

[2024] PBRA 176

Application for Reconsideration by O'Loughlin

Application

1. This is an application by O'Loughlin ('the Applicant') for reconsideration of a decision of a panel dated 22 July 2024 ('the Decision') made after an oral hearing on 7 June 2024 to make no direction for the release of the Applicant and no recommendation for 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the Decision, the Application for Reconsideration, the email dated 21 August 2024 from the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State (the Respondent) to the Parole Board stating that no representations are being made in response to the Reconsideration Application.

Request for Reconsideration

4. The application for reconsideration is dated 14 August 2024.
5. The grounds for seeking a reconsideration are that the Decision was irrational or procedurally unfair in that the panel:
 - a. failed to give appropriate weight to points raised in the closing submissions made on behalf of the Applicant that there was "*unanimous support*" for the Applicant's release, "*unanimous agreement no core risk reduction work [was] outstanding [for the Applicant to complete]*", an "*agreed lack of imminence to risk*", the Prisoner Offender Management's ("POM") view of the Applicant possessing a "*slow burn' risk*", there had been on the Applicant's part "*a lack of violence for a number of years*" and there was "*no evidence of substance misuse [by the Applicant] for [a] significant period*" (Ground 1).
 - b. clearly placed considerable weight on the issues that arose with the Phoenix Futures worker which it "*linked to grievous thinking but failed to give adequate weight to the fact that [the Applicant] was not adjudicated, no*



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professional meeting was arranged and there was no backstaging” (Ground 2).

- c. *“made a mistake of fact in respect of IAPT [Improving Access to Psychological Therapies] [as the panel] proceeded on the basis that [the Applicant] failed to attend appointments as directed and the failure was a result of him failing to engage/comply” but “this was not correct as has been highlighted by [the POM] since the hearing through a report she provided to PPCS and email [which shows that] it was the neurodiversity team that cancelled appointments rather than [the Applicant] refusing to engage [and] in the light of the above the assessment around compliance and manageability were flawed and fell more within the professional witnesses view” (Ground 3).*

Background

6. On 18 September 2007, the Applicant, who was then 35 years old was sentenced to an indeterminate sentence for public protection with a minimum period specified at 3 years 228 days and a concurrent sentence of 3 years imprisonment for offences of wounding with intent and blackmail (“the Index Offences”). The offending occurred at the flat of the Applicant’s victim where the Applicant had *“made himself at home for a number of days”* prior to the Index Offences. The sentencing judge commented on the vulnerability of the victim. The Applicant is said to have beaten the victim, kicked him and repeatedly punched him with a belt wrapped around his fist such that he suffered serious internal injuries, fractured ribs and a collapsed lung. It was only when the Applicant fell asleep that the victim escaped and that the police and the ambulance were then called. The Applicant is said to have justified his violent assault of the victim because of his view that the victim was a sex offender. His tariff expiry date was 3 May 2011.

Current Parole Review

7. The Applicant’s parole hearings took place on 26 January 2024 and on 7 June 2024.

The 26 January 2024 hearing

8. At this hearing, the Applicant’s POM at prison 1 explained that the Applicant has been diagnosed as suffering from Autism, but that he had not been diagnosed as suffering from PTSD.
9. She considered that the Applicant did not have any core work outstanding to be completed but his outstanding work is *“about consolidating”*. She considered that the Applicant will meet the test for release *“in a few months’ time”*, but she implied that at that time when she was giving evidence, he did not *“currently meet the test for release”*. She conceded that the support package and the risk management plan would rely on the Applicant engaging with the plans and support and *“she acknowledged that he has struggled to do that in the past”*. The panel noted that it could be said that the Applicant *“had difficulty forming a close association with newer and younger staff”*.
10. Mr Clarke the Applicant’s POM at prison 2 gave evidence explaining that the Applicant had lost his job *“as a result of appearing to refuse to go to work three*



times". The panel was "concerned about the casual way in which the POM spoke about the Applicant potentially continuing to avoid things that he does not want to do". The panel considered that it was unable to place much weight on the POM's evidence in the light of the lack of knowledge that he has of the case that is not based on the Applicant's self-reporting.

