

**[2023] PBRA 188****Application for Reconsideration by Moloney****Application**

1. This is an application by Moloney ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') which on 4 October 2023 issued a decision not to release the Applicant on licence.
2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

**Background and History of the Case**

3. The Applicant is now aged 57. He has a long history of offending which includes a number of offences of violence. In September 1998 he was sentenced to life imprisonment for causing grievous bodily harm to his then partner Ms K (the 'index offence'). He subjected her to a sustained attack in the course of which he is reported to have thrown her out of a window. She suffered very serious injuries.
4. His minimum term ('tariff') was set at 7 years less time served on remand. It expired in December 2004. He completed the appropriate risk-reduction programmes in closed prison conditions, and after two periods in open prison conditions he was released on licence in February 2017.
5. He was recalled to prison in May of that year, having committed an offence of assault occasioning actual bodily harm against his then partner Ms L (an offence for which he received a 4-month sentence). He had formed a relationship with Ms L whilst he was detained in open conditions, and continued the relationship after his release on licence. He committed the assault when he had been drinking. He punched her, pulled her hair and broke her glasses.
6. After his recall to prison the Applicant completed the Building Better Relationships programme ('BBR'). His behaviour in custody has been generally good.
7. In October 2021 his case was considered at an oral hearing by a panel of the Board to decide whether to direct his re-release on licence and, if not, whether to recommend a further period in open conditions. That panel did not direct his re-release but did recommend a further period in open conditions. It was concerned about some minimisation on the Applicant's part, and it was not convinced that he had yet



internalised all of the skills which he had been taught. It concluded that he needed further testing before his risks could be safely managed in the community.

8. The present review of the Applicant's case by the Board commenced in July 2022. In November 2022 it was directed that the case should proceed to an oral hearing. The case was allocated to the panel, which comprised two psychologist members of the Board and a judicial member. The hearing took place on 13 September 2023.
9. The panel considered the dossier of papers provided by the Secretary of State, which then comprised 460 numbered pages. It also considered oral evidence from four witnesses. These were (a) the Prison Offender Manager ('POM'); (b) the Applicant himself; (c) a prison psychologist ('PP'); and (d) the Community Offender Manager ('COM'). All three professional witnesses supported the Applicant's re-release on licence.
10. As noted above, the panel made its decision on 4 October 2023 (there had been a delay due to a personal emergency affecting the panel chair). The panel did not accept the recommendations of the professional witnesses for the Applicant's re-release on licence but it did recommend that he should remain in open conditions (as opposed to being returned to closed conditions).
11. On 8 October 2023 the Applicant's solicitors submitted written representations in support of their application for reconsideration of the panel's decision.

## **The Relevant Law**

### **The test for release (or re-release) on licence**

12. The test in all cases is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

#### *The Parole Board Rules 2019 (as amended)*

13. Under Rule 28(1) 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.
14. Reconsideration will only be directed if one of more of the following three grounds is established:
  - (a) It contains an error of law or
  - (b) It is irrational or
  - (c) It is procedurally unfair.
15. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
  - (a) A paper panel (Rule 19(1)(a) or (b)) or
  - (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
  - (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

16. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the grounds of irrationality and procedural unfairness. It is not suggested that there was any error of law.

### Irrationality

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

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

18. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.

19. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

20. The reasons why a panel's decision may be found to be irrational include (a) a failure to give adequate reasons for departing from the unanimous recommendations of professional witnesses and (b) the giving of manifestly disproportionate or inadequate weight to a relevant consideration.

### Procedural unfairness

21. 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 from the issue of irrationality which focuses on the actual decision.

22. The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

23. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

## **The Application for Reconsideration in this Case**

24. In support of this application the Applicant's solicitors advance several grounds which will be discussed in the 'Discussion' section below. In summary the solicitors submit that evidence given at the hearing which was favourable to the Applicant was ignored and/or misinterpreted by the panel.

## **The Position of the Secretary of State ('the Respondent')**

25. By e-mail dated 12 October 2023 the Public Protection Casework Section ('PPCS') of the Ministry of Justice on behalf of the Respondent informed the Board that they wished to offer no representations.

## **Documents Considered**

26. I have considered the following documents for the purpose of this application:

- (i) The dossier provided by the Respondent for the Applicant's case, which now contains 483 numbered pages (including the panel's decision);
- (ii) The application for reconsideration; and
- (iii) PPCS's e-mail of 12 October 2023.

