

[2023] PBRA 152**Application for Reconsideration by Walker****Application**

1. This is an application by Walker (the Applicant) for reconsideration of a decision of an oral hearing dated 24 July 2023 not to direct release.
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)) 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:
 - The decision letter, dated 24 July 2023;
 - The reconsideration representations, drafted by the Applicant's solicitor and submitted on 11 August 2023; and
 - The dossier, which now consists of 488 pages, ending with the decision letter.

Background

4. The Applicant is now 39 years old. In 2008, when he was 24, he received an indeterminate sentence of imprisonment for public protection for causing grievous bodily harm with intent, in an ambush with a knife on his ex-partner and a man he believed to be her new partner. The Applicant pleaded not guilty.
5. The trial judge imposed a minimum tariff of 4 years less time served on remand, which expired in February 2012.
6. The Applicant's only other convictions were for possession of cocaine. He had cocaine in his possession at the time of the index offence. He has twice been moved to open conditions, and returned to closed on both occasions. The reasons for return were, in 2014, that he failed to disclose a relationship, and there was concern about drugs use; and, in 2017, that there was an allegation of assault occasioning actual bodily harm against a partner. The 2017 allegation resulted in a prosecution, which did not proceed to trial because the prosecution failed to comply with disclosure requirements. A previous oral hearing panel in 2019 made a finding of fact in respect of this allegation, the panel having seen the Crown Prosecution Service papers. The Applicant had been in open conditions and was out on release on temporary licence (RoTL) when he met a woman and had sex with her. He did not inform either of his offender managers about this relationship. He attacked a male friend of the woman.



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The Applicant claimed the woman was a sex worker and that he acted in self-defence when her friend tried to rob him. The 2019 panel said "*in the light of overwhelming evidence, [the Applicant] failed to be open and honest about the events.*"

7. The Applicant has completed a large amount of offence-related work. Following the failure of the placements in open conditions a different pathway was tried. He entered the London Pathways Unit (LPU) in May 2019. He was deselected in 2019 following a fight. He was re-accepted and transferred back to the LPU in November 2020. He has stayed there since, with generally positive behaviour except for one adjudication on 3 March 2023.
8. The adjudication was for possession of a DVD with unauthorised material on it, which would have required an internet connection to be downloaded. The Applicant denied responsibility for this, saying he had lent the DVD to another man.

Request for Reconsideration

9. The application for reconsideration is dated 11 August 2023.
10. The application was not made on the published form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints, and reminds applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made. It is, however, sometimes so drafted as to express the reverse of what is intended: "*The Panel have not omitted to explain ...*".
11. The grounds for seeking reconsideration are as follows, expressing them as best I can:
 - (1) All the professionals supported release. The Applicant accepts that the oral hearing panel must make its own decision, but submits that the decision not to direct release was irrational on the evidence; "*the recommendation should be followed unless there are compelling reasons not to do so*".
 - (2) The panel placed weight (this should presumably read "*excessive weight*") on one adjudication (discussed above) within the review period, as raising concerns about compliance and openness and honesty with professionals. The professionals expressed themselves as not being concerned about this adjudication. The panel failed to explain how its concerns about this adjudication led to the conclusion that the Applicant's risk of serious harm was elevated to the point where it was necessary for him to remain confined for the protection of the public.
 - (3) The panel considered that further consolidation is required. The Applicant has been consolidating the work he has done for the last 2½ years on the LPU. The panel "*have not omitted to explain*" how the Applicant's previous failures in open and one adjudication during this review period required further consolidation work. The professionals all said they would expect consolidation work to continue on licence. None said that further consolidation work was required or available in the closed estate.

- (4) The panel expressed concern that the Applicant was not able to articulate his risk factors and how he would address them in the community. The panel did not have confidence that the Applicant would be open and honest with professionals, nor that he would fully engage with the Offender Personality Disorder (OPD) pathway. Note: It seems that the complaint here is that in expressing that concern the panel failed to take account of the Applicant's cognitive difficulties and his anxiety during the hearing.
- (5) The panel was concerned that the Risk Management Plan (RMP) was not fully developed and was over-reliant on external controls and the Applicant's willingness to engage in the OPD pathway, which is voluntary and untested. Whilst it may be that the Applicant's risk could be managed in Approved Premises (AP), this would only be for a short time, and the plan for move-on accommodation is still unclear. These conclusions are argued to be irrational, in that the RMP is very well-developed, as is normally the case when a prisoner is engaged in the LPU, with additional support provided on release by the LPU Hub. The Applicant would have support from a clinical practitioner and practical support from a mentor.
- (6) The panel failed to explain why it was not confident that the Applicant would engage with the RMP if released.
- (7) The Applicant has plans to move on from the AP to accommodation with family members *"and should not be at a disadvantage if probation had not undertaken the relevant checks in advance of his hearing."*
- (8) All the professionals agreed that the risk was not imminent.
- (9) *"The panel have failed to set out the rationale and analysis of their factual and historical findings, in such a way as to enable the Applicant to understand why the panel had concluded that those listed factual matters led to a risk of serious harm." "There was no listed behaviours [sic] created during his time on LPU ... that was such that he created the risk of serous [sic] harm."*

12. The complaint is of irrationality. There is no suggestion of procedural unfairness or error of law.

Current parole review

13. The case had previously been listed on 24 April 2023, but was adjourned following the late service of a Psychological Risk Assessment commissioned on behalf of the Applicant.

