

[2023] PBRA 167

## Application for Reconsideration by Dunn

### Application

1. This is an application by Dunn (the Applicant) for reconsideration of a decision of a panel (the Panel) of the Parole Board dated 7 August 2023 (the Panel Decision) making no direction for the Applicant's release and no recommendation for open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration may be made in eligible cases 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 (i) Panel decision, (ii) the Applicant's application for reconsideration of the Panel decision, (iii) the email dated 7 September 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that the Secretary of State offers no representation in response to the Applicant's application for reconsideration and (iv) the Applicant's dossier containing 844 pages.
4. The grounds for seeking reconsideration are that in not concluding that the Applicant's risk could be managed in the community and that his release should have been ordered the Panel acted irrationally because:
  - (i) The prison offender manager (POM) and the community offender manager (COM) supported release although the prison psychologist did not support release or progression to open conditions (Ground 1);
  - (ii) It placed inappropriate weight on "*what they perceived to be the lack of openness of [the Applicant] when he gave his evidence*" (Ground 2);
  - (iii) It failed to appreciate that (a) "*the recent intelligence and unproven allegations all came about as a consequence of the Applicant having been located with a cell mate [and] prior to this his custodial conduct had been significantly better than it had been on previous sentences*" and that (b) "*since his subsequent relocation within his new prison to a single cell on a new wing, there had been a significant improvement with no further negative comments/IEPs and no proven adjudications [and] insufficient weight or consideration had been given to the Applicant's conduct in this regard*" (Ground 3); and
  - (iv) It asserted that "*the Applicant only sought a move to a single cell at the*



*suggestion of the prison psychologist when the Applicant had indicated in his evidence that he had been located in a single cell at his previous prison and that had raised this upon his arrival at the new prison" (Ground 4).*

## Background

5. On 25 April 2008, the Applicant received an indeterminate sentence of imprisonment for public protection for two offences of conspiracy to rob with his tariff set at 5 years, less 189 days spent on remand. He also received a concurrent determinate sentence of 5 years for an offence of possession of a firearm.
6. The index offences occurred when the Applicant and others planned attacks on security vans carrying cash in one location in January and February 2007 and a different area in June and July 2007. The preplanning included stealing and borrowing cars as well as monitoring the movements of the security vans. The intention was to commit the robberies when the vans stopped to make their deliveries and/ or collections.
7. When the Applicant and his co-defendants realised that they were being observed by the police, they abandoned their plans for the first robbery following which a firearm was then thrown into a hedgerow. The Applicant and his co-defendants were in possession of a number of weapons including a wrench and a machete. According to the Applicant, the weapons were to be used to threaten staff and that there was a "slim chance" of the weapons being used but they would have been used if the security guards had offered resistance. The Applicant explained that the firearm was not in the cars to be used in the robbery but was in the car to which they subsequently transferred.
8. The Judge's sentencing remarks explained that the conspiracy to rob was committed in the second area which took place when the Applicant was unlawfully at large and was involved in four separate incidents which comprised two robberies and two vehicle pursuits. The Applicant and his co-defendants had weapons including a crowbar, an axe, and at least one sledgehammer. Security guards were attacked during one of the incidents and were saved from injury by their protective headgear. During the preparation for the robberies, one of the Applicant's co-defendants stabbed a car owner when attempting to steal his car keys.
9. The Applicant's motive for his involvement in the index offences was financial as he had not earned enough from his drug dealing activities at the time of the offences. The Applicant stated that his co-defendants had played a more pivotal role in planning the offences and obtaining the weapons, but he was aware of the plan. He has never had legitimate employment and has been described as a 'career criminal'.
10. The Applicant was first convicted in 1998 when he was 15 years old for the offence of burglary. He has since been convicted of further burglary and theft offences. In 2001, he was convicted of robbery and other offences when he along with three other individuals used a large wrench spanner to smash the front window of an ASDA supermarket and to threaten staff



