

[2023] PBRA 10

## Application for Reconsideration by Johnston

### Application

1. This is an application by Johnston (the Applicant) for reconsideration of a decision of an oral hearing dated 10 December 2022 not to direct release but to recommend a transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are
  - The Decision Letter;
  - Representations on behalf of the Applicant dated 16 December 2022; and
  - The Dossier, which currently consists of 757 numbered pages, the last document being the Decision Letter.

### Background

4. The Applicant is now 52 years old. He is serving a sentence of life imprisonment imposed for murder on 12 May 2004, when he was 34, with a minimum term of 14 years less time served on remand. He intervened in a fight between his friend and the victim. During the fight the Applicant produced a knife and stabbed the victim 3 times. The victim ran to a nearby petrol station and asked for an ambulance to be called. He then collapsed, and died in hospital. The Applicant pleaded Not Guilty on the basis that he ought to be convicted of manslaughter. His tariff expired in August 2017.
5. The Applicant had many previous convictions, including an escalating pattern of violent behaviour, with convictions for assaulting police officers in 1990 and 1991, for assault occasioning actual bodily harm in 1996, and for causing grievous bodily harm with intent, again in 1996, for which he received a 6 year sentence of imprisonment.



6. The Applicant was released on licence by the Parole Board on 15 March 2019, following a hearing. On 4 July 2019 he was recalled. The police had charged him with offences of attempted murder and possession of an offensive weapon. Those proceedings were discontinued.

### **Request for Reconsideration**

7. The application for reconsideration is dated 16 December 2022.
8. The grounds for seeking a reconsideration nearly all relate to what the panel described as the central issue: the panel's consideration of the incident that led to the Applicant's licence being revoked and his consequent recall. This was an incident of violence involving the Applicant and his relative DJ. The panel conducted a Fact-Finding Hearing, concluding, on the balance of probabilities, that "*the Applicant deliberately and unlawfully inflicted the injury on DJ*". The panel then directed updated reports from the professional witnesses that took account of this finding.
9. Between the Fact-Finding Hearing and the final hearing the Applicant changed Legal Representatives. His new Representative objected to the panel's formulation of its finding, and the panel amended its finding to one that "*The injury [to DJ] was inflicted by [the Applicant] and deliberately so ... The parties should be aware that this finding of fact does not equate to a finding that any criminal offence has been committed by [the Applicant]*." I will discuss this re-formulation below.
10. I summarise the grounds of challenge to the panel's decision not to release as follows:
  1. Witnesses were prevented from putting their case properly, because they seemingly had to accept the panel's Finding of Fact. Prior to that finding there was support for release.
  2. The amendment referred to in Paragraph 9 above was made too late for the professional witnesses to take it into account in their reports.
  3. From the point of recall to a final decision in this case took 3 years and 5 months, which is procedurally unfair.
  4. The Fact-Finding Hearing on 22 February 2022 was unfair, because a witness who was not on the Timetable gave evidence unexpectedly, so that the Applicant did not have a fair opportunity to contest what she said.
  5. Phone records were said to have been destroyed and not available, yet they were used at the Fact-Finding Hearing when he just had days' notice of them.



6. *"Arguably the witness composition was bias [sic] and one-sided at this first-stage oral hearing."*
7. The panel was not impartial after making the Finding of Fact, because the second-stage hearing started from a point of the Applicant deliberately (and to some extent in the panel's view unlawfully) caused injury to DJ.
8. The case of **Pearce (R on the Application of Pearce v The Parole Board of England and Wales and the Secretary of State for Justice [2022] EWCA Civ 4)** establishes that *"An assessment of risk can only be made upon undisputed or established facts."* Since the Applicant disputes the facts as found, it is argued (apparently) that the panel contravened the **Pearce** principle.

