

[2022] PBRA 142

## Application for Reconsideration by Swalwell

### Application

1. This is an application by Swalwell for reconsideration of a decision of the Parole Board dated 14 September 2022 following an oral hearing on 31 August 2022. The panel declined to release him.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are: (1) the dossier, now running to some 330 pages including the decision letter; (2) reconsideration representations dated 30 September 2022 by the Applicant's legal representative.

### Background

4. Applicant has a lengthy record of offence involving violence and the use of weapons. Prior to the index offences his convictions include an attempted robbery, a wounding, three offences of ABH committed on different occasions, several lesser offences of violence and public disorder and possession of a kitchen knife in a public place.
5. On 9 December 2005 he was sentenced to imprisonment for public protection ("IPP") for an offence of aggravated burglary. He entered the home of a man armed with a large knife and stabbed him in the chest. At the time he was on bail. He received concurrent sentences for two further offences of violence committed on different occasions: an attack on a neighbour involving punching and kicking; and an attack on another man at his home in which he put a knife to the man's throat.
6. The Applicant became eligible for release on parole on 20 January 2009. He was transferred to open conditions in May 2010 but recalled to closed conditions in January 2011 after he absconded. He was transferred to open conditions again in March 2012 but recalled to closed conditions in April 2013 after he again absconded.
7. In the following years the Applicant was released and recalled three times. He was released on 30 October 2013 and recalled on 10 April 2014 after resuming the drinking of alcohol and failing to return to his hostel for curfew. He was



released on 12 March 2015 and recalled on 16 June 2015, again having returned to alcohol misuse and breached curfew. He was released on 14 January 2016 and recalled on 28 March 2017, having again returned to alcohol misuse and having been accused of violence in a domestic relationship.

8. On 7 December 2020 a panel of the Parole Board (“the 2020 panel”) declined to release him but recommended his transfer to open conditions. However the Secretary of State’s referral, which invited that panel to consider open conditions, had been made in error: the Secretary of State considered that, having twice absconded, he was not eligible for transfer to open conditions. He therefore remained, and still remains, in closed conditions.

### **Request for Reconsideration**

9. The application for reconsideration is dated 30 September 2022. The overall ground relied on is irrationality: error of law and procedural irregularity are not asserted. It is always helpful if representations are made with distinct, numbered, grounds. That is not the case here, but I think the key points, which are relied on individually and cumulatively, can be summarised as follows.

- a. The panel’s decision disregarded all the recommendations of the professionals
- b. The panel’s decision placed undue weight on the decision and reasons of the 2020 panel
- c. The panel disregarded the fact that the 2020 panel recommended a transfer to open conditions
- d. The panel failed to identify for itself what factors pointed towards continuing risk (see **Oyston [2000] PLR 45** at paragraph 47, per Lord Bingham), simply relying on the decision of the 2020 panel and the absence of any further risk reduction work
- e. The panel provided no sufficient justification or reason for its decision.

10. Although the application is stated to be on the basis of irrationality, it encompasses a challenge to the adequacy of the panel’s reasons, and I will consider it on this basis as well.

### **Current parole review**

11. The current review was initiated by the Secretary of State on 26 July 2021. It is important to note that the panel was not asked to consider a recommendation for open conditions: the referral specifically said that the Applicant was not eligible.

12. As noted above, the panel conducted an oral hearing on 31 August 2022. The panel consisted of a judicial chair, a psychologist member and an independent member. The panel heard evidence from the Applicant himself and from the prison offender manager (“the POM”) and the community offender manager (“the COM”).



3rd Floor, 10 South Colonnade, London E14 4PU



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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0203 880 0885

13. The COM had lodged reports recommending the Applicant's release. She said that "[b]eing unable to consider a move to open conditions does provide some difficulty in making a recommendation in Swalwell's case" (dossier page 117). She said she felt it essential that the Applicant had a plan to progress and she did not believe that it remained essential for public protection that he remained in custody. The panel recorded that her evidence at the hearing was to similar effect.
14. The POM agreed with the COM's recommendation. In the 2020 review the POM had lodged a report recommending open conditions; the POM now believed that the risk management plan – with a shorter, intense period in approved premises and a sobriety tag – was capable of managing his risk.
15. The panel did not have any up-to-date psychological evidence. A 2020 report had not recommended release but had recommended a move to open conditions with enhanced behaviour monitoring. A 2017 report had recommended referral to a therapeutic community. Another 2017 report had recommended release but only on the basis that he would be placed in a rehabilitation unit or supported accommodation.
16. In its reasons the panel reviewed Mr Swalwell's history, set out in reasonable detail the evidence which it received, reviewed the risk management plan and set out its conclusions in paragraphs 4.1-4.12. These are too long to quote in full in these reasons. The following paragraphs contain some key reasons for the panel's decision.
17. In paragraph 4.2 the panel said:
- "Swalwell had completed all directed core risk reduction work before his first release. The only work undertaken since then was 1:1 work with a psychologist on intimate partner violence, in 2014. Despite this, in 2017 on his third licence, he formed a relationship which he did not disclose and risk quickly elevated, resulting in his recall. There remains a risk to future partners which should be re-addressed in custody."*

