

[2023] PBRA 118

Application for Reconsideration by Mohamed

Application

1. This is an application by Mohamed (the Applicant) for reconsideration of a decision of a panel (the Panel) of the Parole Board dated 30 May 2023 (the Panel Decision) making no direction for the Applicant's 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 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 Panel Decision, the application for reconsideration of the Panel Decision, the email dated 15 June 2023 from the Public Protection_Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating the matters set out in paragraph 34 and the Applicant's dossier containing 249 pages.
4. The grounds for seeking reconsideration are that the panel erred in not concluding that the Applicant's risk could be managed in the community and that his release should have been ordered because it was irrational to refuse to release him.

Background

5. On 24 April 2017, the Applicant received an extended determinate sentence of 10 years' comprised of a period of 5 years' imprisonment and an extension period of 5 years' for an offence of attempted robbery.
6. On 4 February 2017, the victim was asked by a male if he could provide a lighter and the victim was then approached by the Applicant who demanded the victim's watch stating that he had a "big shank" on him. The victim began to run away but was caught by the Applicant and the other male who grabbed hold of the victim's coat, but he was able to slip out of it and keep running. The Applicant and the other man caught up with the victim and grabbed his t-shirt which was ripped before the victim struggled free and was able to escape.
7. The offence was committed while the Applicant resided at Approved Premises (AP) after he had been released on license on 30 November 2016 while he was serving a sentence of 16 months' detention in a Young



Offenders' Institution imposed on 29 March 2016 for inflicting grievous bodily harm which involved throwing boiling water at a prison officer.

8. The Applicant had previous convictions for a wide range of offences including dangerous driving, possession of a knife, robbery, numerous breaches of anti-social behaviour orders, possession of an imitation firearm and various assault offences. In addition, he was part of a group in 2013 who were involved in dealing in drugs and committing robberies in his local area.
9. The pre-sentence report for the index offence considered that the Applicant's violent offending was escalating. At the time when he was sentenced for the index offence, the Applicant was assessed by Probation as presenting a very high risk of causing serious harm to staff, especially police and prison officers.
10. In relation to the index offence, the Applicant told the panel that the victim must have been "*scared, worried sick*" and that he did not have a knife on him but his co-defendant did. The Applicant admitted to the panel that he used to carry a knife for his own protection.
11. Since being sentenced for the index offence, the Applicant has been convicted of: -
 - Common assault on 20 September 2018 for which he received a concurrent sentence of 4 weeks' custody after the Applicant, while in custody, had punched a prison officer in the face causing him to fall to the ground and injure his wrist; and
 - Assault and criminal damage on 24 November 2022 for which he received a consecutive sentence of 20 weeks' custody for the assault and a concurrent sentence of 2 weeks' custody for causing the criminal damage after the Applicant, while in custody, had thrown a television and punched a prison officer.
12. Prior to his release, the Applicant had not committed any risk reduction work. His prison conduct was very poor, and he received 164 extra days in custody for adjudications.

The period after release

13. The Applicant was released automatically on 9 August 2022 under licence, and he was recalled just under 6 weeks later on 19 September 2022 for breaching the terms of his curfew and for removing his GPS tag in breach of the terms of his licence. A female stating that she was the Applicant's sister arrived at the AP where the Applicant was living at 11pm on 18 September 2022. While she was talking to the AP staff, the Applicant came down the stairs and left the building. He got into a car with the female and drove off. There was evidence that his family had taken him to hospital and that he was discharged at 5.49pm on 18 September 2022.



