

[2023] PBRA 129

## Application for Reconsideration by Gajewski

### Application

1. This is an application by Gajewski ("the Applicant") for reconsideration of a decision of the Parole Board which was issued on 1 June 2023 not to direct his release. The decision followed an oral hearing which took place on 9 May 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the grounds that the decision contains (a) an error of law, (b) is irrational, or (c) is procedurally unfair.
3. I have considered the application on the papers. These are (1) the dossier, now running to some 384 pages including the decision; and (2) the application for reconsideration supported by written submissions from the Applicant's legal representative and a supporting statement. I have also viewed two short clips of CCTV footage.

### Background

4. On 21 November 2006 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for the manslaughter of his long-standing partner. The minimum term for his sentence was set at 4 years, 5 months and 22 days. This minimum term expired on 13 May 2011.
5. The index offence took place on 22 January 2006. The Applicant and his partner had both been drinking heavily and had argued. The Applicant pushed his partner against a wall by the throat; she suffered fractures and bruising in the neck area indicative of considerable manual pressure. She had other bruises on her arms and forearms consistent with being gripped and acting defensively. She jumped from a window while the Applicant was in a different room; she died from a ruptured liver sustained in the fall. At the date of sentencing the Applicant was aged 41. He had numerous previous convictions, including a conviction for threatening behaviour in 2004 which related to a domestic incident. There was a history of call-outs to arguments involving the Applicant and partners. Alcohol consumption appears to have been a particular risk factor for the Applicant's behaviour.
6. The Applicant was first released on licence on 16 February 2015. He was recalled on 12 February 2016 when arrested for drug offences for which he was sentenced to 5 years. He was released again on 18 March 2020 He was recalled again on 3 May 2022 following allegations of violence towards another partner, Ms D. The



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present panel's assessment of these allegations was central to its decision, as I will explain below.

## Request for Reconsideration

7. In broad outline, the application for reconsideration argues that the panel's decision (1) contained an error of law, in that it did not properly apply the decision of the Supreme Court in **Pearce and (R on the application of) v Parole Board of England and Wales** [2023] UKSC 13 ("**Pearce**"), (2) was irrational and (3) was procedurally unfair. These arguments are developed over some 12 pages of detailed submissions. I will return to the detail in my later discussion.

## Current parole review

8. The Applicant's case was referred to the Parole Board on 16 May 2022 following his latest recall. Directions were given for the provision of a police report and CCTV. As noted above, the oral hearing took place on 9 May 2023. The panel consisted of a judicial chair with an independent member as the single co-panellist. The panel had a dossier which contained police evidence relating to the allegations; and two clips of CCTV evidence were also provided to it. The panel heard from the Prison Offender Manager ("the POM"), the Community Offender Manager ("the COM") and the Applicant himself.

## The allegations

9. The principal allegation against the Applicant related to events on 30 April 2022. Uniformed police were called to a street where they found Ms D in distress, crying with redness on the side of her face, blood on her hands and shirt, a small split on her lower lip and a graze on her right knee. She informed an officer that she had been assaulted twice on separate occasions. She said she had first been assaulted by the Applicant in a car following a minor argument; he had punched her on the right side of her face. She had then left his car and gone to an address (evidently that of the Applicant's family member and his partner, although the names have been redacted in the statements provided to the Parole Board) where the occupants would not allow her to use the toilet. She said that a scuffle took place there in which she had been hit in the mouth. Another police officer went to the address of the Applicant's family member. His partner told the police that Ms D had turned up distressed and demanding to be let in, having had a fight with the Applicant; when she was refused entry there was a physical altercation on the street.
10. When officers attended the following day it is recorded that witnesses declined to provide statements. Since there was no evidence against the Applicant, no further action was taken against him. Ms D denied to the COM that she had ever said to the police that the Applicant had assaulted her. There was a statement to this effect from her in the dossier.
11. The Applicant accepted that there had been an argument between himself and Ms D in the car; he said that she had been drinking, that she wished to use the toilet at his family member's house, and he said she could not because there was bad blood between Ms D and his family member's partner. He denied hitting Ms D. He said that she had left the car, as he thought, to use the toilet at a local public house.

He left without taking her home; he said that by then she was in a neighbour's house and he did not wish to escalate an incident.

