

[2023] PBRA 31

Application for Reconsideration by Hamilton

Application

1. This is an application by Hamilton (the Applicant) for reconsideration of a decision of an oral hearing dated 14 December 2022 not to direct 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.
3. I have considered the application on the papers. These are
 - a) The Decision Letter.
 - b) Representations in support of the Reconsideration Application (the Representations) dated 16 January 2023.
 - c) The dossier, which now consists of 1373 numbered pages, the last document being the Decision Letter.

Background

4. The Applicant is now 38 years old. In 2007, when he was 23, he received a sentence of Imprisonment for Public Protection with a minimum term of 4 years 8 months, resulting in a Tariff Expiry Date of 13 August 2012. He pleaded Guilty to an offence of causing grievous bodily harm with intent. He was acquitted of attempted murder. He attacked with a hammer a man standing at a bus stop, causing brain damage that means the victim will suffer permanent disability. The likely motive was a grievance over illegal drugs, though the Applicant to an extent denied this and said it was about a burglary. A previous panel commented that he was unable to explain his precise motivation for the assault.
5. The Applicant had a significant criminal history consisting largely of offences involving violence, and also intimidation and possessing weapons. The trial judge found there to be clear elements of premeditation and planning in the index offence.



6. The Applicant was released on licence by the Parole Board after a hearing in August 2014. He was recalled in October 2014 after his father made allegations which did not proceed to court. The Parole Board again released the Applicant on licence on 12 October 2015. He was recalled on 3 July 2018 following another allegation, of serious violence against BD. He was unlawfully at large until he was arrested and returned to custody on 21 September 2018. He had left the country when he learned he was being sought by the police. He was arrested after his return, not only for the alleged assault on BD, but also for road traffic offences and possession of a knife found in the driver's side front door pocket of a car. The car was reported stolen.
7. The circumstances of the recall are central to this application for reconsideration. The Applicant accepts that he breached the terms of his licence by going abroad. He was never interviewed for or charged with the serious assault, in respect of which he denies involvement. By the time of his arrest the witnesses, including the alleged victim, had signed statements retracting their evidence against the Applicant. The road traffic allegations (dangerous driving and failing to stop when allegedly attempting to avoid the police) were dismissed at the Magistrates' Court for unknown reasons. The prosecution offered no evidence in respect of the knife, because there was no evidence to rebut the Applicant's account that he did not know it was there.
8. A police officer gave evidence to the oral hearing panel in which he expressed his certainty that the Applicant was involved in the assault. The alleged driving offences took place close to BD's address. The panel said it could not disregard the combination of that fact and the radical change in the witnesses' statements to the police, together with his history of witness intimidation, which *"may have related to an agenda of wanting to secure BD's ongoing non-cooperation with the police. However in the absence of clear evidence of this, the panel cannot make any firm finding about this on which it can rely."*
9. The police officer's evidence was that there was no evidence that the Applicant was directly involved in witness intimidation, but that it was *"highly suspicious"* that BD retracted his statement. The officer told the panel that the Applicant has connections who will intimidate people, resulting in retraction statements. He said that the primary reason for not proceeding with a prosecution was the safety of the victim, and that, without the cooperation of the main victim the police could not get a conviction. The officer stated *"it was overwhelming, on the balance of probabilities, that [the Applicant] was involved."*

Request for Reconsideration

10. The application for reconsideration is dated 16 January 2023. This may be a day or two past the 28 day period for making such an application, but the Parole Board has, in my view very properly, accepted it.



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11. The application was not made on the published form CPD 2. It is, however, succinct and very clearly focused on the issues.

12. The grounds for seeking a reconsideration are as follows:

“The decision of the Parole Board was irrational in that the clear evidence of professional and trained risk assessors was undermined by unproven allegations made both orally and in writing by the Police. In addition the Parole Board purported to make a finding of fact without a proper investigation of all the available evidence.”

13. The way this is expressed raises the issue both of irrationality and of procedural unfairness.

Current parole review

14. The parole process was a prolonged one. The panel for a long time endeavoured to discover why no action was taken against the Applicant in respect of the serious crimes he was, and still is, alleged to have committed.

