the Parole Board
working with others to protect the public

[2025] PBRA 3

Application for Reconsideration by Sanderson

Application

1. This is an application by Sanderson (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) dated the 26 November 2024. The decision was not to direct release, but to recommend that the Applicant be transferred to an open prison.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2024) (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 a dossier now consisting of 390 pages, the OHP decision, The application for reconsideration drafted by the Applicant's legal adviser and the response by the Secretary of State (the Respondent)

Request for Reconsideration

4. The application for reconsideration is dated 17 December 2024.

5. The grounds for seeking a reconsideration are set out below:

Background

6. The Applicant is serving a sentence of life imprisonment. The index offence was assault with intent to cause grievous bodily harm (GBH section 18). Details of the index offence are set out below. At the time of sentence the Applicant was 34 years old. At the time of the OH the Applicant was 54 years old. The Applicant had been recalled to prison after being released by a parole board panel. The reconsideration application relates to a referral by the Respondent to the Parole Board to consider whether the Applicant should be rereleased following his recall.

Current parole review

7. The OHP consisted of an independent chair, a psychologist member of the parole board and a further independent member of the parole board. Evidence was given

at the hearing by the prison offender manager (POM), a prison instructed psychologist and the community offender manager (COM). The Applicant was represented by a solicitor. The panel considered a dossier at that time consisting of 344 pages.

The Relevant Law

8. The panel correctly sets out in its decision letter dated 24 November 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)

9. 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)).

10. [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)).]

11. 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

12. 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.

13. 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."*

14. 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**).

15. 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.

16. 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.

17. 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

18. 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.

19. 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.

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

Error of law

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

22. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

23. 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.*"

Reconsideration as a discretionary remedy

24. 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 taken into account 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 Secretary of State

25. The Respondent offered no representations.

Grounds and Discussion

Ground 1

26. The Applicant's solicitor submits, on behalf of the Applicant, that the panel decision was irrational because the decision failed to give sufficient reasons for not directing release, particularly as two of the professionals who gave evidence to the panel were recommending release.

27. The particular criticisms noted were:

- The fact that the prison instructed psychologist had many years of experience and the POM had known the Applicant for some considerable time, whereas the COM had only known him for four months.

- The fact that the psychology witness took the view that risk would not be imminent in the community but would follow a period of instability.

- The fact that the Applicant tended to be vocal when he has an issue to raise which might give warning signs of an escalation of risk.

- The fact that, apart from a violent incident involving boiling water, there had been no other incidents of violence in custody.

- The fact that the incident regarding boiling water was described by the psychologist as occurring after a build up of emotions where the Applicant had no opportunity to walk away. It was suggested that this situation would be more likely to occur in custody than in the community. It was also suggested that the incident regarding boiling water was a one-off incident.

- The fact that the panel failed to recognise that there had been many months of prosocial behaviour, in custody, without violence being used subsequent to the boiling water incident.

Context

28. To address these issues, I briefly summarise the background to the oral hearing (OH). The Applicant in this case, is serving a sentence of life imprisonment. The sentence was imposed for the offence of committing grievous bodily harm with intent (GBH). The tariff imposed by the judge was six years. The tariff expired in 2010. The Applicant was released by a Parole Board oral hearing panel (OHP) on licence in December of 2022. The Applicant was recalled to prison in February 2023.

29. The brief facts of the index offence were that the Applicant, at the time of committing this offence, was a serving prisoner. He assaulted a prison officer. The Applicant was angry because the officer had not delivered the Applicant's newspaper and he also believed that the officer was persistently withholding his mail. He initially punched the prison officer to the floor and then stamped on his head. The injuries were serious, and resulted in hospital treatment, surgical operations and absence from work for five months. There were also continuing problems with eyesight and loss of sensation. The Applicant had told earlier Parole Board panels that he felt, at the time of committing this offence, as if he was in a "storm of emotions". He also could not communicate properly with people and was frustrated with prison.

30. The Applicant had a lengthy past history of prison sentences and convictions for various offences including violent offences. At the time of committing the index offence (the GBH), the Applicant was serving a 10 year prison sentence for offences including aggravated burglary and robbery. Prior to this offending, he had convictions recorded for offences of possessing a shotgun, assaulting the police and a number of acquisitive offences including burglaries.

31. The Applicant was initially released on licence to live in a probation hostel. While at the hostel various items, which were prohibited, were found in his possession. As a result, he was recalled to prison. The items included a knife, a garden trowel, and a brick chisel.

32. At the time of the discovery of these items in his room, in the hostel, the Applicant told staff that he was intending to take the items to a friend. He later said, in

evidence to a parole panel, that the knife was to prepare vegetables in the hostel. He wanted the knife to use at times when knives were not issued for food preparation in the hostel (late at night). The other items, he said, were to tidy his mother's grave.