11. The Applicant gave evidence, and the panel considered having heard the Applicant's evidence that he "continues to minimise his offending in the index offence and that he does not take full responsibility for it". While the judge stated that the Applicant kept the victim for seven days, the Applicant states that that incident "went on for a 10-minute period". The panel assesses that in claiming that the judge was wrong, the Applicant "provides evidence of continuing and current minimisation of his use of extreme violence and also a lack of responsibility taking and poor victim perspective". The panel was concerned that the Applicant "continues to use instrumental behaviour and language to manipulate others in order to achieve an objective".
12. The panel agreed with the evidence of the Prison Psychologist that the Applicant must increase his insight into substance misuse and indicated that "substances do not fully explain the level of violence – extreme violence before". The Prison Psychologist stated that professionals understood how the Applicant's level of violence came about, but the panel considered that "it is problematic for professionals to fully understand the offending and the risk level of violence" in the absence of an active account from the Applicant of the violence and the duration of violence used and why.
13. The Prison Psychologist assessed "the current RMP as not being sufficient to manage [the Applicant] in the community because the supports are not currently included".
14. The Stand-in COM assessed that the Applicant "is not yet ready for release because there are deep entrenched views around Probation."
15. Both the POMs, the prison psychologist and the Stand-in COM all recommended that the Applicant "return to [prison 1] for a period ahead of any release might be directed". After a private discussion between the Applicant and his legal representative, the legal representative asked for a 3-month adjournment so that the RMP could be fully developed, and this application was agreed to. So, the matter was adjourned to the June hearing.

The 7 June 2024 Hearing

16. The COM reported that her working relationship with the Applicant had improved and that he does not disagree with any of the plans nor the requested additional licence conditions. She talked of various services, support and interventions which she wished to provide but the panel noted that she used the word "hopefully" a number of times and when asked if these things were definitely going to happen, she stated that "it is out of my control" which the panel considered to be true but "the panel knowing precisely what will be in place is an important issue and essential to the determination of risk."



17. The panel was concerned that the COM appeared to have overlooked the evidence of the Applicant's *"grievance thinking and poor attitude to females that is current"*. Examples were given of referring to the Probation Officer at the January hearing as *"she devil"* and stating that his Phoenix Future key worker was *"unprofessional and pathetic"* and that she could *"fill my fucking boots"*. The panel considered that grievance thinking, and poor attitudes are core risk factors of the Applicant and that *"the attitudes and beliefs the comments evidence are unlikely to be conducive to developing good and consistent professional working relationships"*. The COM recommended the Applicant's release as all core work has been completed and the Applicant meets the legal test for release.
18. The POM at prison 1 recommended the release of the Applicant. She explained that since the last oral hearing the Applicant had *"demonstrated grievous thinking to his Phoenix Future key worker – we have had three-way meetings with him and her, he struggles with the decisions she made, he is resentful and unhappy about it"*. The panel considered that although it could understand that the Applicant is unhappy about how the transfer out of prison 1 came about *"it is of concern that he is not using the skills we are told he learnt to deal with the issue in a pro social manner, and that he has reverted to maladaptive thoughts and attitudes such as grievance thinking and rumination, that are core risk factors for him."*
19. The POM reported that when the Applicant arrived back at prison 1, he agreed to work with Phoenix Futures but when he was allocated the same key worker, the Applicant disengaged.
20. The panel noted that the Applicant had not developed a relapse prevention plan and the POM reported that concerns about grievance thinking on the Applicant's part remains and he feels unfairly judged. She explained that it is important to explain to the Applicant why he is being asked to do something and *"let him see what is in it for him"*. The POM was asked if the Applicant was asked by his COM not to see someone which he thought was unfair whether that would cause resentment, and she said that it would cause resentment and that it would be necessary *"to break the reasons down and look at what is rumination and paranoia and what is fact"*.
21. The POM says that due to the Autism diagnosis, the Applicant is now able to say if he is not clear or sure about something and that it is important that people have clear boundaries with him but *"the issues of personality disorder and his traits and how [the Applicant] understands and manages them is an area of work that has not been fully addressed"*. The panel agree with the POM that access to Autism support group would be helpful for the Applicant.
22. The POM confirmed that the IIRMS had not conducted any video link or face to face meetings with the Applicant and so his willingness to engage with that service remains untested. She recommended the Applicant's release.
23. The Applicant gave evidence that he was undertaking mediation work with the Phoenix Future key worker and that a mediation meeting took place with just the 2 of them there, but the mediation process requires more than 2 people to be present. When the key worker told the Applicant that the mediation could not go ahead unless the requisite 3 people were present, he told her that she was *"pathetic and unprofessional"* and the key worker declined to have a further conversation. A few