12. Although the allegation relating to 30 April 2023 was the immediate precursor of recall, there had been an earlier allegation on 6 January 2023 when police were called to the address. It was recorded that Ms D telephoned the police stating that the Applicant had tried to kill her by choking and suffocation and that she had fled the address and been picked up by a third party. The following day she had telephoned the police, stating that it had been a mix up and it was not the Applicant but an ex-partner against whom she had been making the allegation. The Applicant denied the allegation; and the statement by Ms D in the dossier stated that the allegation had indeed involved a third party. There are, however, notable similarities between this allegation and the index offence committed by the Applicant.

### The panel's reasons

13. The panel, having summarised the evidence relating to the allegations (in greater detail than has been necessary for this decision) made express reference to the decision of the Supreme Court in **Pearce** and stated that its decision was taken in the light of that case. It set out its conclusions in paragraphs 2.40 to 2.42. Key points are as follows.
14. As regards the January allegation, the panel thought it implausible that Ms D would have exited her home address for the street merely because of a telephone call by an ex-partner many miles away. The panel thought that her initial allegation was likely to be true and her subsequent retraction likely to be an attempt to shield the Applicant. The panel noted that even when sober the Applicant had continued to allege that she had been the subject of some form of choking or violence.
15. As regards the April allegation, the panel noted that the initial complaint of Ms D had been that the Applicant assaulted her in a car after an argument. The panel reflected on the rationality of the Applicant's explanation; on his account he had abandoned her in the street some distance from a public house where she had wanted to use the toilet, and had left the scene with no plans for her to be supported after using the toilet. The panel thought that a far more rational and logical explanation was that Ms D had indeed been assaulted by the Applicant and had then gone to his family member's house.
16. In its conclusions the panel summarised its assessment of the allegations in the following way (paragraph 4.2) -

*" ... the panel having considered with care the two matters which arose in relation to allegations relating to his current partner, determine in both cases that those allegations were credible and that the initial description of the incidents given by [the Applicant's] partner were, in fact, the truth. The subsequent retractions and denials lacked logicality and rationality and appeared to be attempts, by his partner, to shield [the Applicant] from the consequences of his behaviour."*

### The Relevant Law

17. The panel correctly set out the test for release in its decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
18. The panel's decision as to release is eligible for reconsideration since the Applicant is serving an indeterminate sentence and the decision was taken under rule 25(1) of the Parole Board Rules: see rule 28(1) and 28(2)(a) of the Rules. The panel's decision not to recommend open conditions is not eligible for reconsideration.
19. It is not necessary to set out an exhaustive statement of the circumstances in which a decision will be unlawful. Broadly, a decision will be unlawful if it is taken in contravention of some legal principle or duty applicable to the case; or if it leaves out of account a factor which the law requires to be taken into account; or if it places weight on a factor which is irrelevant in law; or if the reasons fall short of the standard which the law requires for the decision.
20. 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.
21. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality.

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

22. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

### Discussion

#### Error of law

23. As noted above, it is argued that the panel erred in law in its application of the recent decision of the Supreme Court in **Pearce**. In this case the Supreme Court considered and upheld guidance on the treatment of allegations given by the Parole Board, while suggesting ways in which the guidance could be clarified and improved. The whole of this decision repays careful reading, but it is sufficient to make reference to part of the summary in paragraph 87. When considering whether to give weight to allegations of criminal or other misbehaviour, the Board should first attempt to investigate the facts to enable it to make findings on the truthfulness of the allegations: see paragraph 87(v). Even if it is unable to do so, it may sometimes be fair to take an allegation into account: see paragraphs 87(vi)-(vii). A failure to

make findings of fact where it was reasonably practicable to do so, or an irrational reliance on insubstantial allegations, may found an application for a successful public law challenge: see paragraphs 87(viii). Applications for reconsideration are decided on public law principles, so in principle there may be a successful challenge by way of application for reconsideration on these principles.

24. In my view it is clear that the panel not only referred to the decision in **Pearce** but also kept its principles well in mind. The panel investigated the facts and found that it was able to make findings on the truthfulness of Ms D's initial allegations to the police in January and April. There was no error of law in the application of the decision in **Pearce**. I turn therefore to the question whether the panel's findings were irrational or procedurally unfair.