33. In May of 2023, after the Applicant was recalled, there was an incident in the prison. The Applicant had a dispute with a prisoner with whom he was sharing a cell. Whilst the prisoner was asleep, the Applicant poured hot water from a kettle onto the face and ear of his cellmate. The cellmate did not report this incident, however prison staff observed severe burn marks on the prisoner's face and ear and other swollen areas to his face. The Applicant had also reportedly punched the cellmate and poured cold water over him on earlier occasions. The background to this behaviour was apparently the fact that the cellmate was snoring. The Applicant was also aggrieved because he was eligible for a single cell, but a single cell had not been allocated to him. An adjudication process was undertaken by the prison and the charge against the Applicant, of assault, was found proven.

34. The Applicant told the oral hearing panel (OHP) that the spilling of water with the kettle had been an accident while he was wearing flip-flops and that only a small amount of water had splashed onto the cellmate.

35. The panel assessed the evidence relating to this incident and was satisfied that the act, by the Applicant, of pouring hot water, was intentional and happened when he was frustrated and struggling to cope.

36. A second incident, noted by the OHP, was the fact that in December 2023, during a meeting with his COM, the Applicant became verbally abusive and demanded that staff escort him from the meeting.

37. The OHP received evidence at the OH from the Applicant's POM, a psychologist who had assessed risk and from the Applicant's COM. The Applicant also gave evidence.

38. The Applicant's POM had known the Applicant for some time. The POM's view was that overall, the Applicant had coped well with problems and disappointments within the prison. He had been living on a prison wing where there was some disruption, but he had again coped well in this environment. He had received positive feedback from staff on his prison wing. His POM took the view that the assault with hot water was a "one-off" incident. His POM noted in evidence that, despite potential difficult situations in the prison, there had been no other incidents of violence of this sort. The view of the Applicant's POM was that his behaviour in prison, indicated that he could be safely released from prison, preferably to live initially in a psychologically supported probation hostel. His POM took the view that the Applicant needed professional support to help him transition into the community. It was also noted that the Applicant had recently had a diagnosis of autism spectrum disorder (ASD) and had in the past been identified as having personality traits all of which would need careful management in the community.

39. A prison psychologist had assessed the Applicant. The psychologist took the view that the Applicant's insight into his behaviour was "*mixed*". The psychologist took the view that the Applicant lacked awareness as to how others might perceive things (For example possessing a knife in a probation hostel), the incident which led to his

recall. The psychologist also took the view that the facts of both the index offence and the assault relating to water from the kettle were specific to being in custody and suggested that they had a background of a "build up of emotions" where the Applicant had no opportunity to walk away. The psychologist took the view that, in the community, there would be more opportunity to remove himself from a stressful situation.

40. The psychologist suggested that a psychologically informed probation hostel would be more appropriate to accommodate the Applicant on release. If that were not available, she suggested that a hostel without psychological specialisation, but with some other forms of support would be appropriate. The psychologist therefore recommended that the Applicant be released.

41. The COM took a differing view. Her view was that the Applicant had yet to demonstrate his ability to manage his risk of serious harm. The COM referred to making poor choices in possessing a knife and other items in the probation hostel. She also took account of the assault with hot water in the prison and the fact that there had now been an ASD assessment and diagnosis. The COM took the view that violence remained a concern and that it may be that the custodial environment helped to reduce or manage that concern. The COM took the view that the Applicant had not fully understood his personality issues and therefore needed more time, in a less restrictive environment, to develop his understanding of those issues.

42. The panel were therefore considering differing views as to the risk of serious harm in the community. The panel made further enquiries about the possibility of a specialist psychologically supported probation hostel. In the event it transpired that the Applicant would not meet the criteria for such a hostel.

43. The panel at paragraph 2.33 indicated that they had taken account of all information and evidence. They found that the Applicant was a person who should be managed, in the community, as someone who would potentially pose a high risk of causing harm. The panel found that the risk of harm would be likely to be elevated when specific factors were present. In particular situations where the Applicant felt that he was not being supported or that he was unable to remove himself from a situation.

44. The panel accepted that there were a number of external factors, such as licence conditions and support from the probation service, which would be in place if he were to be released.

45. However, the panel's main focus of concern was their determination that the Applicant had been unable to use internal skills, to manage the situation in prison, without resorting to violence. The incident relating to the kettle of water was serious, the incident also had close associations with the circumstances of the index offence. The panel came to the conclusion therefore that there was insufficient evidence that the Applicant could harness internal controls to manage his risk of serious harm in the community.

46. In essence therefore, the panel explained the reasons why they disagreed with the POM and the prison psychologist. They did not accept the assessment of those two professionals that the Applicant had developed internal skill sufficient to manage his

risk of serious harm in the community. That finding was based upon realistic evidence, namely the incident with hot water and also to a lesser extent, the lack of control when being interviewed by his COM in the prison. The panel also noted that the Applicant had only recently received a diagnosis of ASD. The panel took the view that it will be necessary for professionals to reflect upon that diagnosis and to work collaboratively with the Applicant to develop internal risk management skills sufficient to protect the public in the future.

Discussion

47. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given, for preferring an opinion, are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

48. 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.