14. On the morning of 19 September 2022, a female arrived at the AP and reported that the Applicant had blocked her phone and stolen money; she was advised to contact the police. The GPS tagging providers have stated that the Applicant had removed his tag at 11.58pm on 18 September and that was a further breach of his conditions. He was then recalled.
15. The Applicant had initially engaged well when on licence, but he told the panel that he had struggled to sleep on his release from prison.
16. Since his return to custody, the Applicant has given an explanation about his conduct which led to his recall stating that he had met a female, had sexual intercourse with her and had borrowed some money from her to buy food. The texts on the Applicant's phone showed that the female was aware that he was residing at the AP. According to the AP, the level of texts from the female demanding repayment of money had increased and that this began to impact his mental health. The Applicant accepted that he had handled the situation badly by leaving the AP and breaking the terms of his curfew. He explained to his Community Offender Manager (COM) that he cut off his tag and why he did not want probation to know of his location. He accepted that he should have raised his concerns with probation or AP staff.
17. The Applicant has not attempted to minimize the seriousness of his conduct in leaving the AP when he was on licence. His conduct has improved since his recall as compared with his previous custodial behaviour. By the time of the panel decision, the Applicant had received 19 positive comments from staff. The panel also noted that the Applicant had made "*significant progress in improving and stabilizing his prison behaviour*". His evidence was that he had changed and that he had come to realize that he needs to seek help from others. He accepts that he needs further treatment to reduce his risk factors and he appeared motivated to engage with such treatment. The Applicant hoped to be given the opportunity to complete this work in the community.
18. A Programme Needs Analysis (PNA) has assessed the Applicant as requiring a high intensity adapted programme while his Prison Offender Manager (POM) explained that she was trying to arrange a transfer to complete this work and take part in the Psychologically Informed Planned Environment (PIPE), a regime designed and supported by psychologists to help people recognise and deal with their problems but the transfer has been put on hold because of the parole hearing and because of prison population pressures. She has also referred him to the stabilization, progression and recovery programme and he was, at the time of the parole hearing, on the waiting list for that programme. The panel noted that the Applicant was aware of both these referrals and that he had expressed his willingness to engage.
19. The Applicant was assessed by the prison's Mental Health In Reach Team (MHIT) when he returned to the prison, but he declined any support and at the time of the panel's decision, MHIT had no current engagement with him.

The hearing before the panel



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20. A two-member panel of the Board comprising 2 independent members convened for an oral hearing at the prison on 23 May 2023 at which the Applicant was legally represented.
21. The panel heard oral evidence from:
- (a) the Applicant's POM;
 - (b) The Applicant's COM; and
 - (c) the Applicant

Risk factors

22. At the time of his recall, the Applicant's risk factors included his *"emotional wellbeing, perceived disrespect, financial gain, conflict situations, [and] feeling undermined/embarrassed"* while his *"risk was considered imminent"*.
23. The most up to date assessment of Probation at the time of the parole hearing was that the Applicant was then assessed as posing *"a very high risk of causing serious harm to the prison staff and prisoners, a high risk to the public upon release and a low risk to known adults and children"*. The Applicant's POM and COM agreed that his risk to prison staff and prisoners could at the time of the hearing be reduced to high *"given the improvement in his conduct since recall"*.
24. The Applicant's Offender Group Reconviction Scale (OGRS), an assessment of risk of re-offending, score placed him within the category of offender with a high risk of reconviction within 12 to 24 months. His general re-offending predictor (OGP) for proven general type reconviction was assessed to be *"medium"* as was his OASys, Offender Assessment System, violence predictor (OVP), an assessment of risk of re-offending for proven violent type reconviction, while his risk of serious recidivism was also assessed to be *"high"*. The Applicant's COM considered that these OGRS and RSR, (risk serious recidivism), actuarial scores present an accurate reflection of the dynamic risk posed by the Applicant in the community. The COM in his written report considered that the Applicant posed *"a high risk of violent reoffending in custody and the community and that his risk of harm is imminent with the potential to cause significant and serious harm"*.
25. The OASys, the probation service assessment report, of the Applicant explained that his risk:
- "Is assessed as being greatest in situations where he feels misunderstood disempowered or spoken down to. Given that this is linked to his core beliefs and attitudes that others may perceive him as 'stupid' or 'different', and he needs to act before he is harmed, it is near impossible to predict or avoid such a situation. As a result, his anger is easily triggered on a very frequent basis resulting in the use of violence to counter feelings of vulnerability and regulate his distress and properly communicate his feelings. [The Applicant] poses an imminent risk of harm to those around him"*.