## **Discussion**

27. I should start this discussion by recording that, in the light of some of the solicitors' representations, I decided that it was necessary for me to listen to the whole of the recording of the hearing, which occupied a little over four hours. Unfortunately, due to a technical error nothing said by the panel chair was picked up by the recording. I have therefore had to rely on the solicitors' representations insofar as they refer to what was said by the panel chair.

28. This is a case in which the panel departed from the recommendations of all three professional witnesses (the POM, the COM and the PP). It is well established that (a) a panel is not bound by the recommendations of the professional witnesses, even if they are unanimous, but (b) adequate reasons must be given if the panel is to depart from their unanimous views.

29. I will need to decide, therefore, whether the panel in this case gave adequate reasons for departing from the views of the professionals. In order to decide that question I will also need to decide whether the panel attached manifestly too much or too little weight to any of the factors which it considered. I will start by discussing the reasons given by the panel for rejecting the opinions of each of the three professional witnesses.

### ***The panel's reasons for departing from the views of the POM, COM and PP***

30. The panel identified what it believed to be weaknesses in the evidence of each of the professional witnesses.

#### *The POM*

31. The POM had not read the whole of the dossier and did not therefore have a full understanding of facts of the index offence and the recall offence as recorded in the dossier. In fairness to the POM it was not entirely his fault that he had not read the whole of the dossier: the recording shows that he explained to the panel that he works part time and is expected to manage 24 prisoners so he could not read everything in all the dossiers. He might, however, have been expected to read the full accounts of the index and recall offences.
32. The Applicant's legal representative was given the opportunity to comment, at the conclusion of the POM's evidence, whether it was fair to proceed in the light of his limited understanding of the offences. The legal representative stated that she wished to continue with the hearing and to take the remainder of the evidence. The legal representative was given a further opportunity, later on, to comment on the evidence and she again raised no concern regarding the fairness of the proceedings.
33. The panel considered that the POM's recommendation was based only on recent progress: he had not fully considered the Applicant's risk or his history.

#### *The COM*

34. The panel stated that it also had concerns about relying on the COM's evidence given that she did not have a full understanding of the circumstances of the recall offence: she had not been the COM at that time. As with the POM, the legal representative raised no objections to the hearing continuing despite the COM's limited understanding of the recall offence. The panel was anxious to establish that both the legal representative and the Applicant were content to proceed and continue with the hearing despite the limitations on the evidence of the POM and the COM.
35. The panel considered that the COM, like the POM, made her recommendation without being in full possession of the facts of the case, which (the panel stated) had implications for future management.
36. The panel was also critical of the COM for not considering the use of an alcohol monitoring tag and for not making a referral to the Intensive Intervention and Risk Management Service ('IIRMS').

#### *The PP*

37. The panel was critical of the PP for recommending release on licence when she had assessed the Applicant's risk of further offending as being high. Whilst the panel stated that it accepted that the risk of offending that could cause serious harm was not likely to be imminent (particularly whilst the Applicant was not in a relationship) it was concerned that warning signs would not be evident to professionals. The basis of that opinion was that, despite his then COM having been aware of the Applicant's relationship with Ms L when he was in the community, his offence against Ms L was the first indication to professionals that there were any problems in the relationship. There had been no warning signs indicating that future offending was imminent or that the risk of it occurring was increasing.

#### ***My view of the panel's reasons for departing from the views of the professional witnesses***

38. Some of the panel's reasons were clearly valid. The fact that the POM and the COM did not have a full understanding of the facts of the case could reasonably be regarded as detracting significantly from the weight to be attached to their evidence. I did not find the panel's other reasons to be as convincing.
39. The panel was of course entitled to its view that the Applicant's licence conditions should include an alcohol tag, which had not been recommended by the COM. That was not really a reason for rejecting the COM's recommendation that the Applicant's risk would be safely manageable on licence in the community: it was simply a reason for strengthening the risk management plan. The panel stated in its decision that when this matter was raised at the hearing the Applicant 'objected to it'. That was not entirely accurate. The Applicant said that he would wear the tag if that was considered necessary but he would prefer not to as he had skin allergies and he was not sure how they would be affected by the tag. He also said that he had not been required to wear one when he was previously released on licence, but the panel pointed out that such a tag had not been available at that time.
40. The suggestion that the Applicant should engage with the IIRMS service had not been made by the PP in her report. It was made by her in the course of her evidence to the panel, though when asked by the panel whether the Applicant would meet the threshold for it she said that she did not know. The COM said that she had discussed with her line manager whether to recommend IIRMS and the view was taken that that was not necessary. Again, therefore, the fact that views differed and the panel believed that IIRMS was necessary was not really a reason for rejecting the COM's recommendation: it was simply a reason for strengthening the risk management plan.
41. The criticism of the PP for recommending release on licence when she had assessed the Applicant's risk of further offending as being high necessitates a careful examination of the PP's evidence. In the course of her evidence the PP was asked specifically what level of risk she thought the Applicant would present to a future partner if he were to enter into a new intimate relationship, and she said 'high'. That was picked up by one of the panel members and the following exchange took place:

