

[2024] PBRA 196

Application for Reconsideration by Brown

The Application

1. This is an application by Brown ('the Applicant') for reconsideration of a decision of the Parole Board ('the Board') not to direct his release on licence. The decision was made by a 3-member panel of the Board ('the panel') on 4 September 2024 after an oral hearing on 3 June 2024. The Applicant is serving an extended determinate sentence for serious offences, the details of which will be described below.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration of panel decisions may be made, either by the prisoner or by the Secretary of State for Justice, in eligible cases. The Secretary of State is the Respondent to any reconsideration application made by a prisoner and will be referred to as such in this decision.
3. Rule 28(2) specifies the types of cases in which reconsideration applications may be made. They include cases, like the Applicant's, where the prisoner is serving an extended determinate sentence.
4. A reconsideration application may be made on the ground (a) that the panel's decision contains an error of law and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
5. In this case an application for reconsideration on the ground of irrationality has been made by the Applicant. It has been made within the prescribed time limit. It is therefore an eligible case.
6. I am one of the members of the Board who are authorised (as Reconsideration Panels) to make decisions on reconsideration applications, and this case has been allocated to me. I have considered the application on the papers.
7. The documents which have been provided to me and which I have considered for the purposes of this application are:
 - (a) The dossier of papers provided by the Respondent for the Applicant's hearing, the dossier now runs to 468 numbered pages and includes the panel's decision;
 - (b) The representations made by the Applicant in support of his application for reconsideration; and



- (c) An e-mail from the Public Protection Casework Section of the Ministry of Justice ('PPCS') stating on behalf of the Respondent that she does not wish to submit any representations in response to this application.

Background and history of the case

8. The Applicant is now aged 36. He has a substantial criminal record which began when he was still a child. He is described as having committed a range of threatening and violent offences, and to have an established pattern of carrying weapons. He has long-standing personality problems.
9. In February 2011 he committed offences of possession with intent to supply, burgling a dwelling house and assault occasioning actual bodily harm. He pleaded guilty and received a total sentence (after reduction by the Court of Appeal) of 3 years.
10. In April 2013, whilst on licence for those offences, he committed an offence of unlawful wounding (stabbing the victim in the leg in the course of an altercation in a pub) to which he again pleaded guilty. For that offence he received another 3 year sentence.
11. He was on licence for that offence when he committed the offences for which he is serving his current sentence ('the index offences'). The offences were kidnapping, wounding with intent to cause grievous bodily harm, theft of a van and attempted robbery. He was convicted of those offences after a contested trial and was sentenced in July 2016 to an extended determinate sentence comprising a custodial term of 10 years and an extended licence period of 4 years.
12. He became eligible for early release on licence in April 2023. If not released early by direction of the Board he will be automatically released on licence in August 2026. His sentence will not expire until July 2030.
13. In June 2022 his case was referred by the Respondent to the Board to decide whether to direct his early release on licence. In January 2023 a Member Case Assessment panel of the Board reviewed his case and directed that it should be considered by an oral hearing panel. The panel comprised an independent Chair, a psychologist member and another independent member.
14. The hearing commenced on 31 January 2024 but was adjourned to enable further evidence to be obtained. This further evidence comprised an updated psychological risk assessment ('PRA'), a report by the Applicant's Community Offender Manager ('COM') and an updated security report.
15. The hearing was then resumed on 03 June 2024. The panel then received oral evidence from the Prison Offender Manager ('POM'), the Applicant, a prison psychologist and the COM. The Applicant was legally represented. The POM and the psychologist recommended release on licence, but the COM did not.



16. The hearing was again adjourned. The panel identified a number of issues on which they needed further evidence, and the COM was asked to prepare an addendum report covering those matters.
17. The COM duly provided the addendum report together with an updated OASys report (OASys is the compendious risk assessment report which is updated by probation from time to time).
18. The panel had hoped to be able to review the case and issue a decision on the papers in August 2024 but the panel chair had personal problems which meant that he was significantly delayed in drafting the decision for the co-panellists to consider. For that reason the decision was not issued until 4 September 2024. The panel chair apologised to the parties for that delay.

The Relevant Law

The test for release on licence

19. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

20. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. The grounds on which an application may be made are as set out above (error of law, irrationality or procedural unfairness). A decision not to recommend a move to an open prison is not eligible for reconsideration.
21. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
- (i) A paper panel (Rule 19(1)(a) or (b)) or
 - (ii) An oral hearing panel after an oral hearing, as in this case (Rule 25(1)) or
 - (iii) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

The test for irrationality

22. The power of the courts to interfere with a decision of a competent public authority on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene as follows: "*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 Parole Board is a public authority for that purpose, and the Wednesbury test therefore applies to applications to the High Court for judicial review of a panel's decision. It also applies to applications to Reconsideration Panels of the Board for reconsideration of a panel's decision on the ground of irrationality.
23. In **R (DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** ('the Worboys case') a Divisional Court applied this test to parole board decisions in these



words: “*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.*” The same test of course applies to ‘no release’ decisions.

24. In **R (on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** Mr Justice Saini set out what he described as a more nuanced approach in modern public law. This approach 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 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 formulation of the 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)**.