days later, the Applicant engaged the keyworker in conversation as to if he would "get a fair report" and the conversation ended with the Applicant telling her "Fill your fucking boots [key worker]."

24. The panel are concerned "*that there is evidence of very recent paranoia, emotional dysregulation, use of aggressive verbal exchanges, rumination and vengeful thinking, poor thinking. Lack of perspective taking and lack of consequential thinking all of which are among the core risk factors in this case*".
25. The panel are also concerned that the Applicant has developed a theory about the Phoenix Future keyworker "*that has been formulated with no attempt to consider facts, ask reasonable questions or consider her point of view*". The panel were concerned that the Applicant said that nothing would go wrong for him upon release which the panel considered to be unrealistic.
26. The panel was concerned about "*the live risk factors his involvement with and responses to [the keyworker] evidences*". After the Applicant stated that he believed that nothing would go wrong on his release, the panel regarded this as "*unrealistic [and] his comments regarding professionals appear to evidence ongoing lack of responsibility taking and ruminations*".
27. The Applicant was asked about the Health Passport with mental health and the Drug Team that the Autism Assessor, has said he should work with, but the Applicant stated that he had not done it because "*it went over my head*". He informed the panel about "*signs that his mental health is declining including getting lethargic, distracted and being disinterested*".
28. The Prison Psychologist, said that she had had no further contact with the Applicant since her January 2024 meeting and that there were no changes to her assessments. She believes that the Applicant is likely to comply because he is aware of the consequences for him if he does not, but the panel pointed out that the fact that there would be negative consequences for him if he does not comply has not always secured compliance or engagement. She recommended the Applicant's release.
29. She noted that the Applicant has not shown direct violence, but she conceded that the issue with the keyworker was of concern and that members of the public would not know and understand the effect of the Applicant's autism. The panel did not share the Psychologist's confidence that there is a low risk of conflict with members of the public in the light of the Applicant's "*live risk factors and lack of engagement with relevant services*". She considered that that the Applicant might disengage if he were to have problems with housing or employment.
30. The panel noted that the Applicant has not engaged to develop the passport that he was advised to develop with either the mental health team or the drug and alcohol team. The panel agreed that there was some evidence that indicates some uncertainty on the Applicant's part about engagement.

Assessments of the Applicant



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31. OASys's assessment is that the Applicant poses a medium predicted risk of violent reconviction and a medium probability of proven non-violent offending. The Spousal Assault Risk Assessment (SARA) assessment indicates a medium risk of future spousal assault/abuse.
32. The panel regards these scores as "*actuarially correct*", but significantly that these scores underestimate the actual risks posed by the Applicant at the time of the Decision due to a combination of significant risk factors that are not directly assessed by these tools such as "*personality traits/disorders, the impact of [the Applicant's own life trauma, and how that impacts upon his attitudes, beliefs, thinking, personality and his behaviour]*" and the length of time that the Applicant has been in custody which is not recognised in these assessments.

