

**[2023] PBRA 98**

## **Application for Reconsideration by Davies**

### **Application**

1. This is an application by Davies (the Applicant) for reconsideration of a decision of an oral hearing dated 25 January 2023 and issued on 1 February 2023 not to direct release or recommend his transfer to 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 (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 1001 page dossier provided by the Secretary of State which included the Panel's written decision, the closing written submissions dated 18 January 2023 submitted by the Solicitor representing the Applicant, the application for reconsideration submitted by the Solicitor representing the Applicant dated 22 February 2023 and an email from PPCS on behalf of the Secretary of State dated 14 March 2023.

### **Background**

4. The Applicant is now 51 years old. In 2004, when he was 31, he received a life sentence with a minimum term of 14 years, resulting in a Tariff Expiry Date of 8 March 2017. The Applicant pleaded not guilty but was convicted of an offence of murder. The victim was his then-partner of 16 months. It is documented that on 28 February 2003, the victim and the Applicant had argued and the victim had asked him to remove his property from her address. When the police forced entry into the Applicant's address several days later, where they found the body of the victim, she had suffered approximately 39 stab wounds. The victim's ex-husband's name was written in blood next to the body. Although it was accepted at his trial that the Applicant was suffering from a form of psychotic illness brought about by his use of amphetamines, the jury concluded this did not significantly reduce his culpability for the victim's death.
5. The Applicant has no previous convictions.

6. During the course of his sentence, the Applicant has given conflicting accounts of his involvement in the offence.
7. The Applicant spent a period of his remand in hospital detained under sections 48/49 of the Mental Health Act. The Applicant rekindled his relationship with his first intimate partner LH (who is now his wife), in 2008 whilst in a medium-secure mental health unit. Concerns have been raised about this relationship.
8. The Applicant has been transferred from prison to hospital under the Mental Health Act on three separate occasions since the commencement of his sentence; in 2008, 2011 and most recently in 2018.
9. The Applicant's psychiatric diagnosis at the point of his recent remittance to prison was one of Delusional Disorder specifically in relation to the circumstances related to the index offence. The delusional beliefs he holds are fixed beliefs which have not changed over many years. His condition has been resistant to medication. In addition to Delusional Disorder, it is also considered that the Applicant suffers with a complex personality structure and he meets the diagnostic criteria for Borderline and Paranoid Personality Disorder.
10. In August 2021, the Applicant had a Mental Health Tribunal which concluded that had he been subject to a Restriction Order he would have been entitled to a Conditional Discharge and that he should remain in hospital pending a Parole review.
11. The Applicant had married during a period of his unescorted leave. He had not disclosed his wife's change of address thus compromising the ability to manage the risk within the relationship. All his leaves were suspended and it was concluded that it was no longer appropriate for him to remain in hospital. The Applicant was remitted back to prison on 17 May 2022.

### **Request for Reconsideration**

12. The application for reconsideration is dated 22 February 2023.
13. The application was not made on the published form CPD2. It is, however, succinct and very clearly focused on the issues.
14. The grounds for seeking a reconsideration are as follows:
  - a) That the Parole Board's decision is irrational given the stark contrast of it to that of the Mental Health Tribunal.
  - b) That the Panel reached their conclusion based on the erroneous belief that he was removed from the Healthy Relationship Programme.

### **Current parole review**

15. The three member panel, including a Psychiatric member and a Psychologist member, heard evidence at oral hearings on 17 August 2022 and 17 January 2023, the first hearing was adjourned part-heard to obtain a psychological risk assessment. Both hearings were held remotely, by video. The panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM), the previous Responsible Clinician (RC), the hospital Psychologist from the mental health unit, a prison Psychologist, a Forensic Community Psychiatric Nurse and the Applicant. Prior to the first oral hearing, six victim impact statements were read. The Applicant was represented throughout by an experienced legal representative who was able to question witnesses and make submissions. The Secretary of State was not represented.

### The Relevant Law

16. The reconsideration mechanism is not a process where I am required to indicate whether, or not, I might have reached the same or a different conclusion from that reached by the Panel.

