

Application for Reconsideration by Okunzuwa

Application

1. This is an application by Okunzuwa (the Applicant) for reconsideration of a decision of a panel (the panel) of the Parole Board dated 28 August 2023 (the panel decision) making no direction for the Applicant's release and no recommendation for open conditions.
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 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 (i) the panel decision, (ii) the Applicant's application for reconsideration of the panel decision, (iii) an email dated 25 September 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) setting out their response to the application for Reconsideration as explained in paragraph 26 below, (iv) emails from the Parole Board to the Panel Chair dated 3 October 2023 and the Panel Chair's response of the same date which are referred to in paragraph 44 below and (v) the Applicant's dossier containing 306 pages.
4. The grounds for seeking reconsideration are that:
 - (a) The incorrect process was followed, and the decision was procedurally unfair as the panel stated that they had heard "*comprehensive evidence*" from the professional witnesses and "*the panel attached great deal of weight to their evidence noting that all three witnesses were of the same opinion namely that [the Applicant's] risk could not be safely managed in the community or in open conditions*". This ground for reconsideration is based on the statement in the panel decision that "*the panel's impression was that the professionals do not fully understand [the Applicant's] risks [and] ignorance in that respect is a risk in itself because it makes it difficult to manage him*". The complaint is that as a result of this complaint, "*the hearing should have been adjourned for the professional witnesses to supplement their knowledge, update their reports, make the [appropriate] referrals and come back for a further hearing, when the risk was correctly known.*" (Ground 1)

(b) The decision was irrational as the Applicant's Community Offender Manager (COM) who attended the hearing had been the subject of complaints to Senior Probation by the Applicant and "*since the hearing that complaint appears to have been upheld as [the] SPO ... has since confirmed that a new COM would be allocated 'by the end of the week'.*" (Ground 2)

The hearing before the Panel

5. A two-member panel of the Board comprising a judicial member and a psychiatrist independent member convened for an oral hearing at the prison on 21 August 2023. The Applicant was legally represented.
6. The panel heard oral evidence from:
 - a) the Applicant's Prison Offender Manager (POM);
 - b) The Applicant's COM;
 - c) The Prison Psychologist (the Prison Psychologist); and
 - d) the Applicant.

Background

7. The Applicant has "*a drug related history of convictions*" which started in 2004 when he was 15 years old, and he was sentenced to an 18 months detention and training order for possession of cocaine and heroin with intent to supply. In 2007, he was sentenced to 30 months in a young offenders institution for possession of heroin with intent to supply and possession of cannabis.
8. On 19 June 2009, the Applicant was convicted of the index offence which was a count of false imprisonment for which he was sentenced to imprisonment for public protection with a minimum tariff of 5 years 6 months. He also received a concurrent determinate sentence of 7 years' imprisonment for blackmail.
9. The Applicant was 19 years old when he committed the index offences which were directly linked to his drug dealing activities and entailed the Applicant and 3 associates torturing and imprisoning the victim and holding him hostage in order to obtain £30,000.
10. When sentenced for the index offences, the Applicant was already a serving prisoner as he had been sentenced in January 2009 to 66 months' custody for supplying heroin. This offence and the index offence were all committed when the Applicant was on bail.
11. Since being sentenced for the index offences, the Applicant has received a concurrent 3-month sentence for having a mobile phone in prison. He was released in December 2017 as a result of the decision of the Parole Board, but he received a sentence of 8 years' imprisonment in January 2019 for possession of crack cocaine and heroin with intent to supply and this led to his recall to custody.
12. This conviction showed that whilst on license the Applicant was heavily

involved in a substantial drug dealing operation and associating with criminals.

The Applicant's Custodial Behaviour

13. The Applicant's custodial behaviour has been mixed. On the one hand, he is an enhanced prisoner with many positive entries for his work ethic and for his assistance to staff. On the other hand, he has many negative behaviour entries relating to making threats to staff, being in possession of substances and of mobile phones, refusing to attend work and failing to comply with instructions and refusing to comply with staff instructions. He has had 50 adjudications since his recall but only one was proven and that was for possession of a mobile phone in March 2022.
14. The POM was of the opinion that the Applicant's negative entries were "*closely linked to him possessing devices and occasional altercations with staff when he felt aggrieved as to how he had been treated*". The Applicant has maintained that he had innocent explanations for his intelligence entries and adjudications as he had not been involved in any wrongdoing.
15. The Applicant has not completed any behaviour work since recall. He has completed a number of in-cell packs and a course with Phoenix Futures although he does not feel he has any substance misuse issues. His request for a return to the... (where he had spent 2 months in 2016 before he was found in possession of a phone) was declined. The psychologist did not consider that the Applicant would be accepted there until he could show "*a sustained period of good behaviour*".

