

[2023] PBRA 73**Application for Reconsideration by Betton****Application**

1. This is an application by Betton (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 7 March 2023 not to direct his release. The decision was made following a review by way of oral hearing on 14 February 2023.
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 Application for Reconsideration dated 28 March 2023; Written Representations by the Applicant's Solicitors dated 27 March 2023; the Decision Document; the Case Dossier; and an email dated 30 March 2023 from the Public Protection Casework Section of HM Prison and Probation Service (PPCS) on behalf of the Secretary of State.

Background

4. On 22 December 2010, the Applicant was sentenced to imprisonment for public protection (IPP) in respect of one offence of robbery. Concurrent fixed terms of imprisonment totalling 12 months were imposed for associated offences of aggravated vehicle taking and failure to provide a specimen of breath. Further concurrent terms of 18 months imprisonment were imposed for two offences of handling stolen goods committed on a previous occasion. The minimum custodial term under the IPP was set at 4 years 6 months (less time spent in prison on remand) and the Applicant's tariff expired on 6 February 2015.
5. The Applicant was 34 years of age at the time of the robbery which he committed on 5 August 2010 whilst on bail for the handling offences. The victims of the robbery were a couple who had been asleep with their daughter and her friend in a tent on a campsite. The Applicant slit open one side of the tent, demanded the keys to their car and the female victim's handbag, and then drove off with it. He was pursued by police and reached speeds of 100mph before crashing into a parked car.
6. During the course of his IPP sentence, the Applicant completed a number of accredited interventions, including the Thinking Skills Programme (TSP), RESOLVE which is a programme designed to address violent offending by males, and also Prisoners Addressing Substance Related Offending (PASRO). He was



transferred to open conditions in April 2016 but returned to the closed estate 3 months later after lapsing into substance misuse. He was transferred to open conditions again in March 2018 but absconded from there in January 2020 shortly before the oral hearing of his Third Parole Board Review was to have resumed. The Applicant explained at the latest hearing that he had not been given access to any education or training and had become frustrated at the lack of periods of release on temporary licence (ROTL).

7. In the event, the Applicant was arrested and again returned to closed conditions. He was later sentenced to 6 months imprisonment for the offence of absconding from lawful custody.
8. The panel conducting the Applicant's fourth review, having concluded that the protection of the public from serious harm did not require him to be confined directed his release. In accordance with its decision dated 3 March 2022, the Applicant was released on IPP Licence on 27 June 2022. As directed, he was living in designated premises. He had not disclosed to his COM that he had been struggling or thinking about drugs and he appeared to have settled in.
9. However, on 1 July 2022, the Applicant went into town to withdraw some money from a cashpoint and accidentally met some former prison associates. They offered him drugs, including heroin, and he purchased some. Back at the designated premises, the Applicant injected himself with the heroin and collapsed. When his state was discovered by premises staff he tried to hide the evidence.
10. The Applicant's bedspace was then withdrawn and the COM confirmed that, without this, his risk in the community could not be managed. Substance misuse had been identified by his COM as a significant risk factor and a trigger for offending. The Applicant's licence was revoked on 4 July 2022 for breach of the condition to be of good behaviour and not to behave in a way which undermines the purpose of the licence period. Having been informed by the COM that he was being recalled the Applicant absconded and remained at large for 10 days before being arrested and returned to the closed prison estate. On arrest the police found tape, a rope and some needles in his possession. The Applicant maintained that the needles were left over from the day he lapsed.

Request for Reconsideration

11. The application for reconsideration is dated 28 March 2023.
12. The grounds for seeking a reconsideration are that the decision was irrational by reason of (1) the Panel's express reliance on a single episode of a lapse into drug use as evidence that the Applicant's risk of serious harm could not be managed in the community and (2) the evidence of the COM in his Part C Report that there was no indication of an imminent violent or sexual offence at the point of recall.

Current parole review

13. By notice dated 11 August 2022, the Applicant's case was referred to the Parole Board by the Secretary of State to decide whether to direct his immediate



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release. The terms of reference included a request to consider, in the event of release not being granted, whether he was ready to be moved to open prison conditions and to recommend accordingly. Such advice is not within the remit of the reconsideration application.