15. The Representations suggest that the reason is that the police have always known they had little or no evidence. Whatever the merits of this argument, the end result is that the panel had to deal with this serious and difficult case on the basis of the evidence that was before them. The Representations accept that the panel placed no weight on a number of unfounded allegations made at various stages of the proceedings, but argue that the making of them had a prejudicial effect.

16. The panel heard evidence over two days, on 16 and 18 November 2022. Before that hearing the panel and all parties had received and viewed two CCTV video files recorded on 24 June 2016 relating to the allegations against the Applicant of attempted murder that led to the revocation decision. The hearing was remote, by video. The panel heard evidence from the Prison Offender Manager, the police witness already referred to, a prison service psychologist, the Community Offender Manager (COM) and the Applicant. The Applicant was represented throughout by an experienced legal representative who was able to question witnesses and make submissions. The Secretary of State was not represented.

The Relevant Law

17. The panel correctly sets out in its decision letter 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.



18. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

19. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. 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."

Parole Board Rules 2019 (as amended)

20. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

21. 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)).

Irrationality

22. 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,

"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."

23. 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.

24. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

25. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: "*A more nuanced approach in modern public law 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 respect 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion.*"

Procedural unfairness

26. 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.

27. 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.

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

29. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the



case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

30. The Secretary of State has indicated that he does not wish to respond to this Application.

Discussion

31. The issue is very clear. The Parole Board's approach to unproven allegations is now set out in the decision of the Court of Appeal in **R (Pearce) v Parole Board and the Secretary of State for Justice [2022] EWCA Civil 4**, which disapproved the Parole Board's previous *Guidance on Allegations* and decided that, in assessing risk, reliance can only be placed on an unproven allegation if a finding of fact can be made that it is more likely than not to be true.

32. I understand the Supreme Court has heard the appeal in **Pearce**, but we do not yet know their decision. Accordingly, I must proceed on the basis that the law is as I have set it out. The question, therefore, is what the evidential basis for the panel's findings was, and whether it justified the panel's conclusions.

33. The panel set out the relevant evidence thus:

2.10. [The Police Officer] informed the panel that there is no evidence that [the Applicant] was directly involved in witness intimidation, but he had ample opportunity to threaten or coerce BD to not proceed and it was considered "highly suspicious" that BD retracted his statement. [The officer] also informed the panel that [the Applicant] has connections who will intimidate people resulting in retraction statements. He stated that there is no information of [the Applicant's] current involvement in organised crime, which he said was the view held by both [police forces involved]. [Police force A] have historically had more involvement with [the Applicant's] case than [police force B] given he is based in [location A]. [The officer] has only been involved in the investigation of BD's attempted murder as this occurred in [police force B's] region.

2.12. The panel have carefully considered all of the available written evidence including witness statements within the dossier. The panel have viewed CCTV and concur with the POM, that it is not clear who the people are in the video footage or who is in the vehicle. However, the CCTV does indicate the Audi that



was connected to [the Applicant] being involved in the assault of BD, although the individuals who committed the offence could not be seen due to images being distant and distorted.

2.13. The panel also notes that in a statement (since retracted) BD alleged that [the Applicant] was responsible for shooting BD in an incident in 2016. The Parole Board made directions in September 2020 for police reports for the alleged shooting be provided. This has not been provided. [The officer] informed the panel that "evidentially, [the Applicant] was not linked to the shooting of [BD] in 2016". Due to the lack of evidence, the panel agree with [the psychologist], in that it does not place any weight on the allegations of being involved in the shooting in 2016.

