

[2023] PBRA 7

Application for Reconsideration by Missenden

Application

1. This is an application by Missenden (the Applicant) for reconsideration of a decision of an oral hearing dated 30 November 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
 - The Decision Letter;
 - The Application for Reconsideration dated 16 December 2022; and
 - The Dossier, which now consists of 611 numbered pages, with the Decision Letter as the last document.

Background

4. The Applicant is now 60 years old. In 1998, when he was 36, he received an automatic Life Sentence with a minimum tariff of 6 years, for offences of robbery, attempted robbery and possession of a firearm with intent to commit indictable offences. His tariff expiry date was in December 2004. He was released on licence following a Parole Board hearing in August 2016, and recalled in June 2018. He received a further sentence of 5 years' imprisonment in December 2018 for a further offence of attempted robbery committed on licence, and is now once more eligible for parole, having passed the halfway mark for that sentence. This is the second time the Parole Board has considered the Applicant's case since his recall.
5. The Applicant had, at the time of the index offences, 24 previous convictions for 66 offences, starting when he was 11 years old. They included convictions for robbery. He had a conviction for causing grievous bodily harm with intent, arising from an assault on a prisoner while he was serving a sentence. The index offences were committed for relatively trivial amounts of money, they were not particularly sophisticated and there was no evidence that the firearm was real, rather than imitation. He denies the recall offence but understands that that the Parole Board must proceed on the basis of his guilt.



6. The panel considered it to be clear that the index offences were part of a pattern of violent acquisitive offending driven by the need to finance the Applicant's drug misuse. There have been few gaps in his offending behaviour when he has not been in custody.

Request for Reconsideration

7. The Application for reconsideration is dated 16 December 2022.
8. The Application is commendably focused. The panel had to consider a number of allegations which had not resulted in convictions or other judicial determinations. This meant that the panel was invited to consider the application of the case of ***R (on the application of Pearce) v Parole Board of England and Wales [2022] 1 WLR 2216; [2022] EWCA Civ 4*** (hereafter ***Pearce***). One allegation in particular was of an assault on another prisoner (referred to as Prisoner X) on 12 April 2022. The panel recorded, incorrectly according to the Application, that the adjudication for this was subsequently overturned because two witnesses did not attend.
9. The panel had to consider the background to that assault and made a finding of fact (at Paragraph 3.4. of the Decision Letter) that the Applicant slapped Prisoner X as a means of debt enforcement. The panel agreed with the Prison Offender Manager (POM) and the Community Offender Manager (COM) that "*accordingly ... risk had the potential to become imminent [on release]*", noting particularly that the assault was committed in full view of Wing Staff in a Closed prison.
10. The grounds for seeking a reconsideration are as follows:
 - (1) The panel had no basis upon which to make a finding of fact in respect of the allegation of assault on Prisoner X;
 - (2) The panel failed to take account of the fact that a judicial determination had been made and unlawfully, and/or contrary to procedural fairness, considered the responsibility of the Applicant in any event in making a finding of fact;
 - (3) Even if the adjudication had been dismissed, it is procedurally unfair that the panel proceeded to make a finding of fact on the basis of what the POM "*has confirmed with Wing Staff who viewed CCTV footage of the incident.*"
 - (4) In relying on the hearsay account of what the POM had discussed with those who viewed the CCTV the panel cannot be said to have carried out sufficient investigation of the allegation. Basic procedural fairness would involve the panel themselves viewing the CCTV footage and the record of the adjudicator at the very least.
11. The Applicant therefore argues in conclusion (a) that the manner in which the finding of fact in respect of the alleged assault has been made prima facie irrational in that the allegation had been subject to a judicial determination at the prison adjudication; and (b) that the manner in which the finding of fact



was made was procedurally unfair and contrary to common law in that the panel relied on what the COM “has confirmed with Wing Staff who viewed CCTV about the incident” without carrying out “a sufficient investigation”, citing **Bourne J.** at first instance in **Pearce**.

Current parole review

12. The Secretary of State for Justice referred the Applicant’s case to the Parole Board for consideration of directing release or making a recommendation for a move to open conditions. The case had quite a complex procedural history, which has no relevance to the issues raised in this Application.
13. The final hearing took place on 10 November 2022 by video link. The panel consisted of two independent members and a psychiatrist member of the Parole Board. The panel heard evidence from the POM, the COM, two psychologists based at the prison, a security officer and the Applicant himself. The Applicant was represented by a solicitor, who asked questions of the witnesses and made submissions at the end of the case, including submissions on **Pearce**. The Secretary of State chose not to be represented and made no submissions. The panel considered a dossier which then contained 570 pages, to which were added, after the hearing, a report from the COM setting out the Risk Management Plan (RMP) and written closing submissions from the solicitor.