The Risks Posed by the Applicant

16. The most recent assessment of OASYS, a probation service assessment report, showed that the Applicant posed a medium probability of reoffending, but that in the event of reoffending he posed a high risk of causing serious harm (including psychological and emotional harm) to the public and known adults and a medium risk to children with a high probability of non-violent offending. The panel considered that those assessments represented "*a reasonable indication of [the Applicant's] current level of risk*" in the light of his offending history, his conduct in custody and on license as well as his evidence at the hearing.
17. The Psychologist's evidence was that "*the Applicant had chosen not to discuss the index offence with her and so the attendant risk had not been fully addressed in her assessment*". She noted that "*he had offended after completing RESOLVE, [a training course addressing the tendency to use violence], when he had also not discussed the full extent of his violent behaviour, and this showed continuing pro-violent attitudes*". She concluded that the Applicant's offending "*is driven by his pro-criminal attitudes and the risk will remain until he makes a genuine decision to become offence free*".
18. The COM had prepared a risk management plan which envisaged the Applicant's initial residence at standard approved premises would last for

up to 12 weeks. The panel was concerned that the COM had not made a referral for approved premises which was something which should have been done prior to the hearing, but in considering whether the Applicant should be released, the panel would assume that a placement would be made available for him. The Applicant would have assigned to him key worker and he would be subject to a curfew, an exclusion zone, electronic monitoring, daily signing as well as drug and alcohol testing, non-contact with named individuals and directed offending behaviour work. There would be warning signs of increased risk.

19. The panel stated that its impression was that *"the professionals do not fully understand his risks [and] ignorance in that respect is a risk in itself because it makes it difficult to manage him."*

20. The panel explained that it had *"undertaken an independent and robust risk assessment"* and it stated that it had concluded that:

(a) The Applicant's *"history of non-compliance both in and out of custody relate directly to risk because he has shown that he is prepared to risk his freedom for financial gain and/or use violence if necessary."*

(b) (As explained in paragraph 16 above) In the light of the Applicant's offending history, his conduct in custody and on license as well as the evidence at the hearing, the panel agrees with the OASYS, a probation service assessment report, assessment that he poses a high risk of serious harm (including psychological and emotional harm) to the public and known adults and a medium risk to children with a high probability of non-violent offending.

(c) The Applicant has *"failed to establish a reasonable period of settled behaviour in custody since recall."*

(d) *"it cannot be said with any confidence that [the Applicant] has made a genuine decision to change his life away from crime."*

(e) *"all three [professional] witnesses were of the same opinion, namely that [the Applicant's] risk could not be safely managed in the community or in open conditions."*

(f) *"[it] is not satisfied that [the Applicant] has developed sufficient motivation to reform or [to have] insight into his risks and strategies to manage them to contribute to the required internal controls and compliance."*

(g) It *"did not consider he had made significant progress in reducing his risks to a level consistent with protecting the public from harm in circumstances where he may be in the community, unsupervised under licensed temporary release."*

21. These matters will hereinafter be collectively referred to as *"the specified risk factors"*.

The Panel's Decision

22. The panel concluded that having undertaken an independent and robust risk assessment and taken account of the specified risk factors that:

- (a) The Applicant's risks "*are not manageable in the community under the proposed risk management plan [and] consequently the panel decided that it remained necessary for the protection of the public that he should remain confined and so did not direct his release*";
- (b) It did not consider that the Applicant had made sufficient progress in reducing his risk to a level consistent with protecting the public to be able to recommend transfer to open conditions.

The Relevant Law

Irrationality

23. 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 that:

"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."

24. 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 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. 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. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontroversial and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will

have to provide “*objectively verifiable evidence*” of what is asserted to be the true picture.

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 summarize 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 craftsmanship.*”

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

27. In an email dated 25 September 2023, PPCS, on behalf of the Respondent stated (a) that “*having reviewed the case and liaised with Senior Probation Officer...it has been confirmed that a complaint dated 29 August 2023 [against the COM] and a further undated complaint made by [the Applicant against the COM] were considered vexatious and were not upheld*”; (b) a new COM has been allocated to the Applicant “*which is common [practice] following receipt of a breakdown of a relationship*”; and (c) that it made no further representations in response to the Applicant’s application for reconsideration.