- before stealing electrical items and making off in two stolen vehicles.
11. In 2002, the Applicant was sentenced for conspiracy to rob and other offences when he, while on licence for the 2001 offences, was found in a car with others all wearing balaclavas waiting to rob a Securicor van with weapons including an axe and a spanner in the car.
  12. The Applicant accrued a number of adjudications for breaching prison rules, including possession of drugs and disobeying lawful orders during the early part of his sentence. He also completed a Thinking Skills Programme (TSP) and the Sycamore Tree Victim Awareness programme which helped to heighten awareness of the impact of his offending on his victims and on others. In addition, he completed courses to address Critical Reasoning, Stress Management and Assertiveness and Decision Making.
  13. In October 2012, the Applicant was moved to open conditions in prison A. Whilst in open conditions, he undertook two local RDRs (resettlement day release) and one overnight ROTL (release on temporary licence) to his partner's home, but he was returned to closed conditions in April 2013 after prohibited substances and prohibited articles were found in his cell. He told a previous panel that his cell mate had accepted full responsibility for the items and no adjudications were made against the Applicant. He was returned back to open conditions in July 2013 until he was returned back to closed conditions in October 2013 after he had been caught driving without a valid driving licence.
  14. In 2015, a Parole Board Panel directed the Applicant's release which took place in January 2016, but he was recalled in July 2016 after he was arrested for alleged conspiracy to murder and for an alleged section 18 wounding. He subsequently pleaded guilty to charges of arson and perverting the course of justice for which he received a sentence of forty months' imprisonment. The sentencing Judge described the Applicant and a co-defendant as "*dangerous and inveterate career criminals*" and their offences as "*gang related violence ... fortified by the wall of silence that went up*".
  15. In July 2016, the Applicant returned to custody, at prison B in 2018, he received a sentence of ten years' imprisonment for the offences of: conspiracy to import class B drugs (75 months) and conspiracy to bring A list articles (drugs) into custody (45 months). Concurrent sentences were imposed for bringing list B articles (mobile phones) into custody and for a proceeds of crime offence. In sentencing the Applicant, the Judge described the conspiracy as "*an organized business operation with [the Applicant] as its chairman and chief executive having as its seat a cell in the A Wing of [prison B]*".
  16. In about July 2017, the Applicant was moved to prison C where he completed various programmes and he received several positive entries as well as being reduced to the standard regime due to being seen in a photograph posted on social media.
  17. He was transferred to prison D in January 2020 and while there he was



sentenced to 91 days' custody for non-payment of a confiscation order. He was removed from his job as wing cleaner and later transferred to prison E as:

*"extensive intelligence reports suggest it is HIGHLY LIKELY that [the Applicant] is linked to the Ingress and distribution of illicit items at [the current prison]. Distribution move arranged to [a new prison location] in order to deter and prevent ongoing criminality".*

18. The Applicant moved to prison E in November 2022 and a mobile phone charger was found in a top bunk in February 2023. A mobile phone was found hidden in a trainer in the Applicant's shared cell in March 2023. At the adjudication hearing, the Governor noted *"charge dismissed as cell mate admitted ownership and I am unable to prove [the Applicant] was aware of presence"*. In fact, the Applicant had admitted that he had been aware of the phone and that he had not been open to the panel about this matter. The Panel was concerned at the Applicant's lack of openness.
19. On 29 March 2023, the Applicant requested a single cell at the suggestion of the prison psychologist, and he moved to a single cell in May 2023.

### **The hearing before the Panel**

20. A three-member panel of the Board comprising three independent members convened for an oral hearing at the prison on 5 April 2023 and at an adjourned oral hearing on 24 July 2023. The Applicant was legally represented at both hearings.
21. The panel heard oral evidence from:
  - (a) The Applicant's Prison Offender Managers (POMs) at prison D and E
  - (b) The Applicant's Community Offender Managers (COMs) at prison D and E
  - (c) The Prison Psychologist; and
  - (d) The Applicant

### **The evidence on risk factors**

22. The Panel was told by the Applicant's COM that according to the latest offender assessment system (OASys) of March 2023, the Applicant presented a high risk on serious harm to the public and to known adults *"i.e. other OCG members"* as well as a low risk of violent offending. The Applicant was assessed as presenting a medium risk of serious harm to children who may witness his drug taking and violent behaviour.
23. The professional opinion of the COM was that the Applicant's risk of further violent offending was *"medium"* while the prison psychologist assessed the Applicant as posing a moderate risk of further violent offending.
24. Having considered all the evidence carefully, the Panel concluded that:
  - (a) The Applicant presented a high risk of serious harm to the public and a moderate/medium risk of serious harm to children;



(b) The risk which the Applicant *"may present to other gang members was not fully understood due to his failure to be open about the circumstances of his arson conviction which occurred in July 2016, some 7 years ago and indicated that involvement in gang violence may have been live at that time"*;

(c) The prison psychologist assessed the Applicant *"as presenting a moderate/medium risk of further violent offending"*.

(d) As the Applicant *"had been involved in serious violent [offending] within 6 months of his last release and considered that this risk may be raised until further testing in the community can take place"*.

(e) It agreed with the prison psychologist that the current live factors of the Applicant were lack of insight and poor treatment response as well as a lack of thinking skills and poor management of his relationship with his cell mate. She identified protective factors as being his life goals and to some extent his relationship with professionals, but his poor treatment response raised concerns about whether he would be open with professionals if released.

