

[2022] PBRA 151

## Application for Reconsideration by Byford

### Application

1. This is an application by Byford (the Applicant) for reconsideration of a decision of an oral hearing dated 26 September 2022 not to direct release, but to recommend a transfer to open conditions.
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)) 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 Dossier, which now consists of 300 numbered pages, ending with the Decision Letter;
  - The Application, dated 26 September 2022, which is on the published Parole Board form CPD2 ; and
  - An email on behalf of the Secretary of State, saying he offers no representations.

### Background

4. The Applicant is now 38 years old. In 2007, when he was 22, he received a sentence of Imprisonment for Public Protection for offences of robbery and assault occasioning actual bodily harm, with a minimum period of 22 months. His tariff expired in March 2009.
5. The offences were an attack with a bottle on a drug-dealer and his associate in order to steal drugs. At the time of the offences the Applicant was on licence following a 2-year sentence for robbery. He had an established pattern of violent and acquisitive offending committed while under the influence of alcohol and/or drugs, in order to obtain more. He had responded badly to supervision and trust in the community by failing to surrender to custody, breaching community orders and licence conditions and offending on licence.



6. The Applicant was released on licence in July 2019 to live and work at a charity for the homeless, which supports people with substance misuse problems to lead an abstinent, pro-social life. At first he complied with what was expected of him. But he resumed his old coping strategies during a period of difficult emotions involving his family. He returned to substance misuse on his own and with another resident. His first positive drug test was in November 2019, for amphetamines. Thereafter he pushed boundaries, stopped engaging with the charity, was dishonest with those managing his risk and did not seek help for the problems he was experiencing. He was recalled to custody in April 2020.
7. In April 2021 the Applicant was transferred to the open estate on the recommendation of a panel of the Parole Board. On arrival he was suffering extreme withdrawal symptoms. He disclosed that he was addicted to methadone. He had been using it for at least 6 months, receiving 100ml a day, regurgitated by another prisoner. He was transferred back to the closed estate having spent only 2 days in open conditions.
8. The Applicant is currently receiving a trial medication by monthly injections as a methadone substitute.

### **Request for Reconsideration**

9. The application for reconsideration is dated 26 September 2022.
10. The grounds for seeking a reconsideration are as follows:
  - (1) Since his return from closed conditions the Applicant has conducted himself to an extremely high standard. He has sought help with managing his emotions and engaged with mental health.
  - (2) He is stable on his medication and this is assisting with his emotional control. The medication is not available in the open estate. The Decision Letter states that the medication is not available in the community, but this is merely an assumption.
  - (3) Both the Prison Offender Manager (POM) and the Community Offender Manager (COM) recommended release, did not feel risk was imminent and both gave evidence that there would be warning signs of risk increasing.
  - (4) Although the Applicant had lapses into substance misuse he has not committed any offences since the index offences in 2007, nor have there been allegations of further offending or violence. He has demonstrated in the past that he can abide by licence conditions. His substance misuse was whilst in closed conditions and as such a period in open would not offer anything further, nor is it essential to inform a future panel of risk.
11. The Application for Reconsideration is based solely on the ground of irrationality.



## Current parole review

12. The Secretary of State referred the Applicant's case to the Parole Board on 16 July 2021 for consideration of release or a recommendation for transfer to open conditions.
13. The oral hearing panel consisted of two independent members of the Parole Board. The hearing took place on 12 September 2022. The panel considered the dossier, which then totalled 285 pages, and heard evidence from the POM, the COM and the Applicant. The Applicant was represented by a solicitor throughout. The solicitor made written representations at the end of the oral hearing.

## 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)

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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or rule 31(6A)).

18. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule



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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 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."*



## The reply on behalf of the Secretary of State

24. The Secretary of State has indicated by email that he does not wish to make any representations about this Application.

### Discussion

25. It seems clear that the Applicant is unwilling to go to open conditions, amongst other reasons because the trial medication he is currently prescribed will not be available to him there.

26. This, however, although undoubtedly an important factor in the case as a whole, is not relevant to the issues in this Application. Before the panel could recommend a transfer to open conditions, it had to decide not to direct release. That is the only decision to which the Application for Reconsideration is, or can be, addressed.

27. The panel cannot be criticised for looking at the Applicant's history both in custody and during his time in the community since 2007 and deciding that, currently, the existence of external controls in the form of supervision and licence conditions in the community would not be sufficient to manage his risks.

28. The Applicant was in the community for 8 months during his first release, but relapsed into substance abuse, the true scale of which he managed to conceal for a significant period before his recall. In custody, before his move to open conditions, he managed to conceal his addiction to methadone for 6 months.

29. In the circumstances the panel could properly decide not to follow the view of the professionals that the Applicant's risk would be manageable in the community, that view being based on the assumption that warning signs would be noticed if there were any relapse into substance abuse.

30. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

31. The risk of releasing the Applicant without proper arrangements being in place to monitor, and so far as possible to prevent, any relapse into substance abuse is manifest. One of the main reasons for him not wishing to go to open conditions is that the trial medication would not be available to him.



Although his legal representative asserts in her final Written Submissions that the trial medication is available on prescription in the community, there is no evidence in the dossier to that effect, and she does not refer in her Submissions or in the Application to any such evidence given at the hearing. She went on to say in her Submissions no more than "*Continued use in the community is more likely*". The panel said in the Decision Letter that it was fully aware that the medication is a trial medication and "*it may not be available in the open estate or the community and [the Applicant] was aware that he may have to come off this medication.*"

32. The position therefore is that the principal protective factor relied on, the medication, may not be available in the community. The panel's decision that, in those circumstances, the Applicant needed to be tested in open conditions without that protective factor before release into the community, with (to say the least) no certainty of the availability of the protective factor after release, is a reasonable one.

33. The panel's decision not to direct release was based on the evidence and cannot be described as irrational.

### **Decision**

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

**Patrick Thomas KC**  
**31 October 2022**