The Relevant Law

14. 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.
15. 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.
16. 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)



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17. 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)).
18. 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)).
19. 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

20. 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."

21. 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.

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

23. 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*



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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

24. 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 focuses on the actual decision.

25. 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.

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

The reply on behalf of the Secretary of State

27. The Secretary of State has indicated that he does not wish to make any submissions about this Application.

Discussion

28. The first question is whether the panel's findings in respect of the assault on Prisoner X impacted on its decision not to direct release. It did. I refer to Paragraph 2.43. of the Decision Letter:

"2.43. The panel noted that [the COM] and [the POM] agree that core risk reduction work remains outstanding to address victim empathy, consequential thinking, problem solving skills and conflict resolution and willingness to use violence. [One of the prison psychologists] concluded that the outstanding work required would be core risk

reduction work if [the Applicant] was involved in the illicit prison economy and had assaulted Prisoner X as a means of debt enforcement, but would be consolidation work if he had instead been selling canteen and assaulted Prisoner

X as part of a game. As referred to above, the panel concluded that there was insufficient evidence to conclude at this stage that [the Applicant] was involved in the illicit prison economy. The panel concluded on the balance of

probabilities, however, that [the Applicant] assaulted Prisoner X as a means of debt enforcement. The panel concluded that, despite being under the increased scrutiny of an extended Parole Review, when [the Applicant] found himself in financial need (whether employed or not), he acted in breach of prison rules by selling canteen and that, at least in the case of Prisoner X, he enforced the debts owed by other prisoners by the use of violence. Accordingly, [the psychologist's] 2 alternatives did not fit the findings of the panel.

2.44. The panel carefully considered all the evidence. In light of [the Applicant's] recall offences, his own description of his behaviour in the community and his behaviour in custody regarding the selling of canteen and the assault on Mr X, the panel was driven to the conclusion that the outstanding work is core risk reduction work. The panel concluded that [the Applicant's] behaviour demonstrates the absence of internal controls. He struggles to maintain "New Me" thinking and resorts to "Old Me" behaviours driven by the need for financial gain. In particular, the panel concluded that his behaviours evidence that his risk factors remain active and unaddressed. The panel accepted that risk might be reduced if [the Applicant] was in employment and if he had secure accommodation. The panel was not confident, however, that [the Applicant] would be able to maintain his "New Me" if he did not have a job or accommodation or was mixing with negative peers. His custodial behaviour evidences that he continues to mix with negative peers, breach rules and use violence to enforce debts owed to him. His recall offence is evidence that if he is under financial strain he defaults to his old methods of violent acquisitive offending.

2.45. Taking account of all the evidence, the panel was unable to conclude that there is evidence of a significant reduction in risk. The panel concluded that core risk reduction work remains outstanding that must be completed in Closed Conditions."

29. It is therefore apparent that the panel's findings about the assault on Prisoner X, and the circumstances surrounding it, played a part in its overall conclusion.

30. The next question is what the evidence was about the assault on Prisoner X and its surrounding circumstances.

31. At Paragraph 2.14 and following the panel discusses the evidence;

"2.14. On 12 April 2022, however, [the Applicant] is reported to have assaulted another prisoner (Prisoner X) by punching him in the face. The Adjudication was proved and he was awarded 7 days cellular confinement, suspended. He was relocated to a different wing for the protection of the other prisoner. The Adjudication was subsequently overturned on the grounds that the 2 witnesses listed to be called were not called at the hearing of the Adjudication.

2.15. Despite the quashing of the Adjudication, the panel was satisfied that the incident occurred, save that [the POM] has confirmed



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with Wing Staff who viewed CCTV footage of the incident that the incident involved a slap and not a punch. In reaching this conclusion, the panel noted that the incident was witnessed by Wing Staff who immediately followed [the Applicant] and escorted him back to his cell and that [the Applicant] admits to slapping Prisoner X in the face.

2.16. [The Applicant's] account of this incident is that he was engaged in a game called 5 Slaps with a number of other prisoners, including Prisoner X, whereby whoever won the game by managing to slap the other prisoner 5 times during the course of the day was entitled to receive an item of canteen from the loser. [The Applicant] informed [the POM] that he took part in this game due to boredom, as a means of entertainment and for a "buzz".

2.17. [The POM] reports that Wing Staff do not agree with [the Applicant's] account that this was a game. Wing Staff have advised [the POM] that they consider that the slap was a punishment due to the other prisoner being in debt to [the Applicant]. [The POM] concluded that, even if [the Applicant's] account of the incident is accepted, the incident raises concerns regarding deficits in his thinking skills, attitudes and negative associates.