11. The Representations assert that the Finding of Fact is disputed because

- (a) The panel took selective evidence, not, as a court would, taking evidence from key people involved in the incident, including DJ, the Applicant's adoptive brother MJ, and others specified.
- (b) The police officer who interviewed DJ did not inform DJ he was being filmed.
- (c) There is no forensic evidence. I presume this should read *"There is no scientific evidence."*
- (d) There was no weapon found: alleged to be a knife, but also mention is made of a ceramic tile.
- (e) There is no available CCTV evidence.
- (f) There is no CCTV evidence of the Applicant with blood on him or his clothing.
- (g) There is no witness evidence of the Applicant having blood on his clothing.
- (h) The evidence about him changing his clothing before or after returning to his Approved Premises is confusing.
- (i) There is reference in the police report to a witness seeing the Applicant leaving the scene with blood on his face, but this witness is unidentified and there is no CCTV evidence.
- (j) The telephone evidence was said to have been destroyed, but resurfaced without explanation.
- (k) There were no phone records from the Applicant's phone.
- (l) The police discontinued the charges against the Applicant.
- (m) The burden of proof is not on the prisoner.
- (n) The Finding of Fact was made on the basis of the Parole Board's *Guidance on Allegations*, which were disapproved in **Pearce**.

12. The Applicant submits that the panel's decision was irrational and procedurally unfair.

### Current parole review



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13. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release or a recommendation for open conditions on 15 August 2019.
14. The case was first listed for hearing in October 2020 and February 2021, before a different panel from the one that concluded the case. That first panel deferred the case to a different panel for reasons fully set out in a Deferral Notice dated 20 February 2021, which records the invitation of the Applicant's then legal representative to the panel to defer the case for further inquiries to be made.
15. The case was not ready to proceed at the next hearing on 21 July 2021, which date the second panel therefore used as a directions hearing. The panel decided that there should be a two-stage procedure, with facts being found at the first hearing and the substantive issues relating to the panel's decision being considered at a second hearing – as eventually happened.
16. The first hearing before the second panel took place on 22 February 2022 and was in part a face-to-face hearing. The panel heard evidence from a Detective Constable, a Detective Sergeant (the witness who, the Representatives aver, was not on the Timetable), the Community Offender Manager (COM), the Prison Offender Manager (POM), and a prison-based psychologist. The Applicant was represented throughout.
17. Following that hearing the panel set out its Finding of Fact in Panel Chair Directions dated 2 March 2022 (corrected, as set out above, on 20 November 2022). The hearing was scheduled to resume on 20 April 2022. However, the Legal Representative requested an extended adjournment to enable a psychologist to be instructed on the Applicant's behalf. The hearing was listed to resume on 14 September 2022. On 25 May 2022 the Legal Representative informed the panel that the Applicant had withdrawn his instructions to her.
18. The September hearing had to be further adjourned because of previously unforeseen and unavoidable circumstances involving the availability of one panel member.
19. The final hearing took place on 1 December 2022 and the review was concluded. The panel consisted of two independent members and one psychologist member of the Parole Board. The witnesses at the second hearing were the COM, the POM, the prison-based psychologist and the psychologist instructed on behalf of the Applicant. The dossier at that stage contained 720 pages. The Applicant gave evidence at both hearings, and was legally represented again at the final hearing. His representative questioned witnesses and made submissions to the panel.

## The Relevant Law



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20. 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.
21. 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.
22. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

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

*Parole Board Rules 2019 (as amended)*

23. 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)).
24. 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)).
25. 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*

26. 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."*

27. 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.
28. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
29. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

#### *Procedural unfairness*

30. 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.
31. 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.
32. The overriding objective is to ensure that the Applicant's case was dealt with justly.



Other

33. 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

34. The Secretary of State has indicated that he does not wish to make any representations in this case.

### Discussion

35. There seems to be a suggestion (see Paragraph 10(8) above) that the panel could only make a finding of fact with which the Applicant agreed. This is obviously nonsense on the face of it, and is contrary to a substantial line of authority including **DSD** above (the **Worboys** case). It is part of the panel's responsibility to make findings of fact upon which to base its assessment of risk. Once a finding of fact is made, the panel will, of course, act on it. The panel can properly require witnesses to accept any such finding and make their own expert assessments on that factual basis, just as the witnesses (and the Parole Board itself) must accept the correctness of any verdict of a criminal court. It is neither an improper restriction on the witness, nor an indication of bias in the panel, for that to be the case. Grounds (1), (7) and (8) are misconceived.