Discussion

28. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance.
29. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those 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.
30. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
31. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
32. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

33. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

The Grounds for Seeking Reconsideration

Ground 1- Procedural Unfairness

34. It is contended that the incorrect process was followed, and the decision was procedurally unfair as the panel stated that they had heard “*comprehensive evidence*” from the professional witnesses and “*the panel attached great deal of weight to their evidence noting that all three witnesses were of the same opinion namely that [the Applicant’s] risk could not be safely managed in the community or in open conditions*”. This ground for reconsideration is based on the statement in the panel decision that “*the panel’s impression was that the professionals did not fully understand [the Applicant’s] risks [and that] ignorance in that respect is a risk in itself because it makes it more difficult to manage him*”. The complaint is that as a result of this, “*the hearing should have been adjourned for the professional witnesses to supplement their knowledge, update their reports, make the [appropriate] referrals and come back for a further hearing, when the risk was correctly known.*”

35. This ground cannot be accepted for a number of reasons.

36. First, the obligation of the panel was to carry out a careful review of the relevant evidence and then to use their expertise in the light of the evidence to decide whether the Applicant could be safely managed in the community. This is precisely what the panel did as is apparent from the specified risk factors and their statement that they had undertaken “*an independent and robust risk assessment*” which is borne out by the facts. It is noteworthy that none of the specified risk factors have been shown to be wrong or undermined in any way in the grounds for reconsideration.

37. Second, there was no obligation for the panel to obtain further evidence if after considering much evidence it decided that the professionals had not understand the risks posed by the Applicant particularly if, as in this case, the panel had on the basis of all the evidence reached the same conclusion as the professionals, namely that the Applicant could not be safely managed in the community.

38. Third, deference is to be given to the expertise of the panel in making a decision on risk especially as this particular panel saw and heard the Applicant and the professionals give evidence. The deference extends to the panel’s judgment on whether they had obtained sufficient credible evidence to reach a decision on whether a prisoner could be safely released.

39. Finally, there is a very strong argument that it was clear that even if the hearing had been adjourned so that the professionals could “*supplement their knowledge, update their reports, make the [appropriate] referrals and come back for a further hearing*”, they are unlikely to have obtained further evidence because as the panel explained “*[the psychologist’s evidence] was that [the Applicant] had chosen not to discuss the index offences with her*”

and so the attendant risk had not been fully addressed in her assessment". It must have been highly likely that if the hearing had been adjourned, the professionals would again have been faced with a prisoner who refused to discuss the index offences with them so that the professionals would then still be unable to determine the nature and the extent of the risk posed by the Applicant. This would mean that nothing would be gained by adjourning the proceedings as the professionals were unlikely to have any prospect of obtaining further evidence. This would constitute a very powerful reason for not adjourning the hearing for the professionals to seek further evidence on the risks posed by the Applicant.

Ground 2 -Irrationality

40. It is contended on behalf of the Applicant in the irrationality section of the grounds for reconsideration that this decision was irrational as the COM who attended the hearing had been the subject of complaints to senior probation by the Applicant and *"since the hearing that complaint appears to have been upheld as SPO...has since confirmed that a new COM would be allocated 'by the end of the week.'"*
41. This ground cannot be accepted for a number of reasons.
42. First, it is based on an erroneous factual allegation because as the Respondent has explained in their email of 25 September 2023 (which is referred to in paragraph 27 above) that it has reviewed the case and liaised with a Senior Probation Officer and *"it has been confirmed that [the complaints made by [the Applicant] about [the COM] were considered vexatious and were not upheld"*. The allegation in the application for reconsideration that *"the complaint [against the COM] appears to have been upheld"* is totally incorrect and therefore this ground for reconsideration must fail.
43. Second, contrary to the ground in the application for reconsideration, the allocation of a new COM for the Applicant cannot be regarded as vindication of the Applicant's complaint because as the Respondent has explained in the email of 25 September 2023, the new COM was allocated to the Applicant not for that reason but instead for a completely different reason which is that a new COM has been allocated to the Applicant *"which is common[practice] following receipt of a breakdown of a relationship"*. So contrary to the Applicant's case, the allocation of a new POM to the Applicant was not in any way a vindication of the Applicant's complaints and this further undermines this ground.
44. Third, the Chair of the panel has explained in an email dated 3 October 2023 to the reconsideration team in reply to an email of the same date from the reconsideration team that nothing was said during the parole hearing or in the closing submissions of the prisoner by his legal representative that the prisoner had complaints relating to the COM that indicates that it was not thought that these complaints were considered to be relevant to the Applicant's parole application. The decision of the panel cannot be regarded as irrational or justifying an order for reconsideration when the Applicant and his legal advisers had failed to make this complaint to the panel before



it made its decision.

Conclusion

45. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
10 October 2023