25. As was made clear by Mr Justice Saini, this is not a different test from the Wednesbury test. The interpretation of (and application of) the Wednesbury test in parole hearings (as explained in the Wednesbury and DSD cases) was of course binding on Mr Justice Saini. It is similarly binding on Reconsideration Panels.

26. It follows from these principles that in considering an application for reconsideration a Reconsideration Panel cannot substitute its own view of the evidence for that of the panel who heard the witnesses. It will only direct reconsideration on the ground of irrationality if the Wednesbury test is satisfied.

27. A panel is of course obliged to take account of the recommendations of professional witnesses but it is not bound to follow them. However, if it is going to reject them it must give adequate reasons for doing so. If it fails to give adequate reasons, or if its reasons do not stand up to close examination, its decision may be regarded as irrational.

The request for reconsideration in this case

28. The application was submitted on 8 September 2024 by the Applicant in person.

The position of the Respondent

29. As noted above, as a party to any parole proceedings the Respondent is entitled to submit representations to the Board in response to an application by a prisoner for reconsideration of a panel’s decision. PPCS have indicated that the Respondent does not wish to submit any representations in this case.

Discussion

30. I need to start by examining the reasons given by the panel for their decision, and then to consider the arguments advanced by the Applicant in support of his contention that the decision was irrational.

The panel’s reasons



31. In their decision the panel explained their reasons as follows.

'To direct release, a panel must be satisfied that it is no longer necessary for the protection of the public that [the Applicant] should be confined.'

'The panel considered all available evidence within the dossier and at the hearings; and the updated report/risk management plan ['RMP'] from the COM. The panel had regard to the legal representative's written closing submissions.'

'The panel considered the efforts to progress [the Applicant] has made in custody and acknowledges that [the Applicant] has engaged in psychological interventions designed to address his offending behaviour and his risk factors ..., although his progress has been variable, and he did not complete his time on a PIPE and was deselected from that and from victim awareness. [PIPEs are psychologically informed environments for prisoners with psychological difficulties: there are PIPEs both in special units in prisons and in special probation hostels in the community.]'

'Professionals are clear that all core risk reduction work has been completed.'

'Whilst he has evidenced some stability, and sufficiently good behaviour for the Prison Service to progress him to open prison conditions, he has continued to breach rules, push boundaries, and misuse drugs. He has made some progress, but his anti-social traits are evident, and his choices and decisions are not consistently good. He has a record of poor compliance and, when offered an opportunity to progress via open prison conditions, he failed to comply, and was quickly returned to closed prison conditions.'

'Professionals assess that he understands his risk factors and evidences some insight, but is still described as 'rigid', and 'wilful, and set in his ways'. For the panel, there is a clear link between his poor compliance, his risks, and his re-offending and his causing serious harm. He was recalled from periods on licence on each of his last two sentences having committed serious and harmful offences.'

'[The Applicant] committed serious index offences, which met the threshold for 'dangerousness' and the imposition of an extended determinate sentence (EDS). He is assessed as posing a high risk to others, and as a high risk of re-offending.'

'Because of the nature of the index and other offending, and the lack of sustained and successful testing of the associated relevant risk factors within open prison conditions, the panel assesses that [the Applicant] still poses a significant risk.'

'Imminence is difficult to confidently predict, and the panel is asked to consider risk on an indefinite basis, but the panel accepts that serious offending could occur at any time and his risks could escalate, and become imminent, should his risk factors become 'live' and he experience challenges and difficulties such as poor emotional management, struggle to cope within the community (including with stressors, and any lack of personal or professional support), any lack of resilience, and a lapse into substance misuse, and difficulties in relationships.'



'For [the Applicant] compliance and the risks around boundary pushing, rule breaking, substance misuse, emotional management, and relationships will require careful monitoring.

'The POM and the psychologist had supported release to a risk management plan that included a PIPE AP and support through [services for prisoners with psychological difficulties], but these are not currently available within the RMP. The panel notes that within the proposed RMP there is no extended stay at an AP, no PIPE AP place available (the referral was rejected), no [support of the above kind] (the referral was not accepted) and currently no local [input by a psychologist through a consultation or a formulation of the Applicant's risks].

'The psychologist had stressed the important role of a PIPE AP (providing a high level of support, monitoring, and important external controls); the 'essential' role of the [above services] and the 'very important' contribution of a consultation and formulation [by a psychologist]. For the panel, the absence of these elements significantly weakens the RMP, and acts to undermine the evidence of the POM and the psychologist, as the RMP does not deliver some critical elements that they had envisaged would be available to support and manage [the Applicant].

'As a consequence, and having considered the professional opinions offered, the panel was persuaded by the opinion and recommendation of the COM. The COM did not support release.

'The panel concluded that there is too little evidence to suggest that [the Applicant's] risk has reduced; but his risk of causing serious harm remains high. For all the reasons outlined, the panel concluded that [the Applicant's] risk is not manageable in the community, and that it is necessary for the protection of the public that he remains confined and made no direction for release.'

