking a reconsideration are copied from the Application (except that typographical errors have been corrected) and are as follows:
  - a) Procedural Unfairness:
    - i) The Panel have accepted that despite the Applicant being recalled on a number of occasions for a relapse into substance misuse, these relapses have not resulted in



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



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



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



@Parole\_Board



0203 880 0885

any serious harm, or any harm whatsoever been caused by The Applicant.

- ii) He has been released now on 4 occasions, spending over 2 and a half years in the community, if all of his time in the community is added together. Despite that time, never once has he re-offended or been the perpetrator of any harm to any victim.
- iii) Whilst drug misuse was a significant factor linked to the commission of the index offence, this was committed back in 2007. The Applicant has been released on licence 4 times since then, and whilst we accept, he has relapsed there is evidence to now suggest that drugs are no longer directly linked to an imminent risk of harm being caused.
- iv) The Panel raised concerns about the Applicant being evasive about substance misuse and there were certain aspects of minimisation. This we do not agree with. At no point during the hearing was the Applicant evasive about this issue. All professionals that have worked with the Applicant have accepted his honesty about his substance misuse and the Applicant does accept that this is a concern.
- v) The Parole Board's test of release has not correctly considered in this case. 3 out of 4 witnesses believes that the Applicant's risk of harm can be safely managed in the community and that the outstanding work necessary can be completed in the community.
- vi) The Panel make reference to outstanding Eye Movement Desensitisation and Reprocessing EMDR work being core work but also this being voluntary. We struggle to understand how it can be both.
- vii) They also refer to not being able to add this work as a licence condition, due to this being voluntary, yet this could fall under the generic condition of "*He shall comply with any requirements specified by the supervising officer for the purpose of ensuring that he addresses his alcohol, drugs or other offending behaviour problems*". This doesn't appear to have been considered by the Panel.
- viii) The Panel have raised concerns that the residence at Red Bank cannot be enforced by licence conditions, yet again, this could fall under the generic condition "He shall permanently reside at an address approved by the supervising officer and obtain prior permission for any stay of one or more nights at a different address" This also doesn't appear to have been considered by the Panel.
- ix) The Panel concluded that the current risk management plan, which is fully reliant on external controls that the Applicant does not meet the test for release. Despite this only one proposed option of release was considered by the Panel. This was to Red Bank Rehabilitation. If the Panel believed, through evidence that this was not a viable option to satisfy their test then there was an option to explore residence with an approved premises, which could be extended for up to 6 months. This would have allowed the Applicant to have the added structure of the approved premises, to which he has always fully complied with, with the benefit of being able to access the EMDR work, whilst under that structured regime and to complete this as soon as possible. Release to an approved premises was just simply not even mentioned by the Panel during their questioning of the risk management plan.

#### b) Irrationality:

- i) We believe that the decision not to release the Applicant was biased, and heavily relied upon the evidence given by the prison psychologist. We believe that the parole board were influenced in their decision by the evidence from the prison psychologist, despite the parole board being "independent". They appear to not have considered the independent psychologist's views, in assessing where the trauma work should take place for the Applicant.



- ii) Both psychologists agreed that the trauma work was necessary, but both disagreed where it should be completed. This was the main question to both psychologists.
- iii) We believe that any reasonable parole board member would surely agree that engaging in trauma work, to address post traumatic stress disorder (which the Applicant has been suffering from since the 80's) should not be addressed within such a setting where the trauma occurred. This would only add to the trauma and could have the opposite effect in addressing the issue.
- iv) Furthermore, it was confirmed that the Applicant would not be in a position to complete this trauma work at any point soon, if he were to remain in custody. No timescale provided for this to be offered and this could remain incomplete at the next review. This will only add to the Applicant's problems and trauma, as this will continue to go untreated for the foreseeable future.
- v) We believe that with the added conditions listed in section 1 of this report that a reasonable Panel would agree that the Applicant's risk is manageable in the community.

## Current parole review

- 7. The original referral from the Secretary of State is dated 17 August 2021 however a fresh referral following changes to the test for open conditions was provided on 9 August 2022 despite being chased by the panel chair. No points have been taken with respect to this late referral.
- 8. The panel sat on 10 August 2022. It consisted of two independent members and a psychologist member. The Applicant was represented throughout. The panel considered a dossier of 341 pages as well as written concluding submissions provided by the Applicant's legal representatives following the hearing. The hearing was held remotely via a video link. Evidence was taken from the Applicant's Community Offender Manager (COM), Prison Offender Manager (POM), the 'prison psychologist' and an 'independent psychologist'. The Applicant also gave evidence.

## The Relevant Law

- 9. 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.
- 10. 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.

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

- 11. 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)).

12. 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)).
13. 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**.

#### *Illegality*

14. An administrative decision is unlawful under the broad heading of illegality if the panel:
  - (a) misinterprets a legal instrument relevant to the function being performed;
  - (b) has no legal authority to make the decision;
  - (c) fails to fulfil a legal duty;
  - (d) exercises discretionary power for an extraneous purpose;
  - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
  - (f) improperly delegates decision-making power.
15. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

#### *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: **Preston [2019] PBRA 1** and others.

#### *Procedural unfairness*

19. 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.

