

**[2021] PBRA 59****Application for Reconsideration by Craigie****Application**

1. This is an application by Craigie (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case on 19 March 2021 and in its decision letter of 23 March 2021 declined to order his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
  - a. The Dossier consisting of 437 pages (including the decision letter the subject of this application).
  - b. The grounds submitted by the Applicant's legal representative dated 30 March 2021.
  - c. Representations submitted by the Secretary of State's representative on 13 April 2021.

**Background**

4. The Applicant is now 36. In January 2009 he was sentenced to an Indeterminate Sentence (IPP) for possession of a firearm with intent to cause fear of violence. The 'tariff' period of the sentence expired on 3 January 2012. He was released on licence in April 2012 and recalled to prison in September of the same year. He was again released on licence in June 2016 and recalled to prison in May 2019. He was again released on licence in December 2019 and recalled to prison on 4 May 2020. The latest recall followed the commission by the Applicant of a number of offences, including assault, affray, and driving under the influence of cannabis.

**Request for Reconsideration**

5. The application for reconsideration is dated 30 March 2021.



3rd Floor, 10 South Colonnade, London E1

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info@paroleboard



@Parole\_Board



0203 880

6. The grounds for seeking a reconsideration fall into two sections. Those submitted by his legal representative allege that the decision was '*irrational*' and are (in summary) as follows:
- a. The psychiatrist who had prepared a report for the hearing and gave evidence at it was the only one of the three witnesses not to recommend a direction for release. His evidence was flawed in a number of respects:
    - i. While suggesting that further intensive work was needed, he was ignorant of some of the programmes available to released prisoners in the community;
    - ii. In particular, as to whether they would be of sufficient intensity to prevent further violent behaviour by the Applicant; and
    - iii. His recommendation was made against the background, which he failed properly to consider, that although there had been breaches of licence conditions in the past none of those had reached the threshold of actual or threatened serious harm to members of the public.
  - b. The panel's decision, in following his recommendation and failing properly to consider the previous lack of actual or threatened serious harm to the public, was therefore irrational.
  - c. The Prison and Community Offender Managers both recommended release on the basis that his previous offending and the behaviours which had prompted his previous recalls had not involved the infliction of serious harm on any person. His most recent recall had been prompted by a violent – but purely verbal – outburst while in police custody.
  - d. For the panel to reject the evidence of the witness who, if the Applicant were released, would be responsible for his supervision and for taking appropriate action if the conditions of that licence required amendment or were broken, was in those circumstances irrational.
  - e. The panel's reference to the provision of psychological services in the community being "*experimental*" was correct, but the same applies to similar provision within the prison system.
  - f. The panel's reliance on the evidence of a witness who did not prepare a risk assessment of his own and who was "*ill-prepared*" for the hearing because of his ignorance of the provision of psychological services available in prison and in the community amounted to a procedural irregularity.
  - g. The panel's conclusion – in summary, that if the sort of situation which had resulted in the Applicant behaving in the sort of way he had behaved prior to his most recent recall were to reoccur, there would be 'a high risk that the same pattern of behaviour would re-emerge given your dissocial personality disorder. That behaviour, whether violence is used or threatened, would cause serious psychological, emotional, and



potentially physical harm' – *"went beyond the evidence and into pure speculation."* The fact that the events leading to his recall had resulted in a sentence at the Magistrates' Court of 3 months imprisonment put his behaviour at the lower end of the scale, and there was no evidence that any of the witnesses (all police officers) to the offences had in fact suffered serious harm as defined within Section 224 of the Criminal Justice Act 2003.

7. Those emanating from the Applicant and included by his legal representative in the application form are in summary:
  - a. The way in which the specialist panel member dealt with the evidence at the hearing, in particular that of the psychiatrist, indicated that he had formed a concluded view before the hearing thus rendering the hearing procedurally unfair.
  - b. The psychiatrist did not know which prescribed drugs the Applicant was taking and therefore was unable to inform the panel of the effect of those drugs on his behaviour.
  - c. His exclusion from school when a child was due to dyslexia and not bad behaviour.
  - d. The reason given for his return to closed from open conditions was not to do with *"suspected spice use"* but to a medical problem. This issue was never raised at the hearing.
  - e. The same point made in the grounds submitted by the legal representative and summarised at paragraph 6 above, reinforced by recent (19 March 2021) press references to a report to the Ministry of Justice concerning the alleged ineffectiveness of Personality Disorder units within the prison system.

### Current parole review

8. The case was referred to the PB on 26 May 2020. It was adjourned on 8 June 2020 for a number of documents to be added to the dossier – then 154 pages. It was directed to oral hearing on 19 October 2020. On 28 December 2020 directions were given for the hearing to be by telephone.
9. A three-member panel of the PB including a judicial member and a psychiatrist member met on 23 March 2021 by a combination of telephone and Skype to consider the case. It heard evidence from a psychiatrist, the Applicant's Prison and Community Offender Managers and the Applicant himself.

### The Relevant Law

10. The panel correctly set out in its decision letter (DL) dated 23 March 2021 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.

*Parole Board Rules 2019*



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11. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).
12. 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 in a previous reconsideration application - **Barclay [2019] PBRA 6**.