The Conclusions of the panel

33. The panel having considered all the evidence and in particular that of the Applicant before it concluded that:
- a. "*there is outstanding work to be completed by the Applicant regarding thinking skills, rigid thinking, vengeful, grievance and rumination thinking, emotional self-regulation, use of violence (both instrumental and reactive) and aggression, relationships, consolidation of his learning to ensure that the learning is properly internalised, development of insight and responsibility taking, better developed insight into his personality traits and how to recognise and self-manage those personality disorders and traits, develop a willingness to be open about negative or difficult developments, and a need to develop skills in being open, honest and cooperative with all professionals involved in his case, in order that his risks can be managed by external controls, and also controls that [the Applicant] has developed, internalised and consolidated*".
 - b. the risks posed by the Applicant "*are currently unmanageable and could be imminent were he to be released at this stage in his sentence*". And that
 - c. the Risk Management Plan ("RMP") "*provided would not manage the risks the Applicant currently poses*".
34. In the light of the challenges to the Decision, it is important to stress that the panel explained that it had carefully noted all the evidence, including the closing written legal submissions of the Applicant's legal representative.
35. The panel explained that it had also taken account of the seriousness of the index offence and the Applicant's recorded offending history, and it is not suggested that the panel was wrong to do so.
36. *The panel further explained its Decision by stating that:*
- a. Although the Applicant has some protective factors, the panel was "*in difficulty to identify any protective factors which would serve to reduce [the*



Applicant's] risk or to indicate the risk is manageable were [the Applicant] to be in the community on licence".

- b. The Applicant has been asked to engage with the drug and alcohol treatment team, and he has not done so and although *"the panel can understand why he did not wish to work with his previous key worker again, he appears to have manipulated the situation to withdraw altogether, this as opposed to asking for a different key worker"*.
- c. The person undertaking the autism assessment advised that the Applicant must develop a Passport, but he has not done so.
- d. The Applicant has declined to engage with IAPS *"because he believed there was nothing for him to do"*, which is *"a theme of [the Applicant] not doing things that he is told he should or must [do and]... work to assist [the Applicant] to change this practice and the attitudes and personality disorders/traits that underpin them is needed"*.
- e. Risk reduction work and consolidation work as described in the Decision letter is required before the Applicant can be safely managed in the community on licence.
- f. There was *"insufficient evidence of risk reduction and consolidation work consistent with protecting the public from the risk of serious harm. upon release"*.
- g. *"work to understand [the Applicant's] personality disorders/traits has not yet been fully and effectively completed and consolidated by [the Applicant]"*.
- h. The Applicant *"is currently evidencing rumination and grievous thinking core risk factors in this case"*.
- i. For the reasons set out in the Decision letter, the panel disagrees with the recommendations made by the witnesses in this case and some of their reasoning.

The Relevant Law

37. The panel correctly sets out in its decision letter dated 22 July 2024 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.

Parole Board Rules 2019 (as amended)

38. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).



39. 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)).]
40. 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**. Accordingly, the application to reconsider the failure to recommend a release to open conditions must be refused and will not be considered further.

Irrationality

41. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation** 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
42. In **R (DSD and others) -v- the Parole Board** 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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.*"
43. In **R (on the application of Wells) -v- Parole Board** 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was "*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 regard 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*". This test was adopted by a Divisional Court in the case of **R (on the application of the Secretary of State for Justice) -v- the Parole Board** 2022 EWHC 1282 (Admin).
44. As was made clear by Saini J this is not a different test to the **Wednesbury** test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.
45. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness



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46. 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.

47. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me 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;
- e) the panel did not properly record the reasons for any findings or conclusion; and/or
- f) the panel was not impartial.

48. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Mistaken Findings of Fact

49. 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.

