

**[2022] PBRA 122**

## **Application for Reconsideration by Shaheen**

application by Shaheen (the Applicant) for reconsideration of a decision of a panel of the Parole Board following a hearing on 3 August 2022. The decision not to direct the Applicant's release nor to direct his progression to open conditions, was communicated in a letter dated 8 August 2022

Rule 28(2) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration may be made in eligible cases (as defined in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is procedurally unfair and/or (c) that it is procedurally unfair

The panel considered the application on the papers. These are the application for reconsideration, the panel's decision letter, and the dossier which was available to the panel at the oral hearing on 3 August 2022, which comprises 511 pages.

### **Background**

In October 2005, when aged 27, the Applicant was sentenced to a period of imprisonment for public protection, following his conviction of wounding with intent to cause grievous bodily harm. The minimum term to be spent in custody ("tariff") was set at 3 years 6 months less time on remand. The index offence was described by the sentencing Judge as a "*sustained and savage beating*" of a male, which was to be related to a drug debt. The victim was held down by the Applicant's co-defendant, whilst the Applicant inflicted injuries upon him which included a broken arm, three stab wounds to his leg, and a laceration. A knife, hammer and hockey stick were used by the Applicant during the attack.

The Applicant's tariff expired on 30 October 2008 and he is now aged 44.

The Applicant was released on licence on 5 August 2015 but recalled on 31 July 2018. Prior to his release he had been in open conditions but returned to closed conditions on three occasions, twice for being positive for drug use, and on the third occasion for possessing a Secure Digital card.

### **Request for Reconsideration**

7. The application for reconsideration is dated 22 August 2022.
8. The grounds for seeking a reconsideration are as follows:

*That the decision of the panel was irrational because;*

- (a) *"The Applicant submits that he has completed all necessary offending behaviour work and that as a consequence he has a full understanding of his risk areas, including drug misuse.*
- (b) *The Applicant argues that too much weight was placed on an outburst in custody when a TV was thrown and also on unproven allegations when the Applicant was in the community.*
- (c) *The Applicant argues there have been no incidences of violence since he committed the index offence."*

### **Current parole review**

9. The Secretary of State referred the Applicant's case to the Parole Board in January 2021, asking it to decide whether he was suitable for release and if not, whether he met the test for progression to less secure conditions.

The Applicant's case was first listed for hearing in October 2021. That hearing was adjourned due to an administrative error in timetabling, meaning that there was insufficient time to proceed on that day. It was relisted on 6 April 2022, but in the intervening period (in February 2022) the Applicant was returned from open to closed conditions following a discovery that he had an unauthorised mobile phone in his possession and had been using it to breach restrictions placed on him. The panel adjourned the 6 April 2022 hearing because they required further information about those adverse developments.

Finally, on 3 August 2022 an effective hearing was undertaken, and the panel was able to reach a decision.

The panel consisted of two independent members and a specialist (psychologist) member of the Parole Board. The panel considered a dossier of 511 pages. It heard evidence from prison officials who had supervised the Applicant both in open conditions and in his current location in closed conditions, from a prison governor, from the probation officer responsible for supervising the Applicant in the community, and from two forensic psychologists, one instructed on behalf of the Secretary of State, and one instructed on the Applicant's behalf.

### **The Relevant Law**

The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

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

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 21(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for consideration. 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)).

A decision to recommend or not to recommend a move to open conditions is not eligible for consideration under Rule 28. This has been confirmed by the decision on the previous consideration application in **Barclay [2019] PBRA 6**.

### *Irrationality*

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 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 consideration, 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 consideration under rule 28: **Preston [2019] PBRA 1** and others.

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

The Secretary of State offered no representations in relation to this application.

### **Discussion**

The panel had the advantage of an extensive dossier of reports. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

The panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting

the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710**.

Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to expect that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as 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.

By way of general observation, I note the following:

In this case, I note that the panel have set out clearly and concisely in its decision letter the opinions of the witnesses in relation to their assessments of the risk posed by the Applicant, and his suitability for release.

The decision letter records the consistent theme in the oral evidence of the officials supervising the Applicant in custody, of their concern that whilst the Applicant engaged with work which suggested he had insight into his risk management needs, nonetheless he then went on to behave in a manner which led to his return to closed conditions. Their opinion of that behaviour was that it reinforced concerns about the Applicant's ability and inclination to deceive professionals, and to place his own perceived needs above the needs to manage risk. Similarly, a probation officer who had previously managed the Applicant's risk in the community, and who had earlier supported his release, reviewed their position in light of the Applicant's return to closed conditions in February 2022, and agreed with the opinions of the supervising officials in custody.

