

[2022] PBRA 94

## Application for Reconsideration by Rehman

### Application

1. This is an application by Rehman ("the Applicant") for reconsideration of a decision of the Parole Board dated 11 July 2022 following an oral hearing on 9 July 2022. The decision was not to direct his release.
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)) 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. The amendments to rule 28 came into force on 21 July 2022 for all purposes: see rule 1(2) of the 2022 Rules.
3. I have considered the application on the papers. These are the dossier (which now runs to 598 pages and contains the decision) and the application for reconsideration.

### Background

4. The Applicant is presently serving an extended determinate sentence consisting of a custodial term of 10 years and an extended licence period of 5 years. The sentence was imposed on 27 January 2012. He was first released on 20 May 2016; recalled on 28 November 2016; released again on 13 May 2019; and recalled again on 14 June 2019. After the last recall he was at large until 16 January 2020. The custodial term of his sentence expired on 5 January 2022; he is therefore now in the extended licence period of his sentence. The extended licence period will expire on 5 January 2027.
5. The Applicant's current sentence was imposed for aggravated burglary. With associates he forced his way into the home of his victims. They were threatened with a handgun and a knife. Property was taken and the male victim was forced to disclose the PIN for his card. Until quite recently the Applicant denied the offence; he now admits it.
6. The Applicant has numerous earlier convictions for offences of violence and the carrying of weapons. These include wounding (x2), possession of a firearm, threats to kill, robbery and attempted robbery (numerous), possession of offensive weapons, threatening behaviour and battery. In addition he has numerous convictions for non-violent acquisitive offences.
7. It is plain that many of these offences were committed to gain funds for drug misuse. The Applicant has repeatedly returned to drug misuse after release from custodial



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sentences. Drug misuse is also associated with both his recalls during the present sentence.

## Request for Reconsideration

8. The application for reconsideration was received on 19 July 2022. It has been prepared on the Applicant's behalf by his solicitors. The grounds may be summarised as follows.

(a) The panel's finding that the Applicant lacked "*the internal skills to manage his own risk*" was irrational because (1) there was no explanation as to what this meant; (2) there was plentiful evidence in the dossier (in particular, from the Community Offender Manager ("the COM") and from the DART team (drug and alcohol recovery team) that the Applicant had acquired a range of skills linked to managing his risk; and (3) undue weight was placed on the Applicant managing his own risk when the risk management plan was acknowledged to be robust.

(b) The panel's finding (relating to the second release period) that '*the possibility of a further serious offence was increasingly likely*' was not supportable. The finding was entirely speculative, and it was irrational to give this as a reason for not directing release. The Applicant did not commit another serious offence whilst unlawfully at large; nor did he commit a serious offence during the first release when he also relapsed into drug use.

(c) The panel was required by law to give reasons why it departed from the recommendation of the COM. In evidence, the COM explained why she was supporting release and none of her evidence was seriously challenged during questioning by the panel. The only indication in the decision letter as to why the panel disagreed with the COM is the issue of '*internal skills*'. But the COM was never asked directly in evidence if she thought the Applicant had the '*internal skills*' to manage his own risk.

(d) There was no evidence that it was necessary for public protection that the Applicant be confined.

(e) There was an error of fact in paragraph 3.1 of the reasons.

9. The application relies on the alleged irrationality of the decision. Ground (c) might be said also to raise issues of fairness and/or law – namely the duty to give sufficient reasons for the decision and the duty to give the parties a fair opportunity to address the case against them. I will keep these issues in mind in considering the application.

## Current parole review

10. The current parole review was the second since the Applicant's recall. The first review had been concluded adversely to him on the papers. This review was directed to an oral hearing. It was heard by a two member panel. The panel chair was an independent member. The co-panellist was a judicial member. The panel heard from the prison offender manager ("the POM") the COM and the Applicant. His legal representative attended and provided written closing submissions.