Panel member: *"You've got someone here who you assess to be a high risk of violent re-offending, you think it's unlikely he'll be able to abstain from alcohol, you think there's impression management going on which will need close monitoring, but you think he is sufficiently low in risk to be managed in the community without posing a risk of harm to others?"*

The PP: *"Yes. I think some of those statements lack context so maybe if I could put in a bit of context? In terms of being highly likely to engage in future violent offending, that needs to be taken in the context of disengaging from supervision, relapsing into substance misuse, deteriorating mental health, engaging in a relationship and not sharing that with his COM. Under those circumstances and in that scenario I'm assessing violence as highly likely. But the imminence of that happening is low and there would be support: imminence in the short term is low and there will be risk management strategies in place to monitor and manage that. There are also plenty of warning signs in place that can be used to detect where the risk is escalating and then interventions can be put in place to manage risk."*

The PP then referred to the extensive list of warning signs which she had identified in her report and which she believed would be likely to be picked up by the COM.

42. The panel in its reasons did not mention these qualifications to the PP's assessment of the Applicant's risk of harm as high (i.e. it would only be high in a certain scenario).
43. The panel did point out, as regards warning signs, that there had been no warning signs before the recall offence. However, it does not appear to have attached any weight to the evidence of the POM on this topic. Whatever criticism there may be of the fact that the POM had limited knowledge of the index and recall offences, there does not seem to be any reason to question the following part of his evidence as summarised by the solicitors and confirmed by listening to the recording of the hearing:

*"The POM stated that he and the Applicant had had long discussions about his risk factors and warning signs; that the Applicant seems up to date with those; that he is very insightful into mistakes he has made in the past; and that he has a firm grip on his risk factors and on the necessity for him to be open and honest with his COM and in his communications."*

44. It follows from the above that the panel did provide specific reasons for not following the recommendations of the professional witnesses though not all of its reasons were convincing. I will need to consider later on whether the panel's reasons for rejecting those recommendations, coupled with its own reasons for finding that the Applicant did not meet the test for re-release, were sufficient to justify its decision not to direct re-release on licence.

#### **Analysis of the panel's reasons for deciding not to direct release on licence**

45. The panel listed six reasons for not directing release on licence. I will discuss them in turn.

***Reason 1: The panel were concerned that the Applicant committed an extremely serious offence against his then partner in 1998 causing life changing injuries. The panel were also very concerned that despite undertaking multiple interventions, some of which were high intensity, during his sentence to address risk factors relating to intimate partner violence, problem solving, and substance misuse, within three months of his release into the community, the Applicant was recalled for violence perpetrated against his partner. In the assessment of the panel this raises significant questions regarding the Applicant's ability to benefit from and/or apply learning and skills from interventions. The panel therefore have concerns regarding the likely effectiveness of interventions undertaken since recall and whether the Applicant would be able to effectively implement learning in the future.***

46. The solicitors do not challenge, nor could they have done, the seriousness of the index and recall offences. They do however submit that the panel's assessment of the prospect of the Applicant now being able to implement his learning in the future and thus to avoid reoffending was unreasonably pessimistic and failed sufficiently to take into account the positive parts of the evidence.

