

[2023] PBRA 199

**Application for Reconsideration by Smith****Application**

1. This is an application by Smith (the Applicant) for reconsideration of a decision by a Parole Board Panel (the Panel) dated 10 October 2023 not to direct his release. The decision was made following the Panel's review of the Applicant's recall to custody which was conducted by way of an oral hearing on 5 October 2023. He had been in the community on licence.
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 or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are: the application for reconsideration with representations; the decision document; the case dossier; and the email message sent on 31 October 2023 by the Public Protection Casework Section (PPCS) of the HM Prison & Probation Service on behalf of the Secretary of State (the Respondent).

**Background**

4. On 22 July 2011, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection (IPP) having pleaded guilty to wounding with intent. A concurrent term of three months' imprisonment was imposed for theft by shoplifting. The minimum IPP custodial term was set at three years and 330 days after taking into account time spent in prison on remand, and the Applicant's tariff expired on 17 June 2015. His appeal against sentence was dismissed by the Court of Appeal on 23 October 2012.
5. These offences were committed on 8 June 2010 when the Applicant was 26 years of age. He had many previous convictions dating from the age of 15, including convictions for dwelling burglary, theft, criminal damage, taking vehicles without consent, robbery, possessing an offensive weapon, unlawful wounding, inflicting grievous bodily harm, driving over the prescribed alcohol limit, dangerous driving, driving whilst disqualified and assault occasioning actual bodily harm.
6. The pre-sentence report dated 21 July 2011 referred to the Applicant's very confusing family history and his limited formal education. He started using drugs at the age of 12 and there was also extensive consumption of alcohol. His offending



history demonstrated a pattern of aggressive and violent offending which was associated with substance abuse.

7. The index offences were committed on 8 June 2010. The Applicant, his partner and two others had been drinking cider in the afternoon and the Applicant had also been taking crack cocaine. They all went to a local shop where distracting activity by the Applicant enabled the others to steal a crate of beer. The group walked around drinking the beer and behaving in a rowdy fashion which included throwing a bottle at the windscreen of a bus.
8. The victim was cycling across a bridge when the group knocked him to the ground and kicked and punched him repeatedly in the head and face causing him to bleed profusely. One of the individuals in the group smashed a bottle over his head. The Applicant was seen to have blood on his trainers and jeans. After the initial assault was over, the Applicant returned and began kicking the victim again despite the fact that he was by then semi-conscious and struggling to breathe. The victim suffered lasting disabilities.
9. During the course of the current sentence, the Applicant completed a number of accredited programmes and engaged in other work to address his offending behaviour. This included the Self Change Programme, spending time in a Prison Therapeutic Community (TC) and engaging in work to understand and prevent substance misuse. He progressed to and was returned from open conditions twice. He then engaged with the Progression Regime within prison and the panel conducting his review in February 2022 directed his release.
10. The Applicant was released to designated accommodation on 25 April 2022. He attended supervision and key working sessions and is reported to have been proactive with Inclusion and mentoring. A lapse into the use of cocaine which he explained he took in order to give him "a bit of a buzz" was dealt with by a written warning. He received a verbal warning for associating with two peers and engaging in substance linked behaviour with them. Alcohol tests on 18 and 19 May 2022 produced readings of 0.54 and 0.52 in breath respectively. He is reported to have admitted drinking four cans of beer and to have been hiding empty alcohol bottles in the bushes. He self-reported being at a public house with residents from the designated premises.
11. On 18 May 2022, the Applicant was five minutes late for his curfew, having met with a female about whom he had not previously informed his supervisor.
12. The Applicant's licence was revoked on 20 May 2022 for breaching the condition to be of good behaviour and not behave in any way which undermines the purpose of the licence period. He was recalled to the closed prison estate.
13. The Applicant did not challenge the recall, but he denied either drinking to excess or hiding alcohol in the bushes.
14. In her 10 June 2022 report, the Community Offender Manager (COM) expressed the view that the Applicant needed to undertake further substance misuse intervention, including relapse prevention, particularly for transition stages. The Applicant

acknowledged the need for further trauma counselling and the COM considered he needed to engage with the OPD (Offender Personality Disorder) Team in custody.