2.14. [The Applicant's] evidence to the panel was that he was in no way involved in the assault upon BD and was with his cousin at the time in [location A]. He stated that it was not him on the video footage and he does not know who it is. The Audi vehicle belonged to a company of [the Applicant's] employment and he was insured to drive the vehicle on a trade policy, but others had access to the vehicle, as it was a hire vehicle and other company employees also had access to it. He told the panel that did not have the keys to the Audi seen on the CCTV on that day, although one of the CCTV videos of the vehicle (not the one which features the assault) features a male who has similar physical characteristics to him but not with such clarity as to make him identifiable. The panel note that he was not interviewed by police and therefore did not have an opportunity to put forward an alibi to be investigated since his apprehension in September 2018. The panel is surprised that such a serious matter was not robustly investigated and that [the Applicant], given he was at that time seen as a primary suspect, was never interviewed about the matter. However, the panel also notes that his leaving the country later on the day of the assault is likely to have impeded the investigation and by the time he was apprehended by police, two retraction statements of the victim had been made.

2.15. [The Applicant] also stated that BD thought that he had informed people (who BD has grievances with) where he lives, which may have been his motivation for initially accusing [the Applicant] of the assault upon him. He advised the panel that his fingerprints would have been on the outside of BD's car as he had been with BD in the vehicle a few days before the assault took place.

2.16. Regarding his travelling to France, [the Applicant] informed the panel that he had been told that the police had visited his girlfriend's house looking for him. He stated that he did not know the full circumstances of the allegation but panicked and made the impulsive decision to leave the country and his cousin went with him. [The Applicant] maintains he was out of the UK for 5 days (which differs from the evidence of [the officer] who believed it was 56 days) and stated that he wanted to 'clear his head' and then intended to speak



to Police. The panel note that despite his suggestion that he wanted to arrange to speak to the police voluntarily, he was unlawfully at large for a number of weeks until he was apprehended on 20 September 2018, 11 weeks after his licence was revoked, which does not support his assertions of his intentions to voluntarily speak to police upon his return from France, if he did in fact return after just 5 days. The panel have not been provided with any evidence supporting [the Applicant's] assertions that he was only out of the country for 5 days. [The Applicant] informed the panel that the reasons for the delay and not handing himself in to police, is that he wanted to wait until after the birth of his son. He indicated that his son was born on 24 September 2018.

2.17. [The Applicant] stated that when he was apprehended and arrested, he was in the area as he was going to see a female. He was driving a vehicle that he had borrowed, with permission, from a friend PD, he did not know that a knife was in the vehicle and that he was not questioned by police about this. However, he was then held in police custody and the car was kept in a compound, hence after two weeks of not being able to make contact with [the Applicant], PD reported the car stolen on 2 October 2018 as a means of getting his car back.

2.24. There has been high grade security intelligence entries alleging that [the Applicant] has offered £10,000 to anyone that will seriously injure another prisoner, LM who is located in another prison. [The Applicant] maintains that he does not know LM and disputes the allegations. Parole Board directions for further information regarding this allegation have not been successful, other than police clarifying that there have been no recorded complaints or investigations. However, in the oral hearing [the officer] informed the panel that circa £10,000 was paid to [the Applicant] by his employer ... when [the Applicant] was abroad. [The employer] has suggested it was for money's owed for a tow truck.

2.29. [The Applicant] does have a previous offence related to witness intimidation, but [the psychologist] pointed out that this was committed when [the Applicant] was just 17 years of age and did not have much knowledge of the Criminal Justice System. [The COM] informed the panel that when discussed at the MAPPa meeting, there was no evidence that BD had been intimidated by [the Applicant].

2.30. [The Applicant] informed the panel that he sent out witness statements that were contained in his parole dossier to three associates. He told the panel that he did not realise the contents of his dossier was private and confidential and did not realise that he had done anything wrong. He felt 'a major injustice' as he was not involved in any way in the assault against BD and was upset so sent out the witness statements which were then seen on social media. [The



Applicant] admitted that these three associates have been involved in criminal activity in the past.

2.31. [The COM] surmised that it is known that BD was assaulted and after hearing all the evidence, on the balance of probability concluded that [the Applicant] may have been involved in the incident against BD in June 2018 and that steps need to be taken to protect BD, including a non-contact licence condition."