20. 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.

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

#### *Other*

22. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

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

23. On 21 September 2022 the Secretary of State confirmed that they offered no representations in response to the Application.

### **Discussion**

24. I will consider both grounds together as they are linked. There will inevitably be some repetition as some of the issues raised under each ground share details.

25. The Application states that the approach of the panel in its consideration of the evidence of the expert witnesses was biased in that they were (unduly or unfairly) influenced by the 'prison psychologist' when they had the evidence of another, independently commissioned, psychologist before them. The Application questions the independence of the panel.

26. There have been a number of applications for reconsideration where a ground of complaint is that a panel preferred the opinion of one psychologist's view over another. I will not reiterate in any depth the general principle that it is clearly the

job of the panel, where there is a difference of opinion among witnesses with respect to the case overall, to state if it has any preference in relation to those opinions, and to give reasons for any preferences.

27. It is the case that some forensic psychologists' assessments that are directed by the Parole Board or separately commissioned by the Prison Service or other government bodies are undertaken by a psychologist employed within the prison service. They are required however to provide an *independent* assessment, based on their knowledge and experience.
28. I note however that in this particular case, the psychologist that is presented as the 'prison psychologist', i.e., commissioned by the Prison Service is in fact not an employee of the prison service and was commissioned through her freelance work as a forensic psychologist. Her status is therefore exactly the same, in my view, as the witness presented as an 'independent psychologist', commissioned and instructed by the Applicant's legal representatives. Both professionals have a duty to provide an independent assessment based on their knowledge and experience, both have stated as much in their reports, and I have no evidence before me to believe otherwise in relation to either of them.
29. I note that the 'prison psychologist' recommended to the panel that the Applicant should complete trauma focused work prior to a future release. She gives full reasons for this recommendation. I note that the 'independent psychologist' agreed with the recommendation that the Applicant should engage in trauma focused work. The difference between them was where this should take place, although in my view on reviewing their written reports and their evidence provided at the hearing as recorded in the decision letter, there is very little disagreement between the two psychologists. One recommended this work was 'core' work and needed to be undertaken in closed conditions. The 'independent psychologist' also accepts that the Applicant's risk was directly linked to their trauma and substance abuse, and accepted that there was a 'dilemma' (their words) in relation to '*balancing the need for this treatment with the identified risks of release into the community,*'
30. In my view the decision letter sets out the evidence of both psychologists in a balanced manner, both in relation to their reports and their oral evidence. I further note that the 'independent psychologist's' view was that the outstanding work with respect to trauma was core work, which was the firm view of the 'prison psychologist'. The 'independent psychologist' was also clear that the work would need to be undertaken in a '*structured, secure and boundaried*' environment, although they also state that they do not think that the current prison environment that the Applicant was in was the appropriate place for this work to be undertaken. They go on to suggest work could be undertaken in a Therapeutic Community, and I note that these are provided for within the prison estate. They also explore appropriate places that this work might be undertaken in the community.
31. The 'independent psychologist's' concern about undertaking the work in the current prison setting was that there was a risk that the Applicant would be 'triggered' by situations in the prison, and this would be detrimental to the trauma work. This was put to the 'prison psychologist' by the panel who answered that he would be triggered in the community as well, so it would be better for the Applicant to engage

with this work in a secure and protective environment. I note that the 'independent psychologist's' report acknowledges that the Applicant was triggered while in the community on at least one if not two of the Applicant's failed releases.

32. I further note that the letter indicates that the 'prison psychologist' was challenged by the panel with respect to her recommendation not to release. I find that the panel ensured that it took both the opinions of the experts into account, and I do not find that there was any improper bias towards one of them over the other. The panel's decision was to favour the approach of the 'prison psychologist' that this was core risk reduction work that needed to be undertaken prior to consideration of a future release.

33. Having decided that there was no bias evidenced in the panel, I next considered whether the panel had sufficiently explained, in its decision letter, how and why it had come to its decision relating to where the core work should be undertaken. I note that both psychologists were agreed that this work needed to be undertaken. The panel agreed that this was core work. The panel states in its decision letter that as this is core work it needs to be undertaken before a future release. In my opinion that is sufficient explanation.

34. The Application also submits that core work is not voluntary work and therefore there is a conflict in the panel's reasoning because the work that the psychologists' recommended was EMDR (Eye Movement Desensitisation and Reprocessing) to address the trauma, which is voluntary work. The remit of the panel is not to decide exactly what kind of work should be undertaken to address the need for core work, it is therefore sufficient that the panel found that core work remained to be done in order to address risk and agreed that this related to the Applicant's trauma. The Secretary of State prohibits a Parole Board panel to state what programmes or therapy might be provided in order to address risk. The decision letter reports what the psychologists recommended could be undertaken to address the trauma and notes the recommendations of where the work could be undertaken but the panel does not itself specify that it is EMDR that should be undertaken. In any event, whether that work is voluntary or not is moot, since no prisoner can be made to undertake any offence focused or therapeutic work whether in the community or in prison if they do not wish to undertake it.