2.18. The panel found it difficult to accept [the Applicant's] account of his behaviour, noting that it would be very immature behaviour for a 59-year-old man to engage in (particularly during his Parole Review), there is no other evidence of this so-called "game" being played on the Wing and that the other prisoner is viewed as vulnerable due to his Spice use.

2.19. [The psychologist] considered this incident in her July 2022 Addendum PRA. In light of this incident, she has raised the scoring of violent ideation / intent to Partially Present in her HCR-20v3 assessment.

2.20. Taking account of all the evidence, on the balance of probabilities the panel accepted the evidence of Wing Staff who viewed the incident (as relayed by [the POM]) that [the Applicant] slapped the other prisoner as a means of debt enforcement and not as part of a game. The panel noted, in particular, that the incident occurred in full view of Wing Staff and that [the Applicant] was immediately escorted back to his cell and an Adjudication opened.

2.21. The panel concluded, however, that on either version of events, [the Applicant's] behaviour was of concern and evidenced a continued willingness to use violence. The incident was carried out in full sight of Wing Staff and during the period when his Parole Review was adjourned. It raises concerns about how [the Applicant] might have behaved in conditions of lesser security or when under less scrutiny. If the incident relates to debt enforcement, the panel considers that it is part of the pattern of [the Applicant's] use of violence for financial gain and would be evidence that his risk factors remain active. Even if [the Applicant's] account is to be believed, the incident suggests



that a number of his risk factors remained active including: willingness to use violence; poor thinking skills; impulsivity; negative associates; negative attitudes towards authority; problematic personality traits; and non-compliance.

2.22. Wing staff have reported to [the POM] suspicions that [the Applicant] is involved in selling canteen items to other prisoners for profit. These suspicions caused [the POM] to check [the Applicant's] financial records, which were found to detail several small and large payments from individuals in the community linked to current prisoners. When challenged by [the POM], [the Applicant] admitted selling canteen items. He said that he was doing so because he was unemployed, bored and did not realise that it was in breach of prison rules. The panel notes that [the Applicant] was selling canteen items during periods when he was employed as well as periods when he was unemployed, so his explanation does not fit well with the evidence. The panel notes that [the Applicant] was initially hostile to [the POM] when she first raised concerns about the Security Intelligence in November 2021 and that he continued to make and receive financial payments following this initial meeting, despite being informed that it was against the rules. Since [the POM] raised the matter again with him in April 2022, he has ceased selling canteen items. He has continued to receive payments from associates outside the prison. He told the panel that these are loans to help him get by in prison, which he will have to repay.

2.23. The panel found it difficult to accept [the Applicant's] account that he was unaware that it was against prison rules to sell canteen despite the length of time that he has spent in custody. The panel noted that, even when informed by [the POM] in November 2021 that it was against the prison rules, he continued to sell canteen and receive payments, suggesting that [the Applicant] is prepared to break rules for his own financial gain, and continues to present with negative attitudes towards authority and poor thinking skills.

2.24. [The POM] discussed the financial transactions with the Security Department in July 2022, which led to further analysis of the transactions. The Security report, confirmed by [the Security Officer] in his oral evidence, confirms that in the view of the Security Department there is reliable information linking [the Applicant] with an organised criminal group, the illicit prison economy and drug facilitation. The Security Department considers that [the Applicant's] account of selling canteen items is a front for drug facilitation and debt collection. In particular, [the Security Officer] confirmed that analysis of bank transactions has revealed that in 2022 there have been a total of 280 shared bank transactions from external sources to [the Applicant] and other serving prisoners. [The POM] reports that a number of the payments received by [the Applicant] are from JK, who was formerly a serving prisoner. [The Applicant] states that JK sends him money as a friend, as he knows how hard prison life can be. [The POM] is

concerned that JK is a negative associate given his history of offending. [The Security Officer] explained that the individual transactions are in small amounts which did not trigger a Security concern initially, but that the analysis of the transactions once the concern was raised by [the POM], has revealed a pattern of behaviour that he concludes is linked to the movement of money as part of the illicit economy in the prison and not confined to the running of a canteen shop as [the Applicant] claims.

2.25. [The POM] confirmed that she agreed with the Security Department's conclusion that [the Applicant] was involved in moving money as part of the illicit prison economy. [The psychologist] considered the Security Intelligence in her July 2022 Addendum PRA. She felt unable to determine what weight to place on the Security Department's conclusions. She considered that if the Security Department's view was correct and if [the Applicant] had assaulted the other prisoner as a form of debt enforcement, then his risk of serious harm would be high and would have the potential to be imminent upon release. In those circumstances, she reported in her July 2022 Addendum PRA, she would recommend that [the Applicant] remain in Closed Conditions to explore and address his ongoing risk. On the other hand, [the psychologist] concluded in her July 2022 Addendum PRA that if [the Applicant's] bank transactions were confined to the selling of canteen items in breach of prison rules, she would consider that his risk of serious harm was moderate, risk would not be imminent and risk could be managed in the community.