32. I will now consider in turn each of the Applicant's arguments. These are as follows:

'I fully believe I should have gained my parole since I completed all courses. I've had zero fights and it was agreed by a psychologist I can be managed in the community.'

33. I have a great deal of sympathy with the Applicant who has clearly put a lot of effort into the risk reduction work which he has completed. As the panel pointed out, there have been some blemishes in his progress but overall he has done very well and he has certainly achieved a significant reduction in the risk which he poses to the public.

34. Unfortunately, completion of risk reduction work in prison is not a guarantee that a prisoner's risk has been reduced to a level where it is safe to release him into the community: he needs to be able to demonstrate an ability to put into practice the learning which he has acquired. In this case, as I have seen from the evidence, the panel were fully justified in their findings that the Applicant has continued to breach rules, push boundaries, and misuse drugs, and that his anti-social traits are evident, and his choices and decisions not consistently good.



35. It is correct that the psychologist was of the opinion that the Applicant's risks could be managed safely in the community, as was the POM, but the COM was of a different opinion. The panel therefore had to decide between the competing opinions of the professionals.
36. As the panel noted, the psychologist's opinion was heavily dependent on the Applicant being housed in a PIPE AP and having the benefit of the supporting services referred to above. It is most unfortunate that for reasons outside the Applicant's and the professionals' control he was refused the opportunity to take advantage of those benefits. The panel rightly pointed out that that significantly undermined the psychologist's and the POM's opinions. The panel were therefore entitled to prefer the opinion of the COM.

'Probation, who do not want me out at any cost, even said as her last words I do not pose an imminent risk to the public.'

37. If a prisoner poses an imminent risk to the public he is almost certainly unsuitable for release on licence. The converse is not the case. As the panel pointed out at the start of their decision, referring to decisions of the courts: *'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. The statutory test for release does not include a temporal element. The test is whether release would cause a more than minimal risk of serious harm to the public at any time. Therefore, consideration of risk goes beyond the sentence expiry date ('SED') in so far as future risks might be avoided or reduced by detention until the SED ...'*
38. I do not think it is fair to say that Probation do not want the Applicant out of prison at any cost. I have carefully read the COM reports in the dossier. They are all balanced and comprehensive. The Applicant has naturally been disappointed that they have consistently recommended that he should remain in prison, but the reasoning in the reports for that recommendation is entirely fair and reasonable.

'All I ask for is a fair hearing with a fair outcome: prison OMU and my solicitor said the hearing couldn't have been better so I believe the decision to have been irrational having seen all I've accomplished.'

39. It is obvious to me that the panel conducted the case throughout with great care and fairness, as is indeed confirmed by the comments of the OMU and the solicitor. The problem was, as explained above, that the information which the panel would have liked to have seen in order to be able to direct the Applicant's release on licence was simply not there.
40. The Applicant had indeed accomplished a great deal but for reasons outside his control it was not enough to enable the panel to decide that the test for release on licence was met.

'I'm 9 years into a 10 year sentence, I've been 100% cooperative and was looking to carry on being 100% but it seems no matter how I turn my life around, no matter how much change I've shown, I'm being refused'



something I've outrightly earned, it feels like there's something that does not like the new me and seems determined to ignite the old me back into life.'

41.I can understand why the Applicant feels like this. However, if he reflects on the panel's decision (and this one) I think he will come to realise that although he has made a great deal of progress it is not quite right to say that he has been 100% cooperative and he needs to make the final step from 'Old Me' to 'New Me'. I can understand the reasons why the authorities have not provided him with the various kinds of support which the psychologist wanted to see (the reasons are set out in the information obtained by the COM in her latest report) but I would have liked to see him provided with that support which would have enabled the panel to direct his release on licence.

'I am home very soon regardless so surely if I am as dangerous as you say so wouldn't it be better to have a dangerous criminal on a tight leash and cooperating at a high level?'

42.This is an entirely understandable point. However, the panel was obliged to apply the statutory test for release on licence and I am satisfied that its reasoning was entirely sound. The Applicant will of course be on licence and 'on a tight leash' for some while whenever he is released. His case will be reviewed again in a year's time and there is a possibility that the next panel will feel able to direct his release on licence then. It will be very much in his interests to demonstrate between now and then an ability to avoid the occasional blemishes in his otherwise good behaviour which the present panel noted.

'The Government spent untold amounts getting doctors/psychiatrist to make me take better decisions but it only applies if I'm happy to toe the line. I've been treated irrationally and only seek to be a better person.'

43.I completely accept that the Applicant wants 'to be a better person' and that he has come a long way towards achieving that goal. He is not there yet but if he continues his good progress he has every prospect of being able to lead a successful and law abiding life in the future. As a prisoner serving a substantial sentence for a very serious offence he does, I am afraid, need to 'toe the line' and show that he is capable of consistently good behaviour.

Decision

44.I have reminded myself that I am obliged to apply the Wednesbury test for irrationality. I have considered the panel's decision very carefully and I am afraid I can find no fault in their reasoning. They were fully entitled, on the evidence, to prefer the COM's evidence to that of the POM and the psychologist. My decision must therefore be that there is no ground for reconsideration of the panel's decision.

**Jeremy Roberts
10 October 2024**