26. The panel explained that it *"broadly agrees with these risk assessments"* and concurs with the conclusion that the Applicant now poses *"a high risk of causing serious harm to Prison Officers and other prisoner[s]"*. The panel concluded that having taken into account the Applicant's prison record it assessed that he *"poses a high risk of violent reoffending on release into the community"*.
27. The panel took into account in deciding whether to order the release of the Applicant many factors supporting his release, including that:
- (a) The opinion of both the COM and the POM recommending the Applicant's release on license and recording that the Multi Agency Public Protection Arrangement (MAPPA) meeting supported the Applicant's release;
 - (b) *"[The Applicant's] good progress on license in the 6 weeks before his recall, he was engaging positively with his COM and the community OPD team, did not appear to be taking drugs and did not reoffend"*;
 - (c) The Applicant's *"engagement and motivation to work with professionals"* and the *"evidence of increasing maturity and of [the Applicant] taking responsibility for his actions and future"*;
 - (d) The fact that the Applicant's COM considers that *"despite his recall [the Applicant's] behaviour and engagement on licence has been positive especially given his conduct in custody"*. The COM believes that the Applicant *"is motivated to comply in the community and can be managed on this very robust Risk Management Plan"*;
 - (e) The Applicant's evidence that *"he now knows he needs to seek help from his family and professionals"*;
 - (f) The Applicant's protective factors which include the support of his family who *"cooperate with probation in reporting on his emotional well-being and seek medical support when needed"*;
 - (g) The Applicant's *"recent improved compliance and engagement demonstrating his growing maturity"*;
 - (h) The Applicant's improved prison conduct as shown by the fact that since recall he has received 19 positive comments from staff and no proven adjudications; and
 - (i) Its conclusion that the Applicant *"has made significant progress in improving and stabilizing his prison behaviour"*.

(These factors will hereinafter be collectively referred to as 'the Applicant's positive factors').

28. The panel accepted that *"the risk management plan is very robust"* but it concluded that [the Applicant's] risks could not be managed in the community until *"he has completed intensive risk reduction work in custody and has developed the skills to allow him to make a successful and safe future in the community."*
29. The factors which influenced the panel in reaching that conclusion after taking account of the Applicant's positive factors were:
- (a) *"[The Applicant] has a very serious history for a young man of his age."*;
 - (b) *"[The Applicant] struggles to cope in the community and has been in prison for most of the time since he was aged 16."*;



- (c) *"The index offence of Attempted Robbery was committed just over 2 months after his release on licence for an offence of GBH."*;
- (d) *"[The Applicant] has a significant history of adjudications and convictions for violence against prison officers."*;
- (e) The Applicant's conviction on 12 September 2018 for common assault of a prison officer and his conviction on 24 November 2020 for assault occasioning actual bodily harm and criminal damage which entailed throwing a television and punching a prison officer as specified in paragraph 12 above;
- (f) In September 2022 *"he was recalled after less than 6 weeks on licence for breaching licence conditions."*;
- (g) *"[The Applicant's] recall demonstrated poor coping and thinking skills."*;
- (h) [The Applicant's] recall was correct;
- (i) The panel's assessment is that the Applicant *"poses a high risk of violent reoffending on release into the community."*;
- (j) Its conclusion to broadly agree with the conclusion that the Applicant *"poses an imminent risk of harm to those around him"* and that *"his anger is easily triggered on a very frequent basis resulting in the use of violence to counter feelings of vulnerability and regulate his distress and properly communicate his feelings."*
- (k) *"The Panel considers most of [the Applicant's] risk factors to be outstanding and untreated."*

(These factors will hereinafter collectively be referred to as 'the Applicant's negative factors').

The Relevant Law

Irrationality

30. 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."

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

Other



32. 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 uncontroversial 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."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.
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 summarize 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 craftsmanship."*

The reply on behalf of the Secretary of State (the Respondent)

34. PPCS stated in an email dated 15 June 2023 that the Respondent makes no representations in response to the reconsideration application by the Applicant save –
- (a) To confirm that the Applicant has been identified as requiring the accredited programme "Becoming New Me+" (the specified programme) to support his learning needs when he engages with risk related work;
 - (b) To explain that the specified programme is not available at the Applicant's present establishment and a time frame for the Applicant's transfer to another establishment to engage with the specified programme cannot be provided.

Discussion

35. In dealing with the grounds for reconsideration, it is necessary to stress five 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 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.



36. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
37. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
38. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.
39. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

The grounds for seeking reconsideration

40. The Applicant contends that the Panel Decision should be reconsidered as it was irrational of the panel not to direct the release of the Applicant. In support of this contention, reliance is placed on:
- (a) The Applicant's "*vastly improved custodial conduct*" since his recall which means that it was irrational not to order his release (Ground A);
 - (b) The fact that his complex needs currently cannot be met in custody but can be met by treatment in the community which the Applicant is prepared to undergo. Therefore it was irrational not to release him so that he can be treated in the community (Ground B);
 - (c) The panel's conclusion that the Applicant's risk is imminent is irrational and is not supported by the evidence or by the POM or the COM (Ground C);
 - (d) The panel's decision that the Applicant cannot be safely released is irrational as it is contrary to the conclusion of the POM and the COM that the Applicant can be safely released (Ground D);
 - (e) The fact that the Applicant has complex needs which currently could not be met in custody with the consequence that at the present time or at any time prior to a future review risk reduction work in custody is unlikely to result in significant progress being made (Ground E).
41. As to Ground A, the Applicant's grounds place great weight on his vastly improved custodial conduct as showing why it was irrational not to release him into the community. The panel took those matters into account when it referred to the Applicant's "*recent improved compliance and engagement demonstrating his growing maturity*". Indeed, the panel gave the Applicant credit for his improved prison conduct and the fact that since recall he has received 19 positive comments from staff and no proven adjudications. The panel put forward clear reasons which are set out in the Applicant's negative factors why the Applicant's vastly improved conduct did not mean that the Applicant should be released.



42. In the light of these factors, it was not irrational for the panel to refuse to release the Applicant. The Applicant's decision does not meet the test for irrationality as it is not *"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."*
43. A further or alternative reason why this irrationality claim fails is that it is settled law that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole. This would be a further or alternative reason for rejecting this ground for reconsideration.
44. As to Ground B, it is contended that as the Applicant's needs cannot at present be met in custody but can be met in the community, it was irrational to refuse to release the Applicant especially as he was content to engage with this treatment in the community. The panel explained that having considered the Risk Management Plan, that *"given [the Applicant's] significant history of violence on licence (the index offence) and in custody, the Panel were not persuaded that recent improved custodial behaviour and [the Applicant's] motivations to engage and to be open with professionals was sufficient grounds to direct release before he has completed intensity risk reduction work in custody"*.
45. Nothing has been put forward, let alone established, that this was an irrational reason in the light of the Applicant's history of violence and the Applicant's negative factors. It is noteworthy that the Applicant committed the index offence just over 2 months after his release on licence and that he was recalled just under 6 weeks after his release from his sentence for the index offence. In light of all these matters, it was not irrational for the panel to refuse to release the Applicant as the Applicant's decision does not meet the test for irrationality as it is not *"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."* Therefore, this ground for reconsideration must be rejected.
46. In the alternative, it is settled law that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole. This would constitute a further or alternative reason for rejecting this ground for reconsideration.
47. As to Ground C, it is contended that the panel's conclusion that the Applicant's risk is imminent is not supported by the evidence or by the POM or the COM, who did not consider that the Applicant's risk was imminent. The panel quoted the OASys which states that the Applicant *"poses an imminent risk of harm to those around him"* and stated that it broadly agreed with *"these risk assessment(s)"*. The panel concluded that the Applicant *"poses a high risk of violent offending on release into the community"*.
48. The Applicant committed the index offence on 4 February 2017 which was just over 2 months after his release on licence on 30 November 2016. The panel was entitled to talk of the imminence of the risk of violent offending



in light of this offending and the OASys conclusion. In any event, the statement that the risk was imminent does not meet the test for irrationality as it is not *“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.”*

49. In the alternative, it is settled law that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole. This would be a further or alternative reason for rejecting this ground for reconsideration.

50. As to Ground D, it is contended that the panel’s decision that the Applicant cannot be safely released is irrational as it is contrary to the conclusion of the POM and the COM that the Applicant can be safely released. As has been explained in paragraph 39, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

51. In this case the panel has put forward powerful reasons for not accepting the opinion of the COM and the POM to order the release of the Applicant and they are set out in the Applicant’s negative factors. Those reasons fall a long way short of being irrational as they rely on the undisputed troubling history of the Applicant.

52. In the alternative, it is settled law that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole. This would be a further or alternative reason for rejecting this ground for reconsideration.

53. As to Ground E, it is contended that it was irrational not to order the release of the Applicant when he has complex needs which currently could not be met in custody with the consequence that at the present time or at any time prior to a future review risk reduction work in custody is unlikely to result in significant progress being made. This submission fails to appreciate that the duty of the Panel was to ascertain if the Applicant could be safely released into the community and not whether and when his complex needs could be met in custody.

Conclusion

54. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
28 June 2023