47. First, they submit that more weight should have been attached to the POM's evidence about the Applicant's current attitudes and beliefs. I have already referred to the POM's evidence about his discussions with the Applicant about his risk factors and warning signs. In addition, the solicitors rely on the following points in his evidence:
- a. The POM was able to demonstrate in his evidence that he knew the Applicant well. He gave full updates in relation to the Applicant's time in open conditions and the progress he had made on periods of temporary release on licence ('ROTLs'). He was able to confirm in his evidence what he had seen from the Applicant in terms of being open and honest with him and other professionals. He confirmed that the Applicant would approach him and staff to ask for help when he needed it. He said that there had been nothing to lead professionals to believe that the Applicant was not being open and honest with them about his time in open conditions and when out in the community on temporary licence.
  - b. The POM made it clear to the panel that he had discussed the recall in depth with the Applicant, as well as his risk factors and his learning from work such as BBR, and that had been the focus of their discussions, along with how he was progressing and coping in open conditions.
  - c. The POM referred to the BBR programme and said that in their conversations the Applicant talked about the lessons he had learned in BBR: the Applicant says that he feels that it has made the biggest difference in terms of managing his emotions and arousal levels.
  - d. The POM added that the Applicant can manage arousal and has no trouble in prison, he has had no concerns or issues with staff or prisoners, has handled himself well and has dealt appropriately with any difficulties.
48. Second, the solicitors refer to the answers which the Applicant himself gave when he was questioned by the panel and the legal representative, at some length, about how he believed he had changed since his recall. Those answers are quoted by the solicitors and were confirmed by listening to the recording.
49. When asked by a panel member what he had learned in the 5 years since his recall, the Applicant said that he had learned to put himself in other people's shoes, and to show compassion. When asked why it had taken him so long to learn that he said there had been a barrier throughout his life, and he had tried to get through the barrier, but never had. He said that since he had been back in prison he had tried to assess his life and to look at himself as the horrible dangerous person he had been and to try and sort his life out.
50. He correctly identified his risk factors as alcohol, relationships and associates. When asked what the risk about relationships was, he said that the risk is to the other person and he knows that if things go wrong he has to keep up communication with his COM. He knows that using controlling, physical or psychological violence is a risk to himself as well because it would result in his being returned to prison.
51. He said that doing BBR was a '*game changer*' for him. It helped him to understand risk. He had learned with the BBR that he was very controlling. He said that he was not always a horrible person, he was nice too, but part of him was very controlling. BBR made him realise that. On BBR he tried to take things on board that meant things to him, touched him and made him want to take them on board. He said that in jail before that, he was learning stuff and going through the process, telling himself this will work,



as opposed to him trying to make a direct change, change within himself. He frankly acknowledged that it was difficult to remember everything he was taught on the programme.

52. When questioned by his legal representative he said that he now looks at himself, asking himself how his behaviour would affect other people. He asks himself why he is upset or angry. He assesses himself better than in the past, he is more aware of how he is feeling. He has his medication, sports, playing the guitar and writing music.
53. He said that on BBR he learned self-talk, he uses that and sits down and chats with himself. He tells himself the problem/issue, and tries to resolve it, starts the process of resolving it, talking it through with himself. He explained how he had used his skills on a ROTL to defuse what could have been a hostile situation.
54. Third and fourth, both the PP and the COM (whilst acknowledging the continuing existence of some risk factors) also acknowledged the progress which the Applicant had made since his recall.
55. I accept the solicitors' submission that the panel attached too much weight to the Applicant's past and not enough to his recent progress.

***Reason 2: The panel also considered that the fact that the Applicant made 26 calls to Ms L seeking to dissuade her from giving evidence against him following his assault upon her was a matter of considerable concern.***

56. This was certainly a matter of concern, illustrating the Applicant's attempt to control his partner. The Applicant accepts that he made the calls because he did not want to be sent back to prison. He also accepts that the calls amounted to controlling behaviour. He says that this was one of the many mistakes he has made in the past and is anxious not to repeat. He says that he has learned how important it is not only to tell his COM about any intimate relationships but also to keep her informed of any difficulties in them. He says that he has learned a lot from the BBR programme, and the professional witnesses all believe that he is well motivated to avoid the mistakes of the past. Obviously there is a risk that in a stressful situation he will be unable to maintain his good intentions, but there is certainly evidence that he is better equipped to avoid mistakes than he was in the past.

***Reason 3: The panel noted the Applicant's expressed motivation to abstain from alcohol and his confidence that he would not resort to violence in a future relationship. However, they were aware from the decision letter that he gave comparable evidence to the panel that directed his release in 2017. The Applicant's apparent reluctance to have an alcohol tag reinforced their concern that abstinence from alcohol was unlikely if he were in the community.***

57. A relapse into use of alcohol is, as the Applicant and everyone else agrees, one of his risk factors. It is correct that the Applicant's evidence to the 2017 panel about his intention to abstain from alcohol use was similar to the evidence which he gave to the present panel. That is not to say that that his ability to abstain from alcohol is no different from how it was then. Apart from learning a lot more about himself through

BBR, an alcohol tag can be included in his licence conditions. No doubt any difficulties with his skin condition can be catered for.