17. 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.

18. 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.

19. 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).

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)).

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 **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."*

### The reply on behalf of the Secretary of State

26. The Secretary of State confirmed by way of email dated 14 March 2023 from the Public Protection Casework Section (PPCS) on his behalf that he did not wish to make any representations in response to the application.

### Discussion

27. The Panel concluded:

*"The Panel assess [the Applicant's] risk of serious harm as high were he to be in the community. Given previous failures to disclose critically important information whilst at the [hospital] the Panel had little confidence he would do any differently*

*within the community. Without his full co-operation with the proposed RMP the Panel were not persuaded he would engage in a manner consistent with his level of risk. The position is further exacerbated by his wife's acceptance of his view of the index offence which would inhibit her ability to identify warning signs of increased risk. This means that [the Applicant's] risk could escalate and become imminent without those tasked with monitoring and supervising him being aware of this. The Panel also had increased concerns about the manageability of his risk once he left an AP and where external controls would inevitably be relaxed."*

#### Ground A:

28. The Applicant submits that *"it is wholly irrational to assess that continued detention in closed conditions is necessary. [The Applicant] is diagnosed with a personality disorder but has proven that he can be managed in the community. The Applicant was conditionally discharged following a review by the Mental Health Tribunal having completed all work identified as relevant within a hospital setting. [The Applicant] was released into the community on an unescorted basis for some 36 hours a week over a 2 year period and asserts that his conduct and behaviour caused no issue or concern to suggest that risk is not manageable in the community. [The Applicant] asserts that the Parole Board's decision is irrational given the stark contrast of it to that of the Mental Health Tribunal... [the Applicant] maintains that he provided a truthful account to the Panel at the oral hearings and is concerned that his account has been dismissed with the account of the professional witnesses preferred without any corroborating evidence. The Applicant believes that the Panel was pre disposed to favour the accounts of the professionals over that advanced by him."*
29. It is for the panel to determine how much weight to attribute to the evidence before it. It is evident from the written decision of the panel that the Applicant was given the opportunity to provide his account to the panel. The panel's decision states *"[The Applicant] has disputed not informing staff he was married and that in his view, he had not breached any of the conditions of his leaves."*
30. The panel therefore did not dismiss his account. However, the corroborating evidence amongst professional witnesses, was that the Applicant had withheld important risk related information and had disengaged from the clinical team at the medium-secure mental health unit where he was residing. Furthermore, the psychiatric assessment, which reiterated *"that since being in the [medium-secure mental health unit] we have gained a better understanding of his personality structure, especially with regards to his propensity to be untruthful in order to further support his own narrative and to support his needs and desires. He has strong traits of a narcissistic personality structure"*.
31. In my view, it is not unreasonable or irrational for the panel to have favoured the account of professional witnesses over that of the Applicant.

32. The parole dossier contained the Mental Health Tribunal decision which had been considered by the panel. The panel also made reference to the evidence of the Applicant and expressly took into consideration the progress he had made by stating: [The Applicant] *"has undertaken a sufficient body of work, specifically in hospital to address his risk factors, however such work has not fundamentally altered his view of the index offence. Therefore, although it could be argued he has made progress on his sentence, the Panel were not content that such progress was consistent with protecting the public from harm...[the Applicant] has undertaken significant periods of unescorted leave whilst in hospital.*

33. I note that the Mental Health Tribunal decision, dated 16 August 2021 stated:

*"In the circumstances, we accept the unanimous view of the care team that the nature of the diagnosis, a personality disorder which continues to pervade his life, means that it is appropriate for him to be liable to be detained in hospital. The degree of the disorder, managed as it is in a highly skilled medium secure setting does not at present make ongoing detention appropriate, although the stressors that would occur if he is exposed to an inappropriate community setting may change that."*

34. The panel also pointed out that, *"of note was that the RC did not consider [the Applicant] suitable for a Conditional Discharge due to limited evidence of change in spite of psychological interventions, that his risks towards others remained unaltered, he had not been sufficiently tested within the community via overnight leaves and further treatment in hospital was no longer necessary."*