### **Request for Reconsideration**

15. The application for reconsideration is dated 20 October 2023 and contains detailed representations.
16. The grounds for seeking a reconsideration are that the decision was irrational because the Panel's expressed reasons were at odds with the evidence of the professional witnesses all three of whom supported the Applicant's release. In summary, it was submitted that (1) there was no evidence to support the Panel's conclusion that his lack of violence in custody had been entirely controlled by the prison environment, (2) the Panel's reasons did not acknowledge that the Applicant's lapses into drug misuse had not led to violence. (3) The Panel's conclusion that the Applicant had yet to demonstrate a full understanding of the areas which place him at risk of further re-offending was at odds with the fact that he was able to report his lapses into drug use not only when in custody but also when on licence, (4) the Panel failed to address the therapeutic approach suggested by the risk management plan proposed by the COM, and (5) the Applicant's engagement with relapse prevention would extend into the community.
17. It was further suggested by the Applicant's solicitors that, in the event of the application being successful and a new hearing directed, it might be of assistance to a future panel to have the benefit of a psychological risk assessment.

### **Current parole review**

18. The Respondent referred the Applicant's case to the Parole Board on 8 June 2022 to decide whether to direct his release. The terms of referral included a request to consider, in the event that release was not directed, whether the Applicant was ready to be transferred to open conditions. Such advice is not within the remit of the reconsideration procedure.
19. The case dossier included updated reports by the Applicant's current COM, by the Prison Security Department and by the Prison Substance Misuse Team. Oral evidence was given at the hearing on 5 October 2023 by the Prison Offender Manager (POM), the COM, a member of the substance abuse team and by the Applicant himself. Oral submissions were made by the Applicant's legal representative. No submissions were put forward by or on behalf of the Respondent who was not represented at the hearing.
20. The Panel heard evidence that the Applicant had engaged with the recovery team, that his medication was being managed and that there were no reports of illicit substance misuse. He had maintained Enhanced Status under the Incentives and Earned Privileges Scheme and was employed in a trusted position. The POM accepted that there had not been time for OPD support in the community to 'kick in'.
21. The plan for release and the risk management plan (RMP) proposed by the COM included an initial period in designated premises in a Psychologically Informed

Planned Environment (PIPE). A place had been secured for the Applicant for a period of up to six months from March 2024, after which he would receive support in obtaining suitable move on accommodation. There would be continuing psychologically informed support. The Applicant would be required to engage in substance relapse prevention work and offending behaviour reduction work in the community.

22. The POM expressed the view that the RMP was highly suitable to manage risk in the community and supported release. The COM told the Panel that work on substances and alcohol would be undertaken through the organisation Change Grow Live. In her opinion, drugs were the main issue, but the Applicant also recognised himself that alcohol could escalate his poor decision making. She considered that further work would be undertaken to address this. He would need high levels of support. The COM considered that a transfer to open conditions would be setting the Applicant up to fail as the lack of support or limited support in that environment would lead him to lapse or relapse.
23. The Offender Assessment System (OASys) Report dated 14 September 2023 assessed the probability of both violent and non-violent re-offending by the Applicant to be medium. The statistical probability of general re-offending was assessed as medium, and the risk of serious recidivism (RSR) based on dynamic or changing factors was assessed as medium at 4.4% over the following two years.
24. The risk of serious harm to the public in the event of any re-offending in the community was assessed as high. This means that there are identifiable indicators of risk at the level, that the potential event could happen at any time and that the impact would be serious. The risk of such harm to children and to any known adult was assessed as medium.
25. These assessments were endorsed by the COM at the hearing and accepted by the Panel in its decision reasons.
26. The member of the Prison Substance Team who gave evidence at the hearing told the Panel that the Applicant had expressed the view that his substance misuse was not an issue as he knew how to manage it. In that witness's view, the Applicant had minimised his misuse of drugs and alcohol. She considered he had chosen to stay on drugs, despite having the skills to avoid them and she was unable to say if he would be able to use his skills in the future to avoid a lapse or a relapse.
27. The Applicant explained to the Panel that his release arrangements had gone wrong as a result of taking cocaine after he ran into an old associate in a local public house. The reason he had accepted a line of cocaine when offered was that he was afraid to refuse in case the associate thought he was a 'grass'.
28. Both the POM and the COM supported the Applicant's release. The POM considered that the Applicant had minimised the substance misuse issues, in particular having viewed his own behaviour as akin to a teenager testing boundaries. However, the POM felt that the Applicant had learned from the recall and that the risk management plan was highly suitable to manage his risks in the community. The COM expressed the view that the RMP with high levels of psychological and practical