The Probation officer who would manage the Applicant's risk in the community if released now, also gave evidence of their concern that the Applicant had insufficient understanding of the risk he poses and needs to engage with further work in that area. They recommended a particular type of consolidation work, which could potentially be undertaken in the community but which, in their view, needed to be undertaken by the Applicant before he could be safely released.

The panel went to some lengths in its decision letter to set out the areas of agreement and disagreement between the two forensic psychologists who had assessed the Applicant. One of those forensic psychologists agreed with the other witnesses that the Applicant's recent behaviour in open conditions had been concerning and related to the risk he poses. The other disagreed but agreed that there was a need for the Applicant to develop open and honest relationships with professionals in future. They agreed on the relevant risk areas, and that the Applicant's risk had transitioned from being drug-related to relationship-related.

The panel also explored the differences in the scores in risk assessment tools used by the two psychologists and set out its own assessment of risk in the context of its analysis of the psychological evidence it had read and heard.

Dealing specifically with the issues raised by the Applicant in support of this application:

#### Ground (a)

The Applicant submits that he has completed all necessary offending behaviour work and that as a consequence he has a full understanding of his risk areas, including drug misuse.

The panel, in its decision letter, acknowledges the offending behaviour work completed by the Applicant, but also notes the evidence of the probation officer who would manage the Applicant if he returns to the community, and of the two forensic psychologist witnesses, that further consolidation work is recommended. The witnesses agreed on the particular programme which would be suitable. It is apparent therefore that the panel relied on the evidence of the witnesses which contradicts the Applicant's assertion set out in this ground.

Furthermore, the two psychologist witnesses also agreed, despite their different conclusions as to the Applicant's stability for release, that the Applicant's risk had transitioned from being drug-related to being relationship-related.

The decision letter records the opinions of the witnesses that the Applicant had not been honest about the length and nature of his relationship with a new partner, nor had he made full disclosure to his partner.

It follows therefore that there was clear evidence before the panel and set out in its decision letter which contradicts the assertion set out at ground (a) above.

#### Ground (b)

The Applicant argues that too much weight was placed on an outburst in custody when a TV was thrown and also on unproven allegations when the Applicant was in the community.

The panel refers to those two matters in its 'Conclusion' section of its letter, as follows:

(a) *"The panel accepted that there has been no further convictions for the use of direct violence since the index offence. However, there was a documented outburst when a TV was thrown towards a prison officer, and, there were heightened concerns and allegations when the Applicant was last in the community."*

(b) Whilst it is clear that the panel have placed some reliance on the two matters, it goes on to say:

i. *"The risk of violence and aggression appears to be well controlled in closed conditions, however, risk paralleling behaviour becomes more apparent, when the Applicant is in conditions of less security."*

*ii. The panel considered that the Applicant's lack of understanding, or acceptance, of his risk factors, and willingness to subvert controls in place to protect others, raised considerable cause for concern.*

(c) The panel carefully considered the potential of the Applicant being released into the community and not re-offending, deciding that unless he addresses his thinking skills, further work in the community was unlikely to succeed and the risk of offending would remain. The risk of offending and harm the Applicant presents is not manageable within the plan, given his level of risk. Therefore, the panel does not direct release."

It is fair to say that the incident involving the throwing of the television, and the concerns prior to the incident in 2018, were factors which the panel took into consideration. However, I am not satisfied that it placed undue weight on those matters because it is clear from the remainder of the 'conclusion' section of the decision letter that a lack of understanding of his risk factors and his subverting of controls were more significant concerns, referred to as "*considerable cause for concern*".

#### Ground (c)

The Applicant argues there have been no incidences of violence since he committed the index offence.

This is acknowledged by the panel, as above, with an explanation as to why the lack of further violence is not determinative of risk.

I have borne in mind the test for irrationality set out in **DSD** which is a high standard to meet.

The panel in this case set out its rationale for its decision in a letter which is clear and thorough in its explanation of its assessment of risk. I find that the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

Having carefully considered the specific grounds on which the Applicant relies, and the general concept of irrationality, I find there is nothing within the panel's decision which meets the test that 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." (Per **DSD**)

#### **Decision**

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

**Victoria Farmer**  
**09 September 2022**