

[2022] PBRA 3

## Application for Reconsideration by Pilkington

### Application

1. This is an application by Pilkington (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 14 November 2021 not to direct release, but to recommend progression to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier amounting to 403 pages (including the decision letter) and the legal representations, dated the 8 December 2021.

### Background

4. The Applicant is presently aged 39.
5. In 2001, when aged 21, he went to aid his brother in a public house brawl. The two men punched and kicked the victim causing his death. On the 17 October 2001, he was sentenced to four years Young Offenders Institution detention for manslaughter.
6. On the 1 February 2006, he returned home, having been drinking all day and started an argument with his girlfriend. In the ensuing struggle, she lost her balance and fell downstairs, hitting her head. The Applicant did not call an ambulance for several hours. The girlfriend died of her injuries some days later.
7. On the 15 December 2006, the Applicant was sentenced to imprisonment for public protection for manslaughter, with a tariff of four years less time spent on remand. He was sentenced on the basis he had not intended to cause his victim any serious injury.
8. At the date of sentence, the Applicant was aged 23. His tariff expired on the 6 February 2010; since then he has been released on licence and recalled four times.

### Request for Reconsideration

9. The application for reconsideration is dated the 8 December 2021.



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10. The grounds for seeking a reconsideration are based on irrationality and are as follows:

Ground 1. The panel assessed the Applicant's risk of serious harm in the community as high. This was erroneous, given the community offender manager had assessed the risk as medium.

Ground 2. The panel erred in finding the proposed risk management plan to be insufficiently robust. The plan was similar to its predecessors and when released on the four previous occasions, those plans had been sufficient to manage the risk of serious harm in that the Applicant had committed no further offences of any nature.

Ground 3. The panel erred when it held a period in open conditions would allow the Applicant to put into place a comprehensive release plan in a safe and staged way.

Ground 4. The panel did not apply properly the test for release.

### **Current parole review**

11. The Secretary of State's referral is dated the 25 May 2021 and required the Parole Board to consider the Applicant's suitability for release or suitability to be recommended for progression to open conditions.
12. The oral hearing took place on the 12 November 2021 before a panel consisting of a judicial member and an independent member.
13. The panel heard evidence from the Applicant and from the prison offender manager and the community offender manager, both of whom supported release.
14. The Secretary of State made written submissions but was not represented.
15. The Applicant was represented by a solicitor who drafted the representations in support of this application.

### **The Relevant Law**

16. The panel correctly sets out in its decision letter dated the 25 November 2021 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.

### *Parole Board Rules 2019*

17. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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

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hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

18. 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*

19. 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."*

20. 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.

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

### **The reply on behalf of the Secretary of State**

22. The Secretary of State did not make any representations in respect of this application.

### **Discussion**

23. I shall deal with the individual grounds in support of the application in turn.

24. Ground 1. The Parole Board has a duty to make an independent assessment of risk on the material before it. It follows the panel does not have to endorse the community offender manager's assessment, provided the decision letter makes it clear what factors the panel has taken into consideration in coming to its own assessment.

25. In the decision letter, the panel noted the connection between misuse of alcohol (and illicit substances) and the two offences of manslaughter and the four instances of recall. The panel also noted the Applicant's own internal controls were not sufficiently robust to manage his risk for a sustained period in the community. The letter acknowledged the community offender manager's assessment and the fact he knew the Applicant well.

26. The panel came to the conclusion that compliant behaviour in custody was not a dependable indication of behaviour in the community and that the Applicant's risk was high and would remain high until his behaviour in the community indicated otherwise. The panel specifically paid attention to the following factors, the index offence and his previous history.
27. The panel was entitled to come to that view.
28. Ground 2. The business of the panel is to assess risk. This means that, although actual behaviour is not to be ignored, the panel has to consider potential behaviour. In the present case, the primary risk factors had been identified as substance and alcohol misuse, as well as poor emotional management.
29. The Applicant had not committed offences on licence, but his periods in the community were severely limited and had been between three months and seven months on each occasion. In the case of at least three of the recalls, he had relapsed into alcohol and drug misuse. Alcohol misuse had been the background for both of the offences of manslaughter.
30. The panel was entitled to take into account the gravity of those past offences and was entitled to say any return to drugs and alcohol misuse was a step along the path back to violent offending.
31. The legal submissions are attractively drafted but come close to saying that, even if the Applicant is not safe to be released, because the risk management plan had caught him in the past before he committed an offence, he should be released a fifth time in the confident expectation that the present risk management plan would catch him a fifth time before he committed an offence.
32. At its simplest, the question is whether the Applicant is safe to be released into the community. The panel was entitled to say he is not.
33. Ground 3. Suitability for open conditions is not a reason for refusing to direct release. The panel's primary task was to decide whether or not to direct release and only then to go on to consider, if necessary, a recommendation for open conditions.
34. It is not pleaded that if the Applicant is not released, he wishes to remain in closed conditions and a decision to recommend a move to open conditions is not eligible for reconsideration.
35. This submission is not relevant to the question of release.
36. Ground 4. This ground states in a different way the submission that, because the Applicant did not commit any offence on licence, he is safe to be re-released. In particular, it is urged on this panel, that if the fact he did not reoffend is not treated as clear evidence his risk can be managed in the community, he will never be able to prove that his risk is manageable.

37. The Parole Board deals on a daily basis with recalled prisoners who have not actually reoffended on licence. Some are deemed safe to re-release, some are not. Each case has to be approached on an individual basis.
38. In paragraph 5 of the decision letter, the panel examined the circumstances of the latest recall in some detail and identified a number of instances of noncompliance as well as substance and alcohol misuse which (for the fourth time) raised the anxiety that, after a few months in the community, the Applicant's risk started to be unmanageable.
39. The representations are couched more in terms of disagreement with the panel's conclusions than irrationality as discussed in paragraphs 23 - 25 above. There is no suggestion, for example, that the panel took into account irrelevant material, failed to take into account relevant material, or misunderstood the evidence, or that the panel's conclusion was one to which no reasonable panel could have come on the evidence.
40. Neither taken individually or collectively do the matters put forward raise an issue about the irrationality of the decision.

## Decision

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

**James Orrell**  
**06 January 2022**