34. The panel gave its conclusions on the issue of the assault on BD as follows:

"4.5. There have been no convictions of violence or further offending since the Parole Board last directed his release. However, after very careful consideration and much deliberation of all of the written and oral evidence available to it, surrounding the allegations of attempted murder/serious assault against BD, the panel is satisfied that, on the balance of probabilities, there is sufficient evidence that [the Applicant] was involved in the serious assault against BD in June 2018."

"4.6. BD was seriously assaulted with a knife left embedded in his face; there is evidence that the vehicle, identified by CCTV and with corroborating damage from the incident, was in the immediate vicinity of the assault; that vehicle is unequivocally connected to [the Applicant] – it belongs to a company he works for and he is insured to drive it; the victim provided two witness statements positively naming [the Applicant] as responsible for the attack (since retracted); the victim's sister provided a corroborating witness statement positively naming [the Applicant] as involved in the attack on her brother (since retracted); [the Applicant's] fingerprint was on the door of the victim's car; circumstantial evidence that he fled the country when told he was wanted for questioning by police after the assault, which hindered the investigation and prevented him from being questioned by police; he was unlawfully at large and therefore avoided detection by the police until after retraction statements had been submitted by the victim and his family members. In addition to the victim making retraction statements and not supporting a conviction, it is hugely concerning to the panel that, the other main reason that the case investigation was stopped by police was to protect BD and potentially his family from further serious harm."

...

"4.8. After hearing evidence directly from [the Applicant], the panel consider that he shows motivation and determination to comply and to continue to make positive changes and succeed in having a pro-social life in the community and found his desire not to be returned to custody genuine. However, the panel was not persuaded by the credibility of [the Applicant's] evidence at times, particularly regarding the suggested reasons why BD would accuse him of the assault, why he travelled to France, that he did not know the vehicle he was



driving had a knife in the driver's door pocket upon his apprehension and why he was in close proximity to the location of the serious attack on BD 11 weeks later when apprehended by police and why he leaked the victim's statement on social media."

"4.9. The panel agrees with the professional witnesses and considers the risk management plan to be comprehensive, however the panel does not consider that his risks can be managed in the community, taking into account the finding of fact and extent of evidence linking his involvement to serious violence and negative associates whilst in the community previously. The panel has particular concerns that risk factors regarding lifestyle and associates and a willingness to use violence and weapons were present when he was in the community prior to his recall in 2018."

"4.10. It was evident to the panel that his COM has a good grasp of his case, that [the Applicant] would also be subject to close monitoring by police and that the licence conditions would be enforced. However, the panel is concerned as to [the Applicant's] likely compliance when in the community – despite knowing he was wanted by police for a serious offence, he left the country, he was recalled, did not have contact with the Probation Service and he was unlawfully at large for 11 weeks."

"4.11. The panel considers that in light of the evidence and finding that he was involved in the serious assault against BD, that potentially further work to address healthy identity, lifestyle and associates and a willingness to use weapons and violence would be appropriate."

35. It is apparent that the adverse finding of fact in relation to the assault on BD was central to the panel's decision not to direct release, though not the sole reason for it. To its credit, if I may say so, the panel did not seek to burke the issue.

36. Was the panel entitled, given the evidence before it, to make that adverse finding of fact? I note that the panel carefully assessed what the evidence amounted to, and where it came from, and based its finding on uncontested evidence (see Paragraph 4.6 of the Decision Letter cited above), and the inferences to be drawn from it on the balance of probabilities, rather than on the assertions of the police officer. The panel also considered, as it was entitled to, the Applicant's evidence, and took that into account, in this instance against him, for reasons it explained.

37. In my judgement the panel approached this singularly difficult exercise rigorously and in accordance with the law as established by **Pearce**. The panel saw and heard the witnesses, and was not influenced by mere allegations, but by what it correctly considered to be solid evidence.



38. The panel's conclusions on the facts were properly available on the evidence, and were within the range of findings that a reasonable panel, properly directing itself on the law, could have come to. I am therefore satisfied that the decision not to release was neither irrational nor tainted by procedural unfairness.

Decision

39. 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.

Patrick Thomas KC
4 March 2023

