

[2024] PBRA 89**Application for Reconsideration by Wilson****Application**

1. This is an application by Wilson (the Applicant) for reconsideration of a decision of an oral hearing panel dated 28 March 2024 not to direct the Applicant's release.
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 panel's decision, the Application for Reconsideration dated 11 April 2024 and the email from the Public Protection Casework Section (PPCS) to the Parole Board dated 24 April 2024 stating that the Secretary of State (the Respondent) will not be making any representations in response to the Application for reconsideration.

Request for Reconsideration

4. The application for reconsideration is dated 11 April 2024. The grounds for seeking a reconsideration are as follows:

"The Parole Board has attached too much weight to the fact [the Applicant] has failed to comply with his licence on 2 occasions. In doing so, the parole board have overlooked the absence of risk in respect of violence. All of the witnesses who gave evidence confirmed the risk of violence was manageable in the community. The decision is irrational given the Parole Board's conclusion which heavily relied on compliance".

Background

5. On 14 May 2009, the Applicant, who was then 28 years old, was sentenced to imprisonment for public protection for the offence of attempted murder with a tariff of 6 years and 6 months less time spent on remand. On that occasion, he received another separate conviction of attempting to inflict grievous bodily harm with intent but received no separate sentence for this.

6. The offences were committed after the Applicant had become involved in an altercation with the victim at a taxi rank during which the Applicant assaulted his victim before taking out a knife and stabbing his victim on multiple occasions.
7. The Applicant had a number of previous convictions for which he had received many sentences of imprisonment for many different offences including being concerned in the supply of Class A drugs.
8. During the course of the sentence, the Applicant was released on two occasions and his licence was revoked on two occasions and he has been convicted for further offences on two occasions.
9. First, he was released on 3 June 2016, but his licence was revoked on 19 September 2017 after drugs with an estimated street value of almost £200,000, a firearm and ammunition were recovered from his home. There were also concerns that in breach of his licence conditions, the Applicant had not been staying at the approved address overnight. In 2017, he was sentenced to five years' imprisonment and made subject to a Serious Crime Prevention Order (SCPO) for three years for two counts of being concerned in the supply of controlled drugs (Class A and Class B) and two counts of being in possession of a firearm/ammunition after a prison offence greater than three years.
10. Second, the Applicant was re-released on 6 September 2022 before his licence was revoked on 19 December 2022 after he had breached his residence licence conditions by not staying at the approved address and he had committed new offences. On arrest, he was found to be in possession of two mobile phones when he was only allowed to have one. Initially, he told the police that the second phone had been provided by his employers, but when the Managing Director of the company employing the Applicant was approached, he informed the police that his company did not provide phones to their employees. The Applicant subsequently stated that he had the second phone so that he could contact colleagues. When giving evidence to the panel, the police officer stated that this might have been the case, but the Applicant had also used the phone for nefarious reasons. He was prosecuted and in 2023, he was sentenced to a four month sentence for two counts of failing to comply with the terms of the SCPO, for not living in the place where he had been directed to live and for having a second mobile phone.
11. Both the Applicant's disclosed and his second non-disclosed phones were subjected to forensic analysis. While nothing untoward was disclosed on his disclosed phone, the second undisclosed phone revealed conversations regarding drug dealing from May to December 2022. There were also various conversations regarding illicit drugs in which the Applicant asks other people when some drugs would be ready and the prices of them, as well as discussing with other people splitting the profit on drug deals, picking up the drugs and selling them on. There was also a message sent by the Applicant on the day before his arrest and his return to custody stating that he had 15 boxes of cannabis and that he wanted to be paid £2,500 for each of the boxes.

Current parole review

12. The hearing commenced on 22 March 2024 when the Applicant was 43 years old.



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13. As this was the first review of the Applicant's case since his return to custody, the panel had a duty to consider the appropriateness of the recall decision. The panel explained that having considered all the evidence available to it, it found that the recall was appropriate as the Applicant *"committed further offences and demonstrated by his behaviour that several of his risk factors remained live in the community, including association with anti-social pro-criminal peers, offending for financial gain by involvement in the drug trade, non-compliance and poor thinking skills, making the risk he presents unmanageable in the community"*. The panel noted that it was to the Applicant's credit that he *"accepted the appropriateness of the recall as he did not comply with restrictions"*. This finding that the recall was appropriate has not been challenged on this application by the Applicant who accepted the appropriateness of his recall as *"he did not comply with restrictions"*.
14. There was some supportive evidence for a decision releasing the Applicant from the professionals. The Lifer Liaison Officer confirmed in her evidence that *"there had been no concerns regarding [the Applicant's] engagement or behaviour since his return to custody and he work[ed] in a trusted position as a passman"*. It is accepted that he has undertaken offending behaviour work and that there has been no evidence that he has used violence since the index offence.
15. The psychologist stated that in her evidence her opinion was that the Applicant does not have deficits in his thinking, but that he deliberately breached the conditions of his release which he considered to impede on his life. She concluded that there was not any outstanding core risk reduction work for the Applicant to complete. She did not consider his risk of serious harm to be imminent in the community unless there was a change in circumstances. Her view was that the Applicant had come to accept that full compliance with his licence conditions was required of him, if he was to be released in future and that he had become motivated to comply with the consequence that she considered that his risk could be managed on the risk management plan (RMP) provided.
16. The Community Based Social Worker explained that she had only met the Applicant twice. His evidence was that there was evidence available that the risk the Applicant presented which showed that he could be managed in the community now that he has accommodation available to him. He considered him to have developed his insight into the consequences of non-compliance.
17. The Community Offender Manager (COM) stated that in her professional opinion as accommodation was available to the Applicant, the risk he presents could be managed in the community on the RMP proposed with the addition of a licence condition recommended by the Community Based Social Worker.
18. The stand-in Prison Based Social Worker has concluded that the Applicant *"needs to remain in custody and progress to open conditions when he can be further tested in the community and demonstrate that he can adhere to conditions and live a crime-free life prior to being released"*.
19. Using OASys, the Applicant's risk of serious harm was assessed as *"high"* to the public and *"medium"* to known adults while his risk of reconviction is assessed as *"medium"*. The psychologist considered the Applicant to present a *"medium"* risk of