11. Prior to the hearing the COM had provided two reports. In the first, dated 3 March 2022, she had not recommended release, saying she was not able to evidence that the Applicant would comply with licence conditions and engage effectively with his rehabilitation process in the community (dossier, page 437). In the second, dated 24 June 2022, she recommended release subject to a robust risk management plan, saying that he had demonstrated progress in managing his addiction to drugs as evidenced by his positive engagement with the drugs and addiction team at the prison.
12. Although the panel's reasons must be read as a whole, it is convenient to set out two passages in the panel's decision to which reference is made in the grounds of application.
13. The first appears in paragraph 3.1 of the section entitled "Manageability of Risk", commenting on the risk management plan –

*"Given his established history of Class A drug abuse the panel was surprised that accommodation in a residential rehabilitation facility was not part of the risk management plan. However [the COM] told the panel that as [the Applicant] had not engaged with substance misuse services in the community, funding would not be available."*

14. The second appears in paragraphs 4.5 to 4.7 of the section entitled "Conclusions". In its conclusions the panel gave credit to the Applicant for his recent positive custodial conduct and engagement with drug services (paragraph 4.2). Against this, the panel noted his lengthy history of offending and the two recent recalls, the second of which involved him in disengaging with support and rapidly returning to the use of heroin (paragraphs 4.3 to 4.4). The panel then continued

*"4.5 The panel notes his choice to remain unlawfully at large after recall. He was using substances, and not being monitored in any way by the authorities. This suggests to the panel that the possibility of a further serious offence was increasingly likely had he not been apprehended by the Police."*

*4.6 The risk management plan is robust. However, the panel did not consider that [the Applicant] had the internal skills required to manage his own risk. The over reliance on external controls only is of concern, particularly as over time restrictions, such as accommodation in Approved Premises, would be removed or reduced."*

*4.7 For these reasons the panel finds that it remains necessary for the protection of the public for [the Applicant] to be confined. The panel does not direct release."*

## Relevant law

15. As noted above, the Applicant is serving an extended determinate sentence. Such a sentence is eligible for reconsideration: see rule 28(2)(b) of the Parole Board Rules.
16. In the box at the beginning of its decision the Panel has stated the test for release to be that the Parole Board will direct release if it is satisfied that it is no longer necessary



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for the protection of the public that the prisoner be confined. Subject to what I say below, this is the test applicable to all cases before the Parole Board; and the box is automatically populated with this wording by the Parole Board's template.

17. However in paragraph 4.7 of its reasons at the point of decision the panel has expressed itself differently. It has made a positive finding that it remains necessary for the protection of the public that the Applicant be confined. This is consistent with the decision in **Sim v Parole Board** [2004] QB 1288, which is authority for the proposition that where a prisoner is recalled during the extended licence period of an extended sentence the Parole Board must direct release unless it makes a positive finding that it remains necessary for the protection of the public that the prisoner be confined. In this case the Applicant was recalled during the custodial period of his sentence; but the panel was in my view correct to apply the reasoning in **Sim** since it was considering release during the extended licence period. I am satisfied that the panel applied the correct legal test; and I would add that in any event the test in **Sim** is more favourable to a prisoner than the standard release test.
18. The concept of irrationality is derived from public law. The test is whether the 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". See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
19. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where a party was not given a fair hearing, or properly informed of the case against them, or allowed to put their case properly.
20. There is a duty on the panel to give sufficient reasons for its decision. Whether a failure to do so is to be characterised as amounting to irrationality, unfairness or error of law may not matter now that a reconsideration challenge can be made on all these grounds. However, I note that the duty was put as a matter of fairness by Lord Carnwath in **Dover District Council v CPRE Kent** [2017] UKSC 79 at paragraph 51, applied in **R (Stokes) v Parole Board** [2020] EWCH 1885 and **In the case of TC** [2022] PBRA 57. The reasons do not have to be drafted elaborately or at great length; they should identify in broad terms the factors relevant to risk of serious harm, the considerations which led to the final decision and the panel's reasons for the conclusion it reached: see **Oyston** [2000] PLR 45. If the panel is differing from an expert its reasons should explain why; but the extent of the reasoning will depend on the issue. The panel's reasons should be read as a whole.

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

21. On behalf of the Secretary of State, The Public Protection Caseworker Section (PPCS) has not made any representations on this application.