#### *Irrationality*

13. 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."*

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.

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

14. The grounds submitted helpfully refer to the more recent judgment of Saini J in **Wells, R (On the Application of) v Parole Board [2019] EWHC 2710 (Admin)** in which he said:

*"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 regard 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."*

*I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach 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*

15. 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.
16. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me of one or more of the following:
- a) express procedures laid down by law were not followed in the making of the relevant decision; or,
  - b) they were not given a fair hearing; or,
  - c) they were not properly informed of the case against them; or,
  - d) they were prevented from putting their case properly; or,
  - e) the panel was not impartial, or
  - f) a combination of any of the above.
17. The overriding objective is to ensure that the Applicant's case was dealt with justly.

*Other*

18. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* 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.
19. 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."*

20. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

21. The Respondent offered no representations in response to this application for reconsideration.

### **Discussion**

22. In view of the way in which the grounds are put I asked for, and have listened to, the recording of the hearing which took place by telephone links between the panel members and the Applicant, his legal representative and all the witnesses.
23. I deal first with the grounds emanating from the Applicant himself.

#### *Ground 7 a.*

24. There is nothing in this ground. While it is understandable that those in the shoes of the Applicant might conclude that a member of the panel has come to a final conclusion before the hearing from the way in which the questions are asked at it, that is no more than a reflection of the fact that the dossier has been read by the panel. I have listened to the recording of the questioning of the psychiatrist and find that the questioning of the psychiatrist indicated no more than that the panel member had read his report.

#### *Ground 7 b-e. The 'mistakes'.*

b. The psychiatrist's possible error when assessing the effect of certain medication on the Applicant's behaviour. As the Respondent's response correctly states, the Psychiatrist had recorded the medication in his report. In any event the panel's ultimate decision did not turn on the effect of particular medication on the Applicant's behaviour.

c. The Applicant's exclusion from school is now a very long time ago. And it was open to the Applicant, himself or through his legal representative, to have corrected



the error if that was the case. Additionally, this topic clearly had no bearing on the panel's decision.

d. This issue appears to have played no part whatever in the panel's decision.

e. The record is clear that his return to closed conditions was attributed to "*suspected use of a drug*". It is inconceivable that the transfer was made because of a suspected medical condition. In any event it is clear that this episode played no part in the panel's decision.

25. As to the grounds submitted by the legal representative.

26. Ground 6 (a) and (b). The evidence of the psychiatrist and its consequences. I find that each of the three points summarised at paras 6 a i-iii are well made and lead to the conclusion sought in 6 (b). The psychiatrist was, through no fault of his own, ignorant of the programmes available to prisoners in the community and as to their intensity. And he, and in due course the panel in its decision, do not seem to have focused on the lack of violent offences by the Applicant since 2008 when he committed the index offence, since when he had spent a total of nearly 4 years in the community on licence.

27. Ground 6 (c). This is in a sense a reiteration of the points made in the above 2 grounds. The incident(s) which triggered his most recent recall, while disgraceful, as he conceded, were confined to threats which, even as he uttered them, he must have known he would not be able to carry out. His previous extensive criminal record contains only one conviction (for common assault), which may have involved the actual infliction of violence to another.

28. Ground 6 (d). The recommendation of the Community Offender Manager (COM). The point of an oral hearing is to enable the opinions of professionals and the evidence of the prisoner to be tested by the panel and the prisoner and his legal representative. The mere fact that a panel rejects a COM recommendation cannot of itself found an irrationality claim. In this particular case the COM had, through no fault of her own, or of course of the Applicant, only had 19 days in the position of COM. However, her recommendation echoed that of her predecessor. Both her, and her predecessor's, reports recommended release in full knowledge of the incident which had provoked the most recent recall. It is clear from the panel's questions, and the terms of the DL, that the panel was concerned that a failure of the Applicant to take part in the regime proposed by the relatively new programme in Essex, though well established in other areas of the country according to the evidence, would significantly add to the risk he posed to members of the public of serious harm were he to find himself in a stressful situation again. However, the panel were in a position, as is stated in the decision letter, to make attendance at two other well-known programmes designed to address violent offending compulsory. While if it stood alone I would not have found that this ground established 'irrationality' it does support the grounds 6 (a)-(c) and thus my conclusion on those grounds.

29. Ground 6 (e). While the programmes referred to may be as experimental in custody as they are in the community, the fact is any risk to the public is minimised if not



eliminated altogether by the fact that a programme is carried out in custody. There is no merit in this ground.

30. Ground 6 (f). I find that this ground has some merit. However I do not find that it satisfies the high test set in the authorities referred to above for 'procedural irregularity' and would not on its own have produced a 'manifestly flawed or unjust result'. It would have been open to the Applicant, through his legal representative, before or during the hearing, to have asked for the psychiatrist (whose report is dated 9 February 2021) to be directed to supply the information and assessment suggested.
31. Ground 6 (g). This ground in effect restates in slightly different terms, the grounds – 6 (a)-(c)- which I have found to be valid.

## Decision

32. Accordingly, whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, including the most recent statement of the 'irrationality' test quoted at paragraph 13 above, that the decision not to direct release was 'irrational'. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**Sir David Calvert-Smith**  
**11 May 2021**