49. However, where a panel makes a decision contrary to the opinions and recommendations of some or all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board 2019 EWHC 2710.**

50. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as found by the panel, unless, of course, it is manifestly obvious that there was an error of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel. The panel accepted that there were mixed views in this case, and accepted much of the positive evidence relating to the Applicant. As noted, the panel's task was to balance those views and then consider the evidence and reach a determination.

51. Dealing with the individual matters raised above by the Applicant's legal adviser:

52. *The professional expertise of witnesses* – I note the point that the COM in this case had been appointed a relatively short time before the OHP, however probation

officers are experienced professionals whose task is to assess and manage the risks of those for whom they are responsible. That management will inevitably rely upon a combination of one to one engagement with a client as well as an assessment of background evidence and information. I am not persuaded that the view of the COM had less authority based on a simple calculation of appointment time. It was clear in this case that all three professionals had adequate and relevant expertise. The role of the panel was to make a judgment upon the views and recommendations expressed by the professionals as well as an independent consideration of the evidence received at the OHP. It was clear that this was the approach of the panel.

53. *Risk of serious harm would not be imminent*- Although the potential imminence of a risk of harm is undoubtedly relevant to a risk assessment, the statutory test does not include any reference to imminence. The question of imminence was addressed by the High Court in the case of **Johnson [2022] EWHC 1282 (Admin**). The court indicated the following at (paragraph 31) "*What Parliament did intend was that an offender was to be confined unless and until it was no longer necessary for the protection of the public. If an offender poses no risk, the protection of the public will not require his confinement. That does not mean that the Board is to ignore anything other than immediate or imminent risk which is what occurred in this case."*

54. *There would be warning signs when risk was elevating. In the community the Applicant could walk away.* – Although these points were made by the POM and the psychologist witness, they were clearly weakened by the fact that the index offence and the boiling water incident were clearly not preceded by warning signs sufficient to manage the outcome of harm. So far as opportunities to "walk away" (from risky situations) were concerned, the potential for walking away from incidents could well be as limited in the community as they are said to be in prison. These were views that the panel were entitled to question and reject.

55. *The panel failed to acknowledge the many months of prosocial behaviour in prison*. – Again, the panel specifically confirmed that they had taken account of the Applicant's behaviour. The decision clearly reflected the fact that the Applicant's behaviour meant that his risk could safely be tested, albeit in the supervised conditions of an open prison. Good behaviour in custody is a factor to consider in assessing risk, however it will be but one of many considerations. The COM in this case had posited the possibility that the good behaviour may have been governed by the structure of the prison regime, a basis for the COM's recommendation.

56. In this case as noted above, I am satisfied that the panel explained clearly its reasons for reaching the decision not to direct release but to recommend a transfer to an open prison. Having considered all the issues raised on behalf of the Applicant in this case , I do not find that the OHP's decision was irrational in the sense set out above.

Ground 2

57. It is submitted on behalf of the Applicant that the panel misdirected itself when it noted that the focus for the Applicant's future progression should be on "*risk management*" rather than on "*risk reduction*". The Applicant's solicitor argues that this note implied that no further risk reduction work was required. It is further

argued that if no further risk reduction work is required then release should be directed.

Discussion

58. So far as applying the statutory test for release was concerned, the panel correctly cited the test at the outset of the decision and within the decision itself. It is clear from the decision of the panel that it fully understood that the test required it to be no longer necessary, in order to protect the public from serious harm, that the Applicant be detained.

59. I am not persuaded that parole board panels should or would be required to direct release, once they were satisfied that no further risk reduction work was required. It is frequently the case, that the undertaking of risk reduction work (behavioural work or other psychologically informed work) is followed by periods of testing and consolidation before release. Risk assessment is therefore not a simple calculation as to whether a particular prisoner has completed risk reduction work, but is a wider question as to whether it remains necessary to protect the public that the prisoner be detained. In this case, the panel were clear that they did not think that any further behavioural work was required to be undertaken, however they determined that the Applicant had not developed sufficient internal skills to ensure the protection of the public.

60. The Applicant's solicitor also criticises the phrase used by the panel, namely that a period in open conditions. "*Would better prepare* [the Applicant] *for eventual release therefore better protect the public*." It is argued that the panel were implying a test which related to the benefits to be secured from a period in open conditions rather than focusing on the statutory test of necessity.

61. Again, I do not find this argument persuasive. The panel made it clear that in order to protect the public from serious harm, they took the view that the Applicant's ability to control his risks internally needed development. They also took the view that a period in open conditions would assist with developing those internal skills, and would inevitably therefore protect the public from serious harm. I am not persuaded that the wording of the panel was other than an explanation of the basis of their decision, which fundamentally, was that the Applicant's internal skills were not developed sufficiently to ensure that the public would be protected from serious harm and therefore it remained necessary in order to protect the public that the Applicant be detained, albeit in the less restrictive environment of an open prison.

62. I therefore do not find that there was an error of law by the panel or indeed a misunderstanding of the test for release.

Decision

63. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH S Dawson
6 January 2025