### **Irrationality and procedural unfairness**

25. It is argued that it was irrational for the panel to make findings concerning Ms D's allegations to the police when she had herself disavowed those allegations. The application for reconsideration refers to her disavowals set out within the dossier and also appends an additional statement from her confirming and expanding upon those disavowals.

26. I do not accept that the panel was irrational in making findings based on Ms D's initial allegations to the police. It is not uncommon, in cases of intimate partner violence, for allegations to be made to the police by a victim shortly after the assault but then withdrawn subsequently. A panel is not bound to take the withdrawal at face value. It is entitled to investigate the facts and conclude that the initial allegation was true. The panel gave proper and sufficient reasons for doing so.

27. It is argued that it was irrational for the panel to make findings based on Ms D's initial allegations to the police when she appears to have been the worse for alcohol consumption. Again I do not accept that the panel was irrational in its treatment of this factor. Alcohol consumption by a victim as well as a perpetrator is not an uncommon background to intimate partner violence (as indeed it appears to have been in the index offence of manslaughter). It does not follow that a victim is necessarily lying or unreliable about an assault because the victim has been drinking. The panel was entitled to, and did, take account of the evidence as a whole in deciding whether the allegations were true.

28. It is argued that it was irrational and procedurally unfair for the panel to make its findings without Ms D being called as a witness by the panel and giving evidence. I do not accept this argument. Ms D's current attitude, which was supportive of the Applicant, was plain from material in the dossier. The Applicant was entitled to and did deploy that material in his favour. A Parole Board hearing is not a criminal trial where it or the Respondent must call witnesses or tender them for cross examination.

29. It is argued that it was irrational and unfair for the panel to make its findings without having body worn camera footage taken by the police when they attended Ms D. I do not accept this argument. The panel had a witness statement from the police officer concerned with the April allegation, and a written police report concerning

the January allegation. The Applicant knew the case he had to meet. It was procedurally fair and rational to make findings based on this material.


30. It is argued that the panel may have seen only one clip of CCTV and may therefore have failed to view evidence which showed that Ms D, before the assault by the Applicant's family member and/or his partner on 30 April, had no injury. The panel referred in its decision to viewing "a CCTV file" whereas in fact there were two clips. I have looked at these clips for myself. One is very short indeed – about 4 seconds. In neither clip can Miss D be seen with sufficient clarity for it to be said whether she had any signs of an injury prior to the altercation in the street. The panel correctly said that the CCTV related to the subsequent altercations not to the interaction between the Applicant and Ms D which preceded it. I see no procedural unfairness or irrationality arising from the way the panel dealt with the CCTV evidence.
31. It is also argued that the panel incorrectly thought that all parties accepted that there was violence from another member of the Applicant's family whereas the CCTV shows that the violence was instigated by Ms D throwing a bottle. It is argued that if Ms D was not truthful about the second part of the incident, the panel acted irrationally in accepting the truth of the allegation she made about the earlier assault by the Applicant. While it is true that the CCTV clip shows Ms D throwing a bottle, it also shows the other family member wrestling Ms D to the ground and fighting her. I do not think this argument demonstrates any irrationality in the decision of the panel.
32. It is also argued that, because the police took Ms D home after they had attended the emergency call in relation to the January incident, this shows they cannot have thought she was assaulted by the Applicant. Again I do not think this point demonstrates any irrationality on the part of the panel. If a putative victim does not provide the necessary support for an arrest to be made, and wishes to return home, the powers of the police are very limited.
33. It is argued that the panel acted irrationally in not accepting recommendations from professional witnesses for release. I do not accept this argument. The panel was entitled to make its own assessment of the evidence relating to the allegations and to find, based on that evidence, that the risk to the public of serious harm could not be managed in the community.
34. It is argued that the Applicant only posed a risk to Ms D and that this risk could have been managed by licence conditions. There is no substance in this argument. There was ample material, including of course the index offence of manslaughter, to demonstrate that the Applicant's risk was not limited to Ms D but extended to any person with whom he had an association or relationship.
35. I believe that I have extracted all the principal grounds from the detailed (and sometimes repetitive) submissions in support of the application for reconsideration. I confirm that I have considered the submissions individually and in totality. Having done so, I conclude that the panel's decision did not contain an error of law and was neither irrational nor procedurally unfair.

## Decision

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36. For these reasons I refuse the application for reconsideration.

**David Richardson**  
**17 July 2023**