36. As to Ground (3). The delay in this case was long and unfortunate but did not impact on the fairness of the two hearings or the end result.

37. The Applicant complains that the amendment to the facts found came too late, in that the reports for the final hearing had already been written in the light of the earlier version. I question whether the amendment was in fact necessary. I am satisfied that it was irrelevant so far as the report writers were concerned. The first version, I remind myself, was *"the Applicant deliberately and unlawfully inflicted the injury on DJ"*. The second was *"The injury [to DJ] was inflicted by [the Applicant] and deliberately so ... The parties should be aware that this finding of fact does not equate to a finding that any criminal offence has been committed by [the Applicant]."* For the report writers there is no significant difference between the two. I am not sure there is a significant difference in any event.



38. The Applicant's ultimate account of the recall incident was that it was an accident. It is important to note that at no stage did the panel find that the Applicant committed the offence of attempted murder. What the panel did was to reject his account of accident, and any suggestion of self-defence, and find that the Applicant was the person who inflicted the injury that DJ undoubtedly sustained, and that he did so deliberately. This is what the final formulation means. As a matter of logic, an injury deliberately inflicted without lawful justification is unlawful. The final version simply omits the word unlawful. Bearing in mind what I say below about the Parole Board not deciding criminal charges, the amendment was appropriate, but did not affect the substantive finding.
39. The substantial issue that is raised relates to the Fact-Finding hearing. The Parole Board cannot and does not follow the procedural requirements of a Crown Court trial. The Board is entitled to act on hearsay evidence, provided it is careful and analytical when it does so: see **DSD [150-152]**, **Brooks [2004] EWCA Civ 80**, **Sim [2003] EWCA Civ 1845** and numerous other cases. The Parole Board has no power to summon witnesses, and does not take evidence on oath. It does not determine a criminal charge, but evidence of other offending can be considered as part of the global assessment of risk (**Pearce [12]**, citing **West [2003] 1 WLR 705**). What **Pearce** decides is that the Parole Board must not act on allegations, but on evidence.
40. The question, therefore, is whether the Fact-Finding hearing in this case was (a) Procedurally fair and (b) Arrived at a conclusion that was based on the evidence. As to (b) I will apply the test in **Wells** set out above.

#### *The Fact-Finding Hearing – Procedural Fairness*

41. The first complaint is that the Detective Sergeant gave evidence without notice. She is recorded in the Decision Letter as giving evidence to the following effect: that a subscriber check showed that the phone that sent a number of texts to DJ before the incident was registered to the Applicant at his then address (which does not appear to be in dispute); that the text messages provide a motive for an attack on DJ by the Applicant (which was a matter on which the panel could draw its own inferences); that the Approved Premises records showed the Applicant leaving the AP not long before the incident (not in dispute); that a still from a CCTV camera shows him to be wearing gloves on a July day (not in dispute - the Applicant said he suffers from cold hands at all times); that she spoke to DJ at the hospital and he did not seem to her to be under the influence of alcohol or illicit substances; that she thought the records of movement at the AP indicated that contact between the Applicant and another resident (AE) had been pre-arranged, with the implication that AE helped to dispose of bloodstained clothing; that she had checked police information systems and could find no record of DJ experiencing mental health issues.