### **The recommendations of the witnesses**

25. The recommendations of the witnesses were that:

(a) The POM at prison D considered that the Applicant was not ready for open conditions or release;

(b) The POM at prison D did not think there was any outstanding core risk reduction work, but that the Applicant would benefit from consolidation work;

(c) The POM at prison E did not consider there was any outstanding work, and that the Applicant's risk could be managed in the community - but the progressive unit could be beneficial, however, she was not in a position to say whether it was necessary;

(d) The Applicant's COM since 24 May 2023 supported release explaining that he considered that the risk was manageable in the community with an initial period in approved premises. His view was that the risk was not imminent and that there would be warning signs such as evidence of spending, police intelligence and disengagement. He accepted that consolidation work was necessary, but he considered that this could be done in supervision. He noted that the Applicant had failed previously by offending shortly after release, but he felt that he was now more aware and would be subject to close supervision. The COM considered that further detention would be dispiriting for the Applicant, that he needed the chance to prove himself in the community and not to be detained for too long. His view was that the Applicant posed an abscond risk in open conditions;

(e) The Applicant's COM until early March 2023 explained that in his interaction with the Applicant there had been no issues of concern and he agreed with the recommendation set out in (d) above;

(f) the prison psychologist did not support release and considered that it was essential the Applicant remained in closed conditions and spent time on the progressive regime to consolidate his skills. She was not comfortable applying the new test for open conditions, but she assessed the Applicant as presenting a moderate risk of abscond, thus making him unsuitable for a recommendation



of a move to open conditions.

26. The Applicant's evidence was that he was happy to engage with his license and on release he would look to rebuild family ties, develop his relationship with his son and find accommodation and work as a plasterer. His opinion was that he did not have anything to gain from a progressive regime and that any testing of him should take place in the community.

### The approach of the Panel

27. In its conclusion section in the decision letter, the Panel explained that it had carefully considered the information provided, taking into account the index offence, the Applicant's offending history, the assessed levels of risk, the identified risk factors, events on licence and in custody as well as legal submissions seeking release. The Applicant's legal representative submitted that the Applicant was then ready, willing, and able to succeed in the community. She stressed that the Applicant had matured and that he wanted to take advantage of the available support, while the concerns raised by the prison psychologist could be addressed by the risk management plan (RMP) and the additional control of GPS tagging.
28. The Panel noted that:
- (a) *"The Applicant had completed a range of offending behaviour work in custody for which he had received positive reports;*
  - (b) *He had demonstrated some insight;*
  - (c) *He expressed a commitment to fully engage with his licence and risk management plan;*
  - (d) *His COM and current POM supported release".*
- (These matters will hereinafter be referred to as 'the Applicant's positive factors').
29. On the other hand, the Panel concluded that:
- (a) *"His index offences were of a very serious and violent nature;*
  - (b) *He was assessed as presenting a high risk of serious harm to the public and his overall risk was not fully understood;*
  - (c) *Within six months of his last release, he committed a further violent offence which indicated links to gang violence and has failed to explain fully his role in this;*
  - (d) *He went on to commit further serious offences in custody;*
  - (e) *Since the index offence he [has] twice committed serious offences as part of a group, mirroring the index offences;*
  - (f) *He has continued to minimize his offending and has failed to be fully open with professionals and this panel;*
  - (g) *Risk factors remain live and the Panel did not see evidence that [the Applicant] possessed sufficient internal controls to manage his risk;*
  - (h) *He had demonstrated poor thinking skills in continuing to share a cell where finds of illegal property were being made;*
  - (i) *A further period in custody is required to enable [the Applicant] to demonstrate a settled period of positive behaviour, develop his skills and insight and become more open in his dealings with professionals to enable a better understanding of his risk to be developed".*



(These matters will hereinafter be referred to as 'the Applicant's negative factors').

30. The Panel considered all the evidence and the recommendations as well as the Applicant's positive and negative factors before it concluded that it remained necessary for the protection of the public that the Applicant continued to be confined and it did not direct his release.

### The Panel's reasons for not directing release

31. The Panel explained the reasons for not directing release were that "a further period in custody was essential to enable [the Applicant] to[:]  
 (a) Demonstrate a settled period of positive behaviour which had not been seen since his recall in July 2016.  
 (b) Develop his skills and insight on the Progressive Regime" and  
 (c) "To ...become more open in his dealings with professionals and enable a better understanding of his risk to be developed" including his "risk [which] was not fully understood in relation to [his] gang associations".

(These factors will hereinafter be referred to as the 'the Panel's crucial factors').

### The Relevant Law

#### *Irrationality*

32. 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."*

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

35. 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 summarize 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 craftsmanship.*"

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

36. PPCS stated in an email dated 7 September 2023 that the Respondent makes no representations in response to the reconsideration application by the Applicant.

### **Discussion**

37. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.
38. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
39. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
40. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.
41. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.