14. The case dossier included Part A, B and C Reports by the COM, an addendum Report by the COM dated 31 January 2023, a security report, and a report from the Applicant's substance misuse key worker. Oral evidence was given at the hearing by the POM, by the COM and by the Applicant himself.
15. The written report from the Applicant's key worker confirmed that he had attended all three scheduled one to one relapse prevention sessions and had completed workbooks in respect of heroin use, motivation to change and relapse prevention. He had accordingly completed the goals set for him. There had been no evidence of the Applicant using illegal substances in custody since recall, no behavioural issues, no security concerns and no concerns about being open and honest with professionals.
16. The 2 August 2022 OASys Report assessed the probability of violent re-offending by the Applicant to be low and of non-violent reoffending. His contact sexual re-offending risk was assessed as medium and the risk of serious recidivism over the next two years to be low at 2.71%. The risk of serious harm to the public in the event of any re-offending by the Applicant was assessed as high and to a known adult and to children as medium. These assessments were confirmed by later reports, although the COM expressed the view at the hearing that the serious recidivism risk was higher than the OASys prediction.
17. The risk management plan (RMP) prepared by the COM provided for the Applicant's release in the first instance to the structured and closely monitored environment of designated premises. In this and other respects it was similar to the RMP in place when the Applicant was initially released, with licence conditions designed to protect past and potential victims, to ensure he would undertake any further work in the community to address and manage his risks, and to monitor any new relationships.

The Relevant Law

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 and this is incorporated within the Decision Letter.

Parole Board Rules 2019 (as amended)

19. 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)).



20. 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)).
21. 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.**]

Illegality

22. 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.
23. 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.
24. No issue of illegality arises in this case.

Irrationality

25. 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."

26. 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.



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

Procedural unfairness

28. 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.

29. In summary, an Applicant seeking under Rule 28 to complain of procedural unfairness 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.

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

31. No issue of procedural unfairness arises in this case.

Other

32. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

33. No mistake of fact has been alleged in this case.

34. 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."

The reply on behalf of the Secretary of State (the Respondent)

35. It has been confirmed on behalf of the Respondent that he has no representations to make.

Discussion

36. The COM concluded that the Applicant's inability to consistently manage his personality traits and emotions, a return to substance misuse, particularly as a coping mechanism, not being fully accountable for his actions and not always being open and honest with his supervisors are all factors likely to increase his risk in the community. Both the POM and the COM expressed the view at the hearing that the RMP was capable of managing the Applicant's risk of serious harm following release.

37. The panel was not satisfied that the Applicant could manage internally the factors which drive his drug misuse and offending. It is clear from the Applicant's history that drug misuse has been a driving factor for his past offending which has involved the use or threat of violence.

38. The Panel concluded that external measures were insufficient on their own to manage the Applicant's risks, given his poor record of compliance and almost immediate relapse into heroin use following release. The Panel further concluded that the Applicant's specific risk of causing serious harm within an intimate relationship has not been adequately addressed with no targeted work having been undertaken. It was not convinced that undertaking the Building Better Relationships Programme in the community would be sufficient. It is also available in custody.

39. In their submissions, the Applicant's Solicitors contrast the circumstances of the index offence occurring at a time of "*full blown addiction*", with the circumstances of the recall being a single lapse. However, that ignores the risk that a single lapse if not checked may lead to further and continuing drug use.

40. It is further submitted on the Applicant's behalf that there was no evidence of imminent risk of sexual violence as the Applicant was not in any relationship. The COM had expressed the view that any such risk could be adequately addressed by the Applicant undertaking the Building Better Relationships Programme in the community.

41. A panel should always take account of the opinions expressed by professional witnesses, particularly where, as in this case, they have been directly involved in the management and supervision of an offender. However, it should exercise its independent judgment, taking into account all the evidence in the case and may properly reach a different conclusion.



42. I do consider that, in the absence of an imminent risk of sexual violence and with measures in place to address such risk in the community, a conclusion based on that factor alone could arguably have been irrational.

43. However, having carefully considered the views of the COM and the POM, the Panel was entitled to reach its own conclusion that there was an outstanding treatment need in the area of emotional management and consequential thinking. These factors are directly linked to the Applicant's risk of causing serious harm in the community.

44. In the light of the circumstances of the recall, the limited nature of the work subsequently undertaken in respect of drug relapse, and the identified outstanding treatment need, it was not irrational for the Panel to have concluded that it remains necessary for the protection of the public for the Applicant to remain confined.

Decision

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

HH Judge Graham White
24 April 2023