42. Much of the Detective Sergeant's evidence was of an essentially formal nature, or covered by another officer, and most of her important evidence was not in dispute. In any event, it seems that no application for an adjournment of the Fact-Finding hearing was made on this (or any other) ground, which it would have been had the Applicant or his then representative seen anything unfair in the witness giving evidence as she did. I cannot find anything in Ground (4).
43. The next complaint is that the phone records had apparently been said at one stage to have been lost, but in fact were used in the Fact-Finding hearing, and that the Applicant only had a few days in which to consider them. Again, no adjournment was sought to deal with any suggested unfairness. The phone texts between the Applicant and DJ were central to the Fact-Finding. At the hearing the Applicant said he had only seen the texts a week before the hearing. He did not dispute that they had been sent from his phone but denied sending them. He said he did not know how to send a text. He had not permitted anyone else to use his phone out of his sight. He could not offer any explanation for the texts, except to suggest that the police may have been responsible for them.
44. The texts were produced by way of screen shots of DJ's phone, evidenced by witness statements from a police officer. In the circumstances of this case, and of the texts themselves, and bearing in mind what I have said in Paragraph 38 above, the panel's decision to admit the phone texts was procedurally fair and not irrational. Ground (5) is not made out.
45. The next complaint is not very well expressed, but I interpret it as a complaint that the panel did not hear evidence from the witnesses who might have been called in a criminal trial. Those witnesses include DJ, the Applicant's nephew; MJ, his brother (these two were present at the scene); certain witnesses as to fact and some police officers. Again, I refer to Paragraph 38 above. The panel considered the evidence it did have in a careful and discriminating way. Its decision to work on the evidence it had cannot be regarded as procedurally unfair as defined above. Ground (6) is not made out.

#### *The Fact-Finding Hearing – Rationality of Conclusion*

46. It is important to bear in mind what the evidence was at this hearing. It is extensively set out in the Decision Letter. I note some significant aspects of it.
- (1) The Applicant was, as he accepts, present and involved in a physical struggle with his nephew DJ.
  - (2) After the struggle, there is no dispute, DJ had an incised wound to the left of his neck.
  - (3) The Applicant left the scene before the emergency services arrived, returned to his AP and changed his clothes.



- (4) The Applicant left the AP before the incident and did not return for his 23.00 hrs to 7.00 hrs curfew. He went to the police station at 9.13 hrs the following day. There he refused to be interviewed and refused to leave his cell to be photographed and provide samples until the Territorial Support Group arrived at the police station.
- (5) The text evidence from DJ's phone evidenced an ongoing argument between the Applicant and DJ starting on 23 June 2019. I will set out the most relevant communications. It starts with the Applicant saying *"I hope your a big enough man to deal with what you have now got coming looking forward to catching up with you tick tock tick tock."* DJ messages back *"Uncle [...] I know I was wrong I was off my head on pills that's know excuse I know I wasn't myself I'm sorry."* On 24 June the Applicant texts *"You've got to Wednesday to Come to me other wise I'm coming for you there's a couple of proper gang members here off your Manor I've known for years they have said if I need anyone to pay a house call to your mums it's not a problem need I say more ... don't ever call me uncle again because we're no longer related."* On 2 July DJ texted the Applicant's phone to say *"How long till u at west ham park."* This was the shortly before the incident. DJ then sent a message to SR, saying *"Bout to have a 1 on 1 with my uncle here we go lol."*
- (6) The Applicant went to the scene of the incident (in July) wearing gloves. There is video of the Applicant on the ground struggling with DJ. The Applicant's adoptive brother is standing over them. The Applicant agrees with those identifications.
- (7) Video from a police body worn camera shows DJ at the hospital, saying he knows the identity of his assailant but is unwilling to name him because it will affect his family if he does. He said he was assaulted with a Stanley knife. He said he was scrapping it out with his assailant whom he punched back. He was getting on top of his assailant who did not like it. He assumes the assailant must have had a knife stashed in a bush.
- (8) A statement from a police officer relates an overheard conversation between DJ and MJ in which DJ said *"I was winning, and then he pulls out a knife and stabs me and then start walking off, and you went after him."* MJ said *"I didn't know you'd been stabbed."* DJ said *"You then walked with him up to the station to try and calm him down."* The two then looked at the officer and stopped talking. DJ shouted *"Mum's going to tell them"*, pointing at the officer. Shortly afterwards DJ's mother and SR spoke to DJ at his bedside, after which they approached the officer and told him it was the Applicant who stabbed DJ. SR then showed the officer the last message referred to in subparagraph (5) on her phone. The officer seized the phone.
- (9) The police searched the Applicant's room at the AP the following day and found a newly opened packet of retractable knives with one knife



missing. Neither the weapon used in the assault nor the Applicant's gloves have been recovered.