35. The Parole Board panel were entitled to and did, undertake their own risk assessments taking into account all the evidence before them and applying it to the correct test for release. It is noted that the Parole decision was made almost 18 months following the Mental Health Tribunal decision and whilst there was some positive progress cited, there had been some adverse developments in the intervening period, which the panel discussed in their written decision, including (in summary):

*"When undertaking some stress management work between October and November 2021, the facilitator considered the Applicant was minimising stressful events he had encountered; staff were concerned that he was living in a bubble with his partner (LH) and not appreciating he could or would experience future stressors; the Applicant expressed frustrations about not being allowed leave to LH's address which led to a deterioration in his relationship with the hospital social worker and LH also began to disengage from the process; the team were concerned he was being vague about his movements when in the community; The Applicant was spending time alone with LH in a caravan during periods of unescorted leave which would have breached the condition of his leave; the Applicant had married during a period of his unescorted leave, he stated that staff were aware of this although there is no evidence from Probation or the Multi-Disciplinary Team to support this assertion; attempts made to make contact his wife (LH) to increase monitoring of*

*his use of leaves, but these efforts were unsuccessful; in March 2022, The Applicant made a request to change clinical teams due to a breakdown in the working relationship; in May 2022 it became known that his wife was not living where the clinical team had thought but instead, she had moved in November 2021 and he had not disclosed this change of address thus compromising the ability to manage the risk within the relationship; all his leaves were suspended and it was concluded that it was no longer appropriate for him to remain in hospital and was remitted back to prison on 17 May 2022."*

36. The panel were entitled, after hearing all evidence, to make their own findings and differ in their conclusions to that of the Mental Health tribunal, especially when considering that the panel had the benefit of additional evidence, both of additional assessments of professionals, including a psychological risk assessment completed by a Forensic Psychologist, and the evidence of the developments and progress during the time period since the Mental Health tribunal.
37. I do not consider that the contrast in the conclusions of the Parole Board panel to that of the Mental Health Tribunal amount to irrationality.

#### Ground B

38. The Applicant submits that he *"is concerned that the Panel reached their conclusion based on the erroneous belief that he was removed from the Healthy Relationship Programme. The Applicant did not commence the Healthy Relationship Programme and maintains that the Panel did not have the correct information available when they recorded at paragraph 1.18 'The current Panel note that The Applicant was assessed for the Healthy Relationship Programme in 2014 but due to concerns raised regarding his account of the index offence he was suspended from the programme.'* The Applicant is concerned that this factual error has tainted the Panel's understanding."
39. It is possible to argue that mistakes of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. 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.
40. The wording adopted by the panel appears in the dossier within OASys reports and in the PAROM1 report at page 351 of the parole dossier. It states:
- "In 2014 [the Applicant] was assessed for the Healthy Relationships Program, during the assessment concerns were raised regarding his views of the offence, resulting in him being suspended from HRP. I understand that he remains unsuitable for this intervention due to the views he has surrounding the offence and his Paranoid Personality Disorder."*

41. The use of the word 'suspended' may result in ambiguity, it is not clear from the use of this wording in the written decision, that the panel understood, that the Applicant was assessed as unsuitable for the HRP and did not commence the programme, rather than commencing the HRP and then being suspended. However, this is confirmed within the legal submissions at page 578 that the Applicant "was deemed unsuitable."
42. I do not consider that ambiguous wording, taken from other evidence in the dossier, as to whether the Applicant was assessed as unsuitable for the HRP or whether he was suspended from the HRP, in 2014, amounts to a fundamental mistake of fact in this case. He has not undertaken HSP, but the panel's decision comments upon evidence that further offending behaviour work would have little benefit due to his views on the index offence.
43. I have considered the specific submissions of the Applicant. I am satisfied that this decision was not 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. I do not consider any of the points raised have succeeded. Consequently, the ground of irrationality fails.
44. The application for Reconsideration is refused.

**Katy Barrow**  
**18 May 2023**