

[2023] PBRA 134

## Application for Reconsideration by Barrett

### Application

1. This is an application by Barrett (the Applicant) for reconsideration of an oral hearing panel (the panel) dated the 19 June 2023 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) 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:
  - a) The Decision Letter dated the 19 June 2023;
  - b) An application for reconsideration from the Applicant's legal representative dated the 9 July 2023; and
  - c) The dossier, numbered to page 368, of which the last document is the Decision Letter. The panel had a dossier of 349 pages.

### Background

4. The Applicant is now 38 years old. In 2006, when he was 21 years old, he received a sentence of imprisonment for public protection (IPP) following his conviction for robbery (the index offence). The court set a minimum term of two and a half years; less time spent on remand. The Applicant reached his eligibility date to be considered for release on the 9 February 2009.
5. The background to the index offence is that the Applicant went to a supermarket armed with a hammer. He and an associate wore disguises, and the Applicant used the hammer to threaten two members of staff, forcing them to hand-over money from the tills. Four months later, while on bail for the robbery, the Applicant entered another shop and threatened the shopkeeper with a broken bottle. The shopkeeper managed to remove the Applicant from the shop. The Applicant then threw a brick through the window. The latter offence led to an extended sentence for attempted wounding, to be served concurrently to the sentence for the index offence.
6. On the 16 September 2010, the Applicant received a four-month concurrent determinate sentence following his conviction for an offence of attempted robbery, committed when he was on temporary release from an open prison. Since then, he has been sentenced for an offence of affray, committed in 2015, and driving offences (including driving whilst under the influence of excess alcohol) in 2019.



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7. The Applicant has been released and recalled to custody four times. He was first released in 2012 but was recalled in 2015. His most recent release was on the 30 August 2022, he was recalled to custody on the 3 September 2022 when he failed to return to his designated accommodation.
8. Following his recall, the Secretary of State referred the Applicant's case to the Parole Board for it to consider whether his re-release could be directed or, in the alternative, whether his move to an open prison could be recommended.
9. On the 13 October 2022, the Applicant's legal representative produced written representations seeking the Applicant's re-release on the papers, or that his case be directed to an oral hearing. The representations set out the difficulties the Applicant had faced on licence, including his difficulties in residing at the designated accommodation. It was submitted that his level of risk had not increased. Subsequently, the Applicant's probation officer produced an updated report and the Applicant submitted further legal representations seeking his re-release.
10. On the 21 December 2022, the Applicant's case was considered by the Parole Board at a paper review. The member reviewing the case noted that in each of the four releases, the period the Applicant remained in the community was shorter than the last. An oral hearing was directed.
11. The panel considered the Applicant's case at an oral hearing on the 12 June 2023. This was the first review of the Applicant's case by the Parole Board following his latest recall. The panel heard oral evidence from the Applicant, his probation officer in the community and the official supervising him in custody. The Applicant was legally represented, and his representative produced closing written submissions dated the 12 June 2023. The panel then issued its Decision Letter on the 19 June 2023.
12. In its Decision Letter, the panel did not direct the Applicant's release but did recommend that he should be moved to an open prison. The panel noted the efforts made by the Applicant to address identified risk factors through his completion of accredited offence focussed work. It noted that on each period of release the Applicant had been "*enthusiastic about the proposed risk management plans but [had] quickly relapsed to alcohol and/or substance use. He [had] been released to various accommodation placements ... but [had] struggled to cope...*".
13. The Applicant told the panel that he had not used alcohol or drugs on his last release. He told the panel that he was ready to be re-released and had "*got to grips with what [he had] to do*". He did not believe that he should be moved to an open prison. The Applicant's probation officer in the community had noted the struggles experienced by the Applicant on licence and felt that he was now doing better. The probation officer had produced a release risk management plan and recommended the Applicant's re-release.
14. The panel accepted that the risk management plan was "*as robust as it reasonably [could] be*". The panel noted that the probation officer had "*gone to*



*great lengths to explore accommodation options that may mitigate [the Applicant's] fear and difficulties ... However, the panel ... must consider [the Applicant's] risk indefinitely ... the panel [was] not satisfied that [the plan could] manage [the Applicant] until he ... strengthened his internal controls ...".*

15. The panel had identified a need for the Applicant to address his life experiences, how these related to his risk of offending and the difficulties he had faced on each release. The panel determined that designated accommodation would be necessary in this case, that the accommodation would only be available (at best) for around six months, and it would be unlikely that therapeutic work on his life experiences would be completed in that time. The panel noted that the work the Applicant would need to complete would be "hugely destabilising".
16. Mindful of the Applicant's risk of emotional instability, the panel determined that he would pose a greater than minimal risk to others and that he did not meet the test for release. It went on to conclude that a period in an open prison would be essential to allow the Applicant to be tested in a less restrictive setting.