2.26. [The POM] and [the COM] are concerned by [the Applicant's] custodial behaviour. They both place weight on the Security Intelligence and concerns of Wing Staff. In their view, [the Applicant's] involvement in supplying canteen and/or Spice to other prisoners, linked to the use of violence or intimidation to enforce debts, has parallels to the index offence. They consider that this behaviour evidences that, when experiencing financial hardship, [the Applicant] will resort to illicit means of raising money backed by the use of or threat of violence.

2.27. Taking account of all the evidence, the panel was unable to make a finding of fact as to whether [the Applicant] was involved in the moving of money as part of the illicit prison economy or whether his activities were confined to the running of a canteen shop in breach of prison rules. Whilst the panel acknowledged the suspicions of the Security Department, the panel was not satisfied that there was sufficient evidence before the panel on which to conclude that the identified payments were part of the illicit prison economy.

2.28. [The COM] and [the POM] agree that there is outstanding risk reduction work to complete to address victim empathy, consequential thinking, problem solving skills and conflict resolution and willingness to use violence. They consider that this is core risk reduction work that must be completed in custody. They agree that risk of serious harm might be imminent if he was released and conclude that his



risk cannot be managed safely in the community until this work has been completed. Further, [the COM] does not have confidence that [the Applicant] will engage with this work in the community given his stance that he completed all offending behaviour work prior to 2016 and will not benefit from further work."

32. The foregoing lengthy quotation demonstrates the care with which the panel disentangled and assessed the various threads of evidence.

33. The panel proceeded on the basis that the adjudication in respect of the assault on Prisoner X was quashed. The explanation for that, in several places in the dossier, is that two witnesses who were directed to attend an adjourned hearing did not do so, and therefore, when the adjudication was made, the Applicant successfully appealed. The Applicant's representative asserts that this is incorrect, and that the adjudication, and therefore the factual findings that underlie it, stand. I am happy to proceed on the basis most favourable to the Applicant: the adjudication was quashed.

34. The undisputed facts, therefore, are as follows:

- (a) On 12 April 2022 the Applicant slapped Prisoner X.
- (b) This was in the presence of prison staff, who immediately removed the Applicant from the scene and commenced disciplinary proceedings.
- (c) The Applicant agreed he slapped Prisoner X. He said this was part of a game. There was no evidence before the panel to support the Applicant's account of there being such a game. The applicant was 59 years old at the time, and in his parole window.
- (d) The Applicant was engaged in selling canteen items. Whether he realised it or not (and he has been in prison for long enough to know the rules), this was a breach of prison regulations. He continued to do so after being plainly told that it was against regulations.
- (e) The Applicant received numerous payments from outside the prison, some from former inmates.

35. The panel found the Applicant's explanation for the slapping to be incredible. The Applicant may not agree with this finding of fact, but it was one available to the panel on the evidence and cannot be characterised as irrational. Once the Applicant's explanation was rejected, it was reasonable for the panel to infer that the slapping, if not random bullying, was connected with the Applicant's other known activity, selling canteen.

36. The panel did not consider that the allegation that the Applicant was involved in drug-dealing within the prison was made out on the balance of probabilities, and therefore it played no part in the panel's conclusion. Overall, the panel's approach to the evidence was entirely in accordance with **Pearce**.

37. On the undisputed evidence, having heard and paid attention to the Applicant's account, and applying the test in *Pearce* (which I summarise as being that the Parole Board should act on evidence, not mere allegations, and apply the civil burden of proof (the balance of probabilities)), the panel concluded that the assault on Prisoner X was not part of a game. Seen in that context, the panel's conclusion, set out at Paragraph 27 above – *"His custodial behaviour evidences that he continues to mix with negative peers, breach rules and use violence to enforce debts owed to him. His recall offence is evidence that if he is under financial strain he defaults to his old methods of violent acquisitive offending"* – is unimpeachable. It is solidly evidenced and properly justified. No further investigation, such as viewing CCTV material, was necessary.
38. The Parole Board is entitled to take account of evidence which in other contexts would be characterised as hearsay, provided that it is careful when doing so. The hearsay material in this case (the concerns of Security and the Wing Staff) was carefully weighed, and played no significant part in the overall decision.

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
12 January 2023