35. Finally, on the issue of the trauma/core work, the Application states that there was no timescale offered for the Applicant to complete this work if he were to remain in custody. This is not in my view a ground for reconsideration. The Parole Board has no control or remit in relation to the lack of availability of specific work in the prison estate or in the community, although I accept that it is regrettable if recommended work is not made available to prisoners.

36. The Application also states that the panel did not take into account the fact that the Applicant had been released (and recalled) on 4 occasions on this sentence and had not re-offended on any of them. I agree that evidence of no further offending during a time on licence should be weighed in the balance when a panel looks at the evidence as a whole. It does not however automatically mean that future risk is manageable. A panel's duty, as referred to in this letter, is to consider risk at the time of the review, and the panel took note of past offending linked to serious harm, the direct link as agreed with all witnesses between offending and substance abuse,

the Applicant's difficulties with abstinence from substance misuse, the Applicant's difficulties with coping while in the community as evidenced by the large number of recalls, the panel's own conclusion that core work remained to be undertaken, and placed this in balance with the evidence of no further offending and good engagement while in custody. Both psychologists were concerned about future risk as evidenced in their reports and their oral testimony as recorded in the decision letter.

37. The Application also submits that while drug misuse was a 'significant factor' in the commissioning of the index offence and accepts that there is evidence of continuing drug misuse in the community on licence, there is no evidence to suggest that substance misuse is currently linked to a risk of 'imminent harm'. This is a surprising submission given that the 'independent psychologist' stated in their report that they agreed with the 'prison psychologist's' formulation with respect to the Applicant "*which identifies the functional link between unresolved trauma, substance use, mental health difficulties and offending behaviour*" (from independent psychologist's report). On the subject of imminence of risk of harm, I note that the panel deals with this issue in the decision letter, reporting the COM's statement in one of their reports that in their opinion risk would become imminent when the Applicant relapsed into substance abuse and noting the link between substance abuse, violent offending and serious harm. I cannot find any unfairness or irrationality in the manner in which the panel approached their consideration of harm and links to substance abuse.
38. The Application also submits that that panel erred in stating that the Applicant was evasive about his substance misuse. I note that the decision letter states in its conclusion that the Applicant evidenced 'levels' of minimisation and evasiveness about substance misuse'. I also note that the decision letter records that when the panel asked the Applicant questions about his substance misuse prior to the most recent recall, he stated that he had lapsed but only on a couple of occasions, but when challenged by the panel, he admitted to using Class A drugs 'on occasion' but not every day. When taking the evidence of his difficulties during the recall period as a whole and his answers to the panel, I consider that the panel was reasonable in its conclusion that he had not been fully honest about his drug misuse.
39. The Application also states that if the panel was not satisfied with the risk management plan that was not presented on the day, it had the option to explore other ways in which to manage risk, and the Application states specifically that they could have discussed different options for release address if they were not satisfied with the recommendation that the Applicant be released to a substance abuse rehabilitation centre.
40. There is no evidence that the panel had specific difficulties with the release address. The decision letter is clear that the panel considered that while core work remained to be carried out, the risk management plan was unable to manage the Applicant's risks, as it relied on external management rather than any internal management strategies developed by the Applicant himself.



41. Finally, the Application states that the test for release was not correctly considered and that 3 out of 4 witnesses believed that the Applicant's risk could be managed in the community and that he could complete the necessary outstanding work in the community. It is recorded in the decision letter that the COM's position was that the core work needed to be undertaken in custody, but when challenged by the Applicant's legal representative during the hearing, the COM indicated that the risk management plan could manage his risk. The evidence of the COM changed over the course of the hearing, and the panel would have considered all aspects of this professional's evidence including their stated concerns about release. I cannot see evidence in the decision letter where the POM indicates that they consider the Applicant should be released before undertaking the recommended work, in fact what is stated in the decision letter is that they consider that the work should be undertaken in custody prior to future release. The only clear recommendation that the Applicant could complete the work in a highly structured environment in the community came from the 'independent psychologist' and I have already considered that the panel's approach in taking into account the evidence of both psychological witnesses was balanced and fair.
42. In any event, even had all the witnesses before the panel been in favour of release, it is the job of the panel to look at all the evidence before it, taking into account past and current behaviour and assess risk of harm and re-offending in the future. As long as the panel takes relevant information into account and takes a lawful approach to considering the evidence, and as long as they are able to explain their conclusions, they can disagree or agree with the evidence of the witnesses. In their conclusion, this panel is clear that they consider that outstanding core work is required in order to address risks that are linked to risk of serious harm, and this would need to be done prior to consideration of future release. That makes it necessary for a prisoner to remain in custody. I can find no error in their approach to this decision and therefore dismiss the claim that the panel incorrectly applied the test for release.

## Decision

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.

**Chitra Karve**  
**5 October 2022**