Reconsideration as a discretionary remedy

50. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having



considered the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Respondent

51. An email from the Public Protection Casework Section (PPCS) on behalf of the Respondent to the Parole Board dated 21 August 2024 offered no representations in response to the Applicant's Reconsideration Application.

Discussion

52. I have considered with care all the submissions of the Applicant, including of course the points made in the closing submissions of the Applicant's legal representative. I have concluded that the panel was entitled to conclude that the release test was not met for the following reasons and that this conclusion was neither irrational nor procedurally unfair.

53. First, the panel members, as the specified decision makers were entitled to conclude that the release test was not met by the Applicant having seen and heard all the witnesses including the Applicant and then concluded, as they were entitled to, that at the time of the Decision:

- i. there was *"insufficient evidence of risk reduction and consolidation work [carried out by the Applicant] consistent with protecting the public from the risk of serious harm. upon release"*;
- ii. there was outstanding *"work to understand [the Applicant's] personality disorders/traits [that had] not yet been fully and effectively completed and consolidated by [the Applicant]"*;
- iii. the Applicant was then showing *"ruminating and core risk factors"*; and/or because
- iv. the Applicant still had to complete the outstanding work set out in paragraph 33 above because as they explained the risks posed by the Applicant *"are currently unmanageable and could be imminent were he to be released at this stage in his sentence"* and that *"Risk reduction work and consolidation work as described in this decision letter is, in the assessment of the panel, required before [the Applicant] can be safely managed in the community on licence."*

54. Second, the Applicant has failed to show that the panel was not entitled to reach the conclusions set out in paragraph 53 or any of them. In so far as it is contended that had the panel failed to give *"appropriate weight to the points raised in the closing submissions [of the Applicant's legal representative]"* or that the panel made mistakes of fact in respect of IAPT or the Phoenix Futures worker, it has not been alleged (let alone proved) that these matters undermine in any way:



- i. each or all the matters set out in paragraph 53;
- ii. the findings that the risks posed by the Applicant "*are currently unmanageable and could be imminent were he to be released at this stage in his sentence*"; and that
- iii. the "*risk reduction work and consolidation work as described in this decision letter is, in the assessment of the panel, required before Mr O'Loughlin can be safely managed in the community on licence*".

55.Third, in any event, there is no evidence that there is any truth in the allegation in the Grounds for Reconsideration that the panel failed to give "*appropriate weight to the points raised in the closing submissions [of the Applicant's legal representative]*" or that the panel made a mistake of fact in respect of IAPT or the Phoenix Futures worker.

56.Fourth, if which is denied, there is any truth in the allegation in the Grounds for Reconsideration that the panel failed to give "*appropriate weight to the points raised in the closing submissions of [the Applicant's legal representative]*" or that the panel made a mistake of fact in respect of IAPT or the Phoenix Futures worker, then

- a. in that event, (even after taking into account the points raised in the closing submissions of the Applicant's legal representative and the mistakes of fact made in respect of IAPT and the Phoenix Futures worker) there were still numerous cogent and valid reasons to be found in the Panel's conclusions for concluding that the Applicant did not meet the release test for the reasons set out in 53 above;
- b. these alleged mistakes of fact (even if correct) were not fundamental or material errors of fact (whether considered individually or cumulatively in the light of his other failings and difficulties) and therefore should not lead to the Decision being reconsidered as being irrational or procedurally unfair; and/or
- c. in any event, reconsideration is a discretionary remedy as explained in paragraph 50 above, and it should not be ordered because if there was a reconsideration, the next panel would then hold that because of the factors set out in paragraph 53 above, the release test has not been met.

Decision

57.For the reasons I have given, I do not consider that the Decision was irrational/procedurally unfair and accordingly the application for reconsideration is refused.

58.The Applicant has been in custody for more than 13 years since his tariff expiry date on 3 May 2011 and I hope that he can have another parole panel hearing soon however this will be a matter for the Secretary of State to refer him to the Board in the first instance.



Sir Stephen Silber
9 September 2024