general reoffending and a low risk of violent reoffending. She considered his risk of serious harm to be "medium", but she did not consider his risk of serious harm to be imminent unless there was a change in circumstances. The panel considered that the Applicant's risk of serious harm to the public to be high.

20. The Community Based Social Worker considered that there would be warning signs observable to professionals involved in the management of the risk if he was released and if the imminency started to rise. The panel considered that this might be the case, but that there might not be warning signs that the risk was becoming imminent given the Applicant's offending history and his propensity to not to be open and honest with those tasked with managing his risk.

The Decision of the Panel

21. The Panel explained that it had considered the evidence in the dossier, the evidence it had heard and the written submissions of the legal adviser for the Applicant. He had committed a serious index offence and demonstrated by this that he is capable of serious harm. It noted that he had engaged in treatment to address his offending behaviour and that there was no evidence that he had used violence since the index offence. In addition, there had been no concerns regarding his conduct or his engagement since his return to custody and he works in a trusted position. None of the professional witnesses considered that he had any core risk reduction work outstanding. Other than the stand-in Prison Based Social Worker, all the professional witnesses involved in the assessment of risk or management of risk of the Applicant "considered the risk he presents can be managed in the community now that there is clarity around release accommodation".

22. The panel acknowledged the offending behaviour work the Applicant had undertaken and the learning he had taken from it, but it remained very concerned that he has demonstrated during two periods of release that his risk factors have been live and this had led to him making deliberate decisions not to comply with licence conditions, to reoffend and on the second release and prior to the actual release to act in breach of an SCPO. The proposed RMP, like many other RMPs, contained many conditions with which the Applicant was required to comply, and he could only be released if the panel dealing with his case were confident that he would comply with the terms of his RMP.

23. It was a matter of great concern to the panel that the analysis of the Applicant's phone, which the Applicant was not entitled to use, showed that he was engaging in the drug trade before and after his second release and during the period when the previous panel was reviewing the Applicant's case. The panel noted that the psychologist, the COM and the Community Based Social Worker all considered that the Applicant's risk could be managed on the RMP (as amended), but the panel considered that it had been "provided with little evidence explaining why [the Applicant] would comply this time given his history and given that he has the same support network" as he had when he failed to comply on the two previous occasions.

24. For those reasons, the panel was not satisfied that it was no longer necessary for the protection of the public that the Applicant should be confined in custody and concluded that his risk cannot be managed in the community. Accordingly, the panel did not direct his release.



The Relevant Law

25. The panel correctly sets out in its decision letter dated 28 March 2024 the test for release.

Parole Board Rules 2019 (as amended)

26. Rule 28(1) of the Parole Board Rules 2019 (as amended) 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)).

27. 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)). 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**.

Irrationality

28. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116 that:

"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

29. 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. 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

30. 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.

31. 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; and/or
- (e) the panel was not impartial.

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

33. 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.*"

34. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

The reply on behalf of the Respondent

35. PPCS on behalf of the Respondent has stated that they will not making any representations in response to the Application for Reconsideration.

Discussion

36. The Applicant's case is that the decision to refuse to release him was irrational as the panel overlooked the absence of risk in respect of violence. This submission cannot be accepted for three alternative reasons.

37. First, the reason why his release was not ordered was not because of the fear that the Applicant would be violent, but for the completely different reason which was because of the prospect of the Applicant "*making deliberate decisions not to comply with licence conditions*" and "*the panel was provided with little evidence as to why [the Applicant] would comply [with licence conditions] this time given his history [of non-compliance]*". That was the issue which the panel was required to consider and they did consider this in the light of the many conditions set out in the



Applicant's RMP, all of which the Applicant was compelled to comply with. So, the panel was entitled to refuse to release the Applicant because of the prospect of him not complying with his conditions of release.

38. Second, it is not disputed that there was no evidence that the Applicant had used violence since the index offence for which he was convicted almost 15 years ago in May 2009 and it is not suggested (let alone established) that the decision to refuse to release the Applicant was in any way caused or contributed to by his risk of being violent with the consequence that, contrary to the Applicant's case, the panel was not obliged to consider the absence of the Applicant's risk in respect of violence.

39. Third, in any event, the decision to refuse to release the Applicant which "*heavily*" relied on the non-compliance record of the Applicant fails by a substantial margin to reach the high threshold of being irrational as being in the words of the Divisional Court in **R(DSD and others) v Parole Board** [2018] EWHC 694 [116] "*so outrageous in 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*".

Decision

40. For the reasons I have given, I do not consider that the decision to refuse to release the Applicant was irrational and accordingly this application for reconsideration is refused.

Sir Stephen Silber
09 May 2024