support required after many years of institutionalisation was sufficient to manage his risks.

### The Relevant Law

29. In its 10 October 2023 decision letter, the Panel correctly sets out the test for release, namely that the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. This test is automatically set out in the Parole Board's template for oral hearing decisions.

#### *Parole Board Rules 2019 (as amended)*

30. Under Rule 28(1) of the Parole Board Rules 2019, a decision concerning whether the prisoner is or is not suitable for release on licence 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)). This case concerns the decision of an oral hearing panel after an oral hearing. Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)) but this does not apply to the present case.
31. 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)). The present case falls under Rule 28(2)(a).

#### *Illegality*

32. An administrative decision is unlawful under the broad heading of illegality if the panel:
- (a) misinterprets a legal instrument relevant to the function being performed;
  - (b) has no legal authority to make the decision;
  - (c) fails to fulfil a legal duty;
  - (d) exercises discretionary power for an extraneous purpose;
  - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
  - (f) improperly delegates decision-making power.

33. No issue of illegality arises in this case.

#### *Irrationality*

34. 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."*

35. 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.
36. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### *Procedural unfairness*

37. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed, or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.
38. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy the reviewer that either:
  - a) express procedures laid down by law were not followed in the making of the relevant decision;
  - b) they were not given a fair hearing;
  - c) they were not properly informed of the case against them;
  - d) they were prevented from putting their case properly; and/or
  - e) the panel was not impartial.
39. The overriding objective is to ensure that the Applicant's case was dealt with justly.
40. No issue of procedural unfairness arises in this case.

#### *Other*

41. 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 uncontentious 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.

42. No mistake of fact has been alleged in this case.
43. 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 Respondent**

44. PPCS has confirmed that no representations are offered by the Respondent.

### **Discussion**

45. The 2022 panel which directed the Applicant’s release noted that the professional witnesses whose evidence it heard had concluded that he did not need to undertake any further core risk reduction work. In directing his release, it expressly recognised that substance misuse remained a key risk factor and one which could trigger the return of other risk factors. Significantly, a lapse into using cocaine was a major factor in the decision to revoke his licence.
46. The 2023 Panel acknowledged that two of the three professional witnesses whose evidence it considered supported release and that the RMP was augmented by additional support from a PIPE designated premises. However, having identified the Applicant’s underlying risk factor to be substance misuse, it concluded that he had not fully addressed this. In view of the outstanding issues which it considered required further exploration and resolution, the Panel was unable to conclude that the test for release had been met.
47. A Panel should always take into account the opinions expressed by professional witnesses, particularly where they have been directly involved in the management and supervision of an offender, as both the COM and the POM in this case have been. However, it should exercise its independent judgment, taking into account all the evidence before it and may properly reach a different conclusion. It is apparent that in this case not all the opinions expressed were as one. The Panel clearly identified a key area of concern which lies at the heart of the Applicant’s offending history and concluded he had not completed all the core risk reduction work necessary for his progression.

### **Decision**

48. In my judgment, the Panel carefully assessed and weighed in the balance all the evidence received and submissions made before making an objective and well-reasoned conclusion. For the reasons I have given, and applying the test set out in case law, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**HH Judge Graham White**  
**15 November 2023**