- (10) The Applicant gave a variety of accounts to professional witnesses. He first told his COM, shortly after his recall, that he had intervened in a fight between DJ and an unknown assailant, who cut DJ. The Applicant left the scene because he did not want to get arrested on life licence. He later admitted this version was not true. He told a psychologist that he had a call from MJ to attend the scene. DJ was drunk and arguing with MJ. DJ picked up a piece of metal from the ground and cut himself on the neck. To a POM he said MJ asked him to go to the scene. DJ was drunk, staggering around. He picked up a piece of metal from the ground and threatened to cut his own neck. The Applicant attempted to stop him, they tumbled over and in doing so DJ hurt his own neck. To another POM he said when he arrived at the scene he saw DJ who was drunk, agitated and holding a metal tent peg to his neck. When the Applicant and MJ tried to reason with him, DJ grabbed the Applicant and tried to throttle him. They struggled on the ground. After they got up DJ picked up a piece of broken tile and drew it across his neck. To another COM he said he went to MJ's address where DJ was intoxicated. The Applicant tried to help but matters escalated, DJ attacked him and in doing so cut himself on the neck with a tile.
- (11) DJ submitted a letter two years after the event, signed by him and other family members, saying he tried to take his own life, the Applicant tried to stop him and fought to take the knife from him. DJ selfishly let the family believe it was the Applicant who caused his injury.
- (12) The Applicant told the panel he went to meet MJ, unaware that DJ would be there. DJ was distraught and had obviously been drinking and taking something. DJ picked up a wire tent peg and held it to his throat. MJ managed to take the tent peg from him. DJ then lunged and grabbed the Applicant. They fell over. The Applicant managed to break free. DJ walked round the garden and returned bleeding from the neck. DJ was holding a piece of ceramic tile which he said he had used to injure himself. He denied possession of a knife or that there was one at the scene.
- (13) The panel noted that at times the Applicant was ill at ease and became very agitated when questioned. He later apologised for his demeanour. He suggested a case had been put together against him because of his criminal past and the police need to achieve their targets.

47. The panel rejected the Applicant's evidence that DJ self-inflicted his injury and found, as discussed above, that the Applicant inflicted the injury on DJ and that he did so deliberately. It gave extensive and cogent reasons for its finding. The



panel took into account the matters relied on behalf of the Applicant. In particular, the panel found that there was no plausible explanation for the text messages except that the Applicant sent them, and that they show a motive for the assault and evidence of a pre-planned encounter where the use of violence was anticipated. The evidence that DJ's injury was caused by a knife was "*compelling*": the panel pointed out that, whatever the motive for DJ's letter, in it he said, as he had said at the hospital, that a knife caused his injury, not a metal peg or a broken ceramic tile. The panel did not find the Applicant to be a truthful witness.

48. The only challenge raised to the decision not to release the Applicant is a challenge to the rationality and procedural fairness of the Fact-Finding. The panel's conclusion that the Applicant's risk of causing further serious harm has not yet reduced to a level where he can be safely managed in the community could, in my view, be sustained on the basis of his text conversation with his nephew alone, involving as it did threats and challenges. That in the end it led to a confrontation which resulted in the Applicant using violence without lawful justification was a conclusion entirely open to the panel on the evidence.

49. The only decision in this case which can be the subject of a Reconsideration Application, the decision not to release, cannot be described as irrational as defined above.

## Decision

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

**Patrick Thomas KC**  
**12 January 2023**