### **Request for Reconsideration**

17. The application for reconsideration is that the panel's decision was irrational, in that:
- a) The panel incorrectly assessed the level and imminence of risk of serious harm posed by the Applicant;
  - b) The panel's concern about the Applicant failing to comply with prescribed medication was unfounded;
  - c) The panel's concern about destabilisation when he begins therapeutic work was unfounded;
  - d) The Applicant has been working with a support service that has been hugely beneficial and the service will not work with him in an open prison; and
  - e) The current recall reveals nothing further in terms of risk assessment and risk management.

### **The Relevant Law**

18. The panel correctly sets out in its decision letter dated the 19 June 2023 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.
19. 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)*

20. 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 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

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

### *Irrationality*

22. 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."*

23. 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.

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

25. 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."*

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

26. The Respondent has not submitted any representations.

### **Discussion**

27. The Applicant submits that he has not caused serious harm to the public since 2010. He accepts that he was sentenced for an affray in 2015 but submits that this increased his risk to a known adult (his ex-partner). He submits that he



and his ex-partner have an *“amicable and positive relationship”*. He says that the definition of serious harm *“includes the essential element that recovery from the harm, whether physical or psychological, can be expected to be difficult or impossible”*. He submits that his ex-partner has *“plainly recovered from the harm caused in 2015, accordingly the harm caused is not commensurate with the definition of serious harm”*.

28. The Applicant notes *“the panel’s assessment [of his] likelihood of further violence [having] the potential to be high and imminent if [he] were to relapse into substance misuse, not take his prescribed medication and/or disengage from professionals and services”*. He submits that this is wrong because *“he has not caused serious harm for many years, even in circumstances where he has relapsed and failed to take medication and disengaged. As such there is no recent evidence whatsoever to support this assessment”* [original emphasis].

29. In its Decision Letter, the panel noted that the Applicant would present a high risk of serious harm towards the public and a medium risk of serious harm to his ex-partner. This was an assessment produced by probation and the panel agreed with it. The fact that the risk to his ex-partner has reduced in professional assessments perhaps supports the Applicant’s submission of the risk profile changing towards any adult known to him. However, the panel was entitled, on the evidence before it, to conclude that he would present a high risk of serious harm to the public if he were to reoffend.

30. The panel noted that the probation officer considered the risk of serious harm to lack imminence. The panel disagreed. It noted the history of offending, the past recalls and it identified circumstances under which a *“high and imminent”* risk would exist. The Applicant is entitled to disagree, and he clearly does, as set out in his representations. However, the panel was entitled to reach the conclusions that it did on the evidence before it. The high bar of irrationality is not met.

31. The Applicant states that he has never expressed a desire to stop taking prescribed medication. He says that medication was changed due to difficulties and/or issues, however, there was never a request on his part to stop taking any medication. He maintains that he intends to comply with medication and that he has remained compliant with other medication for many years.

32. The panel commended the Applicant for his compliance with medication and noted that he had been taking certain medication for some time. It noted the absence of substance misuse on licence or since his return to prison. However, the panel noted *“material concerns relating to [the Applicant’s risk] ... alcohol and substance misuse; poor emotional control and poor coping ...”*. Any reading of the Decision Letter demonstrates that the panel was not solely focussed on the question of medication compliance. This ground does not meet the test for irrationality.

33. The Applicant submits that therapeutic work is voluntary, cannot form a part of sentence planning targets and would be inappropriate for him to commence in prison. He has been working with a specialist agency and he submits that the agency has confirmed this.



34. Sentence planning was not a consideration for the panel. It assessed the potential impact of therapeutic work and its relevance to risk. It was entitled to do so. How or where therapy might be delivered was not a matter the panel needed to consider. There is nothing to this ground.
35. The Applicant's submission that a beneficial support service will not work with him in an open prison is not a ground for reconsideration. Support and engagement with professionals is a matter for others and not for the Parole Board.
36. The Applicant believes that his latest recall reveals nothing further in terms of risk assessment or risk management. He notes that the risk management plan proposed by his probation officer was "*significant more robust than it had been previously...*", there had been no evidence of substance misuse on licence and, he submits, there was evidence of risk reduction. As can be seen from the Decision Letter, the panel clearly disagreed. It was entitled to do so on the evidence before it.
37. Two crucially important issues I must decide are first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and secondly, whether the conclusions were adequately and sufficiently explained.
38. I am satisfied that the decision not to direct release was fully justified on the totality of the evidence. In a thorough and carefully reasoned decision which sets out (in detail) the findings, assessments, operative reasoning and conclusions of the witnesses and takes fully into account all of the evidence given to the panel, including that of the Applicant himself, the panel in my judgment satisfied the public law duty to provide evidence based reasons and these adequately and sufficiently explained the conclusions it reached.

## Decision

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

**Robert McKeon**  
**19 July 2023**