## Discussion

22. Ground (a)(1). The panel's finding that the Applicant did not have "the internal skills to manage his own risk" was, I accept, central to its conclusion that he should not be released. I do not accept that this phrase required any further explanation. Every applicant for parole who is assessed as posing (as here) a high risk of serious harm will have risk factors which require management. To some extent they can be managed externally; but it is a serious problem if the applicant lacks the internal skills to manage his risk factors. In the Applicant's case the panel had identified earlier in its decision what his risk factors were: they included drug abuse, lack of consequential thinking and a failure to make use of the support on offer to him. It was assessing the extent to which he had developed himself the skills to manage the risk factors it had identified.
23. Ground (a)(2). There was, I accept, evidence in the dossier that the Applicant had recently engaged with drug services and recently stayed out of trouble in prison. The panel noted and acknowledged this recent improvement: see paragraphs 2.6, 2.12 and 4.2 of the decision. But I do not accept that the panel's conclusion that he lacked the internal skills to manage his own risk was irrational. There was a wealth of evidence over many years to support this conclusion, including a very rapid relapse, disengagement and disappearance after his last recall and mixed conduct in prison since recall: these matters were also acknowledged by the panel in paragraphs 4.2 to 4.4 of its conclusions. The panel was not bound to find that a short recent period of improvement meant that the Applicant had acquired significant internal skills.
24. Ground (a)(3). I do not accept that the panel was irrational in placing weight on its assessment of the Applicant's internal skills; this is a vital part of any risk assessment. The Applicant's rapid disengagement when last released – even though he had the support of approved premises, drug agencies and his community offender manager – demonstrates the importance of this assessment in his case.
25. Ground (b). I have quoted paragraph 4.5 of the panel's reasons above. I do not accept that the panel was irrational in finding that "the possibility of a further serious offence was increasingly likely" if he had not been apprehended. By the time of his arrest the Applicant was using heroin, street homeless and disengaged from family and drug support: see paragraph 2.5 of the panel's reasons. He was arrested in possession of heroin and crack cocaine. The panel was entitled, bearing in mind the association between his violent offending and his drug abuse, to find that these facts enhanced the risk of a further serious offence.
26. Ground (c). It is plain from the panel's reasons that it took evidence from the COM as to why she supported release. There is a summary of this evidence in paragraphs 2.11 and 2.12 of the reasons; and she had provided two reports, the effect of which I have summarised above. It is suggested that the panel did not directly question her as to whether the Applicant had the "internal skills" to manage his risk; but it is plain that she gave evidence about his improved attitude and engagement. Whether he was likely to comply with a risk management plan, and what the risk was that he would choose to disengage as on the last release, were plainly issues for the panel to assess. He and his representative were allowed to and were able to put his case on these issues. I do not accept that there was any unfairness in the procedure.

27. I do not accept that the panel was irrational to have rejected the COM's recommendation; as noted above she had recently changed that recommendation and relied on a quite short period of improved engagement and attitude against many years of serious offending and disengagement. Nor do I accept that the reasons given were insufficient. The panel's short conclusion in paragraph 4.6 must be seen against its reasons as a whole, including paragraphs 4.3 to 4.5. The panel justifiably assessed that the Applicant posed a risk of serious harm to the public; the question was whether, given his recent improved attitude and engagement, the risk could be managed after release. This was a matter of judgment and assessment on which views might differ; and the panel sufficiently made clear why its view differed from that recently formed by the COM.

28. Ground (d). I do not accept the argument that there was no evidence that it was necessary for public protection that the Applicant be confined. There was ample evidence from which the panel could draw this conclusion, summarised in paragraphs 4.3 to 4.5 and set out in more detail earlier in its conclusions.

29. Ground (e). It is said that there is an error of fact in the second sentence of paragraph 3.1 of the reasons, quoted above. It is not easy to see quite what error of fact is asserted: it does not appear to be challenged that the Applicant had not engaged with drug services in the community, or that funding was not available for residential drug treatment. The suggestion appears to be that the panel may have misunderstood the reason why funding was not available and/or ought to have recorded that a further application could be made for funding at some point after the Applicant's release. I am not satisfied that there was any error of fact in the panel's reasons. In any event the panel went on to find that there was a robust risk management plan; and the non-availability of residential rehabilitation did not figure in its conclusions.

## Decision

30. For these reasons I do not consider that any ground for reconsidering the decision is made out. The application for reconsideration is refused.

**David Richardson**  
**1 August 2022**