***Reason 4: The panel were concerned at the time of his recall the Applicant had chosen to stop taking his prescribed medication.***

58. It was a mistake on the Applicant's part to stop taking his prescribed medication before the recall offence, but it is unlikely that he will make the same mistake again.

59. The panel stated in its decision letter that the Applicant was not taking his medication at the time of 'the hearing', which was ambiguous and gave the impression to the solicitors that the panel believed the Applicant had stopped taking his medication again. In fact, as I am sure that is not what the panel believed. The evidence was very clear that the Applicant was still taking the medication at the time of the recent hearing. He explained to the panel that he is on medication for anxiety which he said really 'levels him out, and keeps him calm'. He is keen to continue taking it and the COM agrees that he should do so. She told the panel: "*he has reflected on the recall and realizes the importance of his medication on him and his moods*".

***Reason 5: The panel assessed that the risk management plan was not robust. The absence of an alcohol tag or a referral to an IIRMS reduced the likely effectiveness of the licence. Whilst the panel could direct the former, they cannot direct IIRMS and also accept engagement with such a service is voluntary. The panel assessed however that a future risk management plan would likely be strengthened by the inclusion of an alcohol tag and also an indication that the Applicant had shown genuine willingness to engage with IIRMS as recommended by the PP, and which could offer a greater level of oversight of this risk and more advice to the COM about how to engage the Applicant in supervision.***

60. If a panel believes that the proposed risk management plan is not sufficiently robust but it could be strengthened by the addition of a further licence condition or conditions, the panel can always direct the further condition or conditions. As the panel noted, it could have directed an alcohol tag condition in this case. It is unlikely that the Applicant would breach that condition: he is fully aware that a breach would be likely to lead to another recall.

61. The IIRMS suggestion (which would be voluntary) was rather 'sprung on' the Applicant at the hearing so there had been no opportunity for it to be discussed with him before then. It is likely that, if it transpires that he meets the threshold for IIRMS, he will have the opportunity to discuss it in detail with the COM. If she says that it is necessary, in all probability he will be happy to engage voluntarily in it.

***Reason 6: There was uncertainty about the Applicant's future plans and the precise area to which he might wish to relocate after leaving any probation hostel ('AP').***

62. This is a factor to which I do not think much weight should be attached. It is quite normal and sensible for a prisoner to wait until he is on licence in the community before making a decision about the area in which he wishes to live. He is in a much better

position to make that decision when he is in the community where he will be assisted by his COM and staff at the AP.

63. For reasons outside his control the Applicant has spent overnight leaves from the open prison at two different probation hostels ('Approved Premises'), in different parts of the country. He does not come from either area, and it is not surprising that he is still considering which of those areas he would prefer to be released to.

64. I should mention a matter which is referred to in the panel's decision letter but which does not appear in the panel's list of reasons for its decision. It is that the Applicant failed two drug tests (for cocaine) at one of the APs where he spent his overnight ROTLs.

65. False results from drug tests are not uncommon. They may occur for a variety of reasons. These were isolated positive results and, although understandably the hostel staff insist that the correct procedure was followed, it is impossible to say whether the results were true or false. A disciplinary charge against the Applicant was dismissed, and the panel made no finding about this matter. The results must therefore be ignored.

## Decision

66. I have not found this to be an easy decision to make. I have reminded myself that it is not my task to say what I would have decided if I had been in the panel's place: I cannot direct reconsideration of the panel's decision unless I am satisfied that that decision was irrational or procedurally unfair within the meanings explained above.

67. At the end of the day I am satisfied that the panel attached manifestly too much weight to the Applicant's past and not enough to the evidence of the changes which he has made since his recall; and I do not find that its reasons for rejecting the unanimous recommendations of the professionals are sufficient. It may well be that none of the specific points which I have set out in paragraphs 39-43 and 47-63 above would, on its own, provide a sufficient basis for deciding that the panel's decision was irrational; but I am satisfied that taken together they do provide such a basis.

68. I must therefore allow this application and direct reconsideration of the panel's decision on the ground of irrationality. I do not find that there was any procedural unfairness.

69. Although it is not for me to make any suggestions to the parties about the evidence, it may well be that the POM and the COM will wish to make sure that they are fully familiar with the facts of the case before they give evidence again.

**Jeremy Roberts**  
**07 November 2023**