14. The oral hearing took place remotely on 17 July 2023. The panel consisted of two independent members and a psychologist member of the Parole Board. The panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM), the LPU keyworker, the prison-based psychologist, the psychologist instructed on the Applicant's behalf, and the Clinical Lead Psychologist at the prison, and from the Applicant. The Applicant's representative had some technical difficulties on 17 July 2023, but was happy to take part by telephone.


15. The panel had a dossier consisting of 468 pages. There had been an application for non-disclosure, which was rejected.

The Relevant Law

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16. The panel correctly sets out in its decision letter 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.
17. 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.
18. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

19. 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)).
20. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (Rule 28(2)(a)).
21. 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 on the previous reconsideration application in **Barclay [2019] PBRA 6**.

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 many previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
25. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"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 respect 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put 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."*
26. 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)

27. The Respondent has indicated that he does not wish to make any representations in this case.

Discussion

28. I should stress that the question in issue is not whether the Applicant disagrees with the panel's conclusions, or, indeed, whether I do, but whether those conclusions are properly described as irrational in the sense set out above.
29. As to Ground (1), I am not referred to, nor am I aware of, any authority to the effect that where all the professional witnesses support release the Parole Board should follow that recommendation unless there are compelling reasons not to do so. To recognise any such principle would be to risk departing from the basis on which the Parole Board must take decisions, which is clearly set out in the authorities cited above. The panel expressed itself in those terms, (at paragraph 4.5 in the decision letter), and said that this was such a case. The question is whether its reasoning is irrational. The approach taken by the panel was favourable to the Applicant.
30. As to Ground (2), the panel carefully explained its approach to the recent adjudication. It found the Applicant's explanation (that he did not know who had downloaded the material onto the DVD) implausible, and that the incident appeared to reflect wider concerns about the Applicant's willingness to be open and honest with professionals and his lack of consequential thinking. The adjudication was not determinative.

31. The panel's conclusion that there was more consolidation work to be done (see Ground (3)) was founded, not on the adjudication, but on the Applicant twice having failed in open conditions, failures which did not appear to be anything to do with the regime at open or any lack of support, but rather the lack of internal controls. This was a finding open to the panel on the evidence, and cannot be characterised as irrational. The panel was aware of the Applicant's generally good behaviour during his recent period in the LPU, and able to assess the relevance of that to the future in the community.
32. As to Ground (4): the panel was fully aware of the Applicant's struggle to articulate himself at times, and of his anxieties about what were described as formal meetings (see paragraph 2.12 of the decision letter). The panel recorded the evidence that the Applicant would need support and prompting in order to use his skills.
33. As to Grounds (5) and (7), the panel was fully aware of the issues raised. The Applicant's involvement with 'The Hub' would be voluntary, but monitored by probation. The panel was entitled to find that the RMP was not fully developed post AP. There was no move-on accommodation identified. Whether or not that was due to any default by the probation service, it was a fact. The RMP relied on the Applicant's voluntary engagement with the OPD pathway, which had not been tested outside closed conditions. It was by no means irrational of the panel to be concerned about the lack of certainty about the Applicant's employment plans, when he was saying he intended to work with his cousin selling gold bars, in a company which, it transpired at the hearing, was in the process of being wound up. Again, the conclusions complained of were supported by evidence and cannot be described as irrational.
34. Ground (6). The panel explained in terms why in its view the proposed RMP would not be sufficient to manage the risk of serious harm the Applicant presents (see decision letter at paragraph 3.15). It specified the lack of testing in the community, the Applicant's previous failures in open conditions, the recent adjudication, the Applicant's denials about the findings of fact, uncertainty about his lack of openness with professionals, the length of time he had been in custody, the view of all professionals that a period of consolidation is needed. Very properly, the panel did not focus on any one element of this, but on the whole picture.
35. Ground (8). Imminence of risk is a factor in the adequacy of any proposed RMP on release, but, bearing in mind that this is an indeterminate sentence and the panel had to consider the risk period accordingly, could not be a determinative factor. In any event, the panel had concerns, which it expressed and which are discussed above, about the Applicant's openness with his supervisors, which implies that indications of deterioration might not be apparent. The panel was concerned that, after so long in custody, the Applicant would struggle to manage a sudden change from closed conditions to life in the community. In the panel's view testing in the community before release was essential. Again, this cannot be criticised as an irrational conclusion on the evidence.
36. As to Ground (9), the panel set out the evidence, its conclusions, and its reasoning very clearly.

37.Overall, there is no complaint that the panel did not take account of any relevant evidence, or that it paid attention to any irrelevant evidence. The complaints are about the weight the panel attributed to various points in the evidence, and the conclusion it drew from the evidence as a whole. Neither separately nor together do they give rise to a justifiable criticism of irrationality.

Decision

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

Patrick Thomas
31 August 2023