## The grounds for seeking reconsideration

### Ground 1 - Irrationality

42. It is contended the Panel acted irrationally in not concluding that the Applicant's risk could be managed in the community and that his release should have been ordered because the POM and the COM supported release although the prison psychologist did not support release or progression to open conditions.
43. This ground fails because the Panel has put forward adequate reasons explaining why it was not obliged to follow the views of the POM and the COM and to order release including that:
- (a) The Panel's crucial factors (which are set out in paragraph 31 above) show why it was entitled to refuse to order the release of the Applicant and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters;
  - (b) The Panel was entitled to rely on the Applicant's negative factors (which are set out in paragraph 29 above) to show why it was entitled to refuse to order the Applicant's release or progression to open conditions. No valid reason has been put forward to show why the Panel was not entitled to rely on those matters; and/or
  - (c) The prison psychologist put forward cogent reasons why she opposed release including that the Applicant could not recognise the risk from anti-social peers, it was essential for the Applicant to spend time on a progressive regime for skills consolidation and that this would provide the Applicant with the opportunity to consolidate and develop skills as well as demonstrating stable and compliant behaviour over a period of time. This shows why the Panel was entitled to refuse the Applicant.
44. Further or alternative reasons why this ground must fail are that:
- (a) the Applicant was subject to close supervision on his last release, but no warning signs were picked up before he quickly committed a further serious offence and/or that;
  - (b) the Applicant's risk was not fully understood in relation to his gang associations, and he has failed to be open about his further offending in July 2016 which appeared to be linked to gang violence; and or;
  - (c) due deference must be given to the expertise of the Panel in making decisions relating to risk and parole.

### Ground 2 - Irrationality

45. The Panel acted irrationally as it "*placed inappropriate weight on what they perceived to be the lack of openness of [the Applicant] when he gave his evidence*".
46. This ground must also fail because the Panel was entitled to conclude in the light of all the evidence that:



- (a) the Applicant has continued to minimise his offending and has failed to be fully open with the professionals and the Panel and/or no matters have been put forward to show why the Panel was not entitled to reach that conclusion; and /or
- (b) the Panel's crucial factors (which are set out in paragraph 31 above) show why it was entitled to refuse to order the release of the Applicant and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters.

47. Further or alternative reasons why this ground must fail are that:

- (a) the Panel was entitled to accept the evidence that the Applicant's current live risk factors were lack of insight and poor treatment responses; and or
- (b) due deference must be given to the expertise of the Panel in making decisions relating to risk and parole.

### Ground 3 - Irrationality

48. The allegation is that the Panel acted irrationally in failing to appreciate that (a) *"recent intelligence and unproven allegations all came about as a consequence of the Applicant having been located with a cell mate [and] prior to this his custodial conduct had been significantly better than it had been on previous sentences"* and (b) *"since his subsequent relocation within his new prison to a single cell on a new wing, there had been a significant improvement with no further negative comments/IEPs and no proven adjudications [and] insufficient weight or consideration had been given to the Applicant's conduct in this regard"*.

49. This ground cannot be accepted as it fails to appreciate that the Panel was entitled to refuse to direct the release of the Applicant for very many reasons other than the matters arising while the Applicant was sharing a cell, including that:

- (a) The Applicant was subject to close supervision on his last release, but no warning signs were picked up before he quickly committed a further serious offence; and/or
- (b) The Panel's crucial factors (which are set out in paragraph 31 above) show why it was entitled to refuse to order the release of the Applicant and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters; and/or
- (c) The Panel was entitled to rely on Applicant's negative factors (which are set out in paragraph 29 above) to show why it was entitled to refuse to order the Applicant's release or progression to open conditions and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters.

50. Further or alternative reasons why this ground must fail are that:

- (a) The Applicant's risk was not fully understood in relation to his gang associations, and he has failed to be open about his further offending



- in July 2016 which appeared to be linked to gang violence; and or
- (b) Due deference must be given to the expertise of the Panel in making decisions relating to risk and parole.

#### **Ground 4 - Irrationality**

51. It is contended that the Panel acted irrationally when it asserted that the Applicant only sought a move to a single cell at the suggestion of the prison psychologist when the Applicant had indicated in his evidence that he had been located in a single cell at his previous prison and that had raised this upon his arrival at the new prison.
52. This ground must be rejected as (a) even if this ground was correct, the Panel's crucial factors (which are set out in paragraph 31 above) show why it was entitled to refuse to order the release of the Applicant and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters; (b) the Applicant's case fails to undermine the potency of the Applicant's negative factors (which are set out in paragraph 29 above) and no valid reason has been put forward to show why the Panel was not entitled to rely on those matters; and (c) due deference must be given to the expertise of the Panel in making decisions relating to risk and parole.

#### **Conclusion**

53. For all these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber**  
**20 September 2023**