18. In paragraph 4.8 the panel said:

*"Having questioned Swalwell carefully, the panel did not agree with the assessment of professionals that he had developed insight into his offending behaviour, risk factors and victim empathy. He only saw alcohol as a problem and nothing else. Even then, he did not consider a sobriety tag was necessary. The panel could not detect any change in his mindset indicating a genuine desire to be more open and honest with professionals so as to disclose problems and breaches of licence conditions such as relapse into alcohol or forming a new*



*relationship for fear of recall. Simply put, having heard from Mr Swalwell, the panel formed totally different impressions to the professionals in the key risk areas and so rejected their recommendation to release."*

19. In paragraphs 4.11 and 4.12 the panel said:

*"Having read everything in the dossier, the panel agreed with the decision of the 2020 panel that, at that time, Swalwell's risk could not be safely managed in the community. Moving on from then, although he has continued to present good prison behaviour, he has not undertaken any offending behaviour work. There is no evidence of genuine risk reduction since the last hearing.*

*Having undertaken an independent and robust risk assessment, the panel decided that Swalwell's risks are not safely manageable in the community. Consequentially it is necessary for him to continue to be confined for protection of the public and so the panel did not direct his release. The panel considered he needed to complete more work in custody to address his risks."*

### **The relevant law**

20. In its decision letter the panel correctly set out the test for release: the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner be confined.

21. The Applicant was serving an IPP sentence. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28(2)(a) of the Parole Board Rules 2019. For the avoidance of doubt, the panel's decision as to a recommendation for open conditions is not eligible for the reconsideration process.

22. The concept of irrationality is derived from public law. The test is whether the decision was "*so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*" See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.

23. There is a duty on the panel to give sufficient reasons for its decision. Whether a failure to do so is to be characterised as amounting to irrationality, unfairness or error of law may not matter now that a reconsideration challenge can be made on all these grounds. However, I note that the duty was put as a matter of fairness by Lord Carnwath in **Dover District Council v CPRE Kent** [2017] UKSC 79 at paragraph 51, applied in **R (Stokes) v Parole Board** [2020] EWCH 1885 and **In the case of TC** [2022] PBRA 57. The reasons do not have to be drafted elaborately or at great length; they should identify in broad terms the factors relevant to risk of re-offending and serious harm, the considerations



3rd Floor, 10 South Colonnade, London E14 4PU



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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which led to the final decision and the panel's reasons for the conclusion it reached: see **Oyston** [2000] PLR 45. If the panel is differing from an expert or professional its reasons should explain why; but the extent of the reasoning will depend on the issue. The panel's reasons should be read as a whole.

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

24. The Secretary of State has informed the Board that no representations are to be made.

### **Discussion**

25. I will now address the representations made on the Applicants behalf, adopting the analysis which I have set out above.

26. As to (a), I accept that the recommendations of the COM and the POM were for release: see paragraphs 13 and 14 above. The panel was not bound to accept those recommendations; it was, however, required to give rational and sufficient reasons for rejecting them.

27. In my opinion the panel gave rational and sufficient reasons for its decision. The panel was entitled to place weight upon the Applicant's lengthy history of violent offending and upon the circumstances in which he came to be recalled three times. It was entitled to point out that the vast majority of the risk reduction work done with the Applicant pre-dated the three occasions when he was released and recalled. It was entitled to form its own assessment of him, based on the way in which he answered questions put to him. It was entitled to note that no risk reduction work had been done with him in the two years since the last review. These were key element of its reasoning; they suffice to make clear why it took a different view from the COM and the POM.

28. As to (b), I do not accept that the panel placed undue weight on the decision of the 2020 panel. It is plain that its conclusions were based on its own assessment of Swalwell: see in particular paragraph 4.8, quoted above. The decision of the 2020 panel was relevant background; and the panel was entitled to note that in 2020 (when open conditions appeared to be an option) neither the COM nor the POM had supported release. It was entitled to ask whether anything which had happened since sufficiently supported their change of view.

29. As to (c), the panel expressly recognised that the 2020 panel had recommended open conditions: see paragraph 2.2 of its reasons. I do not accept that it disregarded this fact. As noted above, the panel was required by the Secretary of State to consider release, not open conditions; no further specific reference to the 2020 panel's reasons for recommending open conditions was necessary.

30. As to (d), the panel did explain in its reasons what factors pointed to continuing risk. The factors were enumerated in paragraphs 1.17 to 1.19; the panel returned to them in paragraph 2.17; noted potential warning signs in paragraph 2.19; and noted in paragraph 4.1 that the circumstances of his recall indicated



that he had not learned from formal risk reduction work. It also specifically drew attention to a risk to future partners in paragraph 4.2 of its decision.

31.As to (e), in my view the panel did give reasons for its decision which were both sufficient and rational: see paragraph 27 above.

32.I have looked at the application for reconsideration as a whole, in addition to analysing individual aspects. Even considering the grounds cumulatively, they do not in my opinion establish that the decision of the panel was irrational.

### **Decision**

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

**David Richardson**  
**13 October 2022**