

[2023] PBRA 48

## Application for Reconsideration by Tait

### Application

1. This is an application by Tait (the Applicant) for reconsideration of a decision of an oral hearing dated 13 January 2023 not to direct release or recommend his 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)) 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 388-page dossier provided by the Secretary of State which included the Panel's written decision, the closing written submissions dated 12 December 2022 submitted by the Solicitor representing the Applicant, the application for reconsideration submitted by the Solicitor representing the Applicant dated 3 February 2023 and an email from PPCS on behalf of the Secretary of State dated 3 March 2023.

### Background

4. The Applicant is now 39 years old. In 2008, when he was 25, he received a sentence of Imprisonment for Public Protection with a minimum term of 3 years less time spent on remand, resulting in a Tariff Expiry Date of 22 October 2010. He pleaded Guilty to two offences of causing grievous bodily harm, one with intent (section 18), one without intent (section 20), both upon his cousin. After drinking to excess, he lost his temper and on each occasion used a weapon to assault his cousin. On the first occasion, the Applicant struck his cousin with a bottle, which broke and continued to strike him. On the second occasion, he stabbed his cousin behind the ear with a knife or a pair of scissors. The victim suffered serious injuries on both occasions and has suffered permanent scarring as a result of both. For the section 18 offence, the applicant received a sentence of Imprisonment for Public Protection, for the Section 20 offence, he received a determinate sentence of two years to run concurrently. The sentencing judge said this was a premeditated attack involving the use of a weapon taken to the scene with intent to injure. The victim sustained permanent scarring and psychological trauma.



5. The Applicant has demonstrated a pattern of violent behaviour as evidenced by previous violent convictions, including assaulting a police constable, common assault, and in 2005 he was convicted of unlawful wounding. This offence involved him stabbing his then girlfriend in the upper thigh whilst she was driving her car after they had been arguing. She required hospital treatment as a result.
6. The Applicant was released on licence by the Parole Board, after a hearing, in July 2020. He was recalled in August 2021 after Police advised that on 30 July 2021, a stop and search was conducted on the Applicant's car due to him having no licence and no insurance. A large black handled hunting knife and a BB gun were found in the glove compartment of his vehicle. He was driving the vehicle at the time and his partner was in the passenger seat.
7. The circumstances of the recall are central to this application for reconsideration. Both the Applicant and his partner were charged with possession of the firearm and bladed article. The Applicant's partner was found guilty at court of possession of the knife. The Applicant was not convicted of possession of either the knife or the firearm.

### **Request for Reconsideration**

9. The application for reconsideration is dated 3 February 2023.
10. The application was not made on the published form CPD 2. It is, however, succinct and very clearly focused on the issues.
11. The grounds for seeking a reconsideration are as follows:

*"The decision [of the Parole Board] was irrational as the Parole Board made a finding of fact in relation to The Applicant allegedly being found in possession of a hunting knife and imitation firearm despite being unable to prove the items were in his possession on a balance of probabilities."*

### **Current parole review**

12. The three-member panel, including a Psychiatric member and a Judicial Member, heard evidence at an oral hearing on 13 January 2023. The hearing was remote, by video. The panel heard evidence from the Prison Offender Manager, the Community Offender Manager (COM) and the Applicant. The Applicant was represented throughout by an experienced legal representative who was able to question witnesses and make submissions. The Secretary of State was not represented.

### **The Relevant Law**

13. 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.



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14. 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.
15. 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).
16. 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)).
17. 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)).

### *Irrationality*

18. 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."*

19. 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.
20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

21. 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*



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*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

22. The Secretary of State confirmed by way of email dated 3 March 2023 from PPCS on his behalf that he did not wish to make any representations in response to the application.

### Discussion

23. The issue is very clear. The Parole Board's approach to unproven allegations is now set out in the decision of the Court of Appeal in **R (Pearce) v Parole Board and the Secretary of State for Justice [2022] EWCA Civil 4**, which disapproved the Parole Board's previous *Guidance on Allegations* and decided that, in assessing risk, reliance can only be placed on an unproven allegation if a finding of fact can be made that it is more likely than not to be true.

24. I understand the Supreme Court has heard the appeal in **Pearce**, but we do not yet know their decision. Accordingly, I must proceed on the basis that the law is as I have set it out. The question, therefore, is what the evidential basis for the panel's findings was, and whether it justified the panel's conclusions.

25. The panel set out the relevant evidence thus:

*"1.79... [The Police Officer's] witness statement continues "both male and female were trying to whisper to each other and kept looking in the front passenger side of their vehicle which gave me concern there was something inside. I was then joined by other officers".*

*"1.8. As the officer went to take the keys from the ignition and turn the vehicle lights off, [the Applicant's] partner opened the front passenger door and tried to go inside the glove box but stopped. The two officers searched the car and in the glove box found a large bladed hunting knife on top of a black apparently genuine (but in fact imitation) handgun."*

*"2.29. Ms M dealt with the events surrounding recall. She had spoken with PC B who was the arresting officer. He had examined the car and it had contained a very small tent but there was no other camping or cooking equipment.*

*2.30. Ms M dealt with the controversial topic as to whether [the Applicant] knew the presence of the gun and knife in the car.*

*2.31. In his evidence to the panel, [The Applicant] said he had no idea they were in the car. Ms M said that was clearly at variance with what he said in his*



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*interview to the police conducted on the 31 July 2021 at 12:49. The police file is not in the dossier but Ms M has seen it and spoken with PC B. The summary in Ms M's statement at page 264 is:*

*"[The Applicant] confirmed that he owned the vehicle but that the weapons found in the vehicle (gun and knife) were not his. He stated that the knife belonged to [the Applicant's partner] who was the passenger in the vehicle and the air weapon/bb gun belonged to her 6-year-old son. He stated they were in the vehicle as part of camping equipment as they were planning to go camping the next day. He stated the gun was a toy that his partner's child plays with and the knife was to use to cut sticks and rope up with. [The Applicant] said to Police that he thought that people would be allowed to have the items for that reason. [The Applicant] confirmed that he knew they were in his car but did not admit possession on the basis that he did not own them."*

26.The Panel concluded:

*"4.1. The panel listened very carefully to [the Applicant's] evidence and decided he had not been as honest and as forthcoming as he might have been with the panel and that he was a poor historian.*

*4.2. The evidence of Ms M and the written evidence of PC B revealed that both [the Applicant] and his partner showed an interest in the passenger side of the car and in particular the glove compartment. The panel reminds itself of what [the Applicant] said about the weapons in his interview with the police and the panel, like Ms M, finds it unlikely in the extreme that he was unaware of the weapons in the glove compartment.*

*4.3. The panel acknowledges it heard oral evidence from [the Applicant] and not from the police but nevertheless prefers the police account that the car contained only one small tent. If it had been loaded in the way [the Applicant] described, the luggage would have been obvious to the police and there is no sensible reason for them not to record a straightforward search accurately."*

27.The reconsideration application states that the Applicant "is of the view that the Parole Board, in determining whether he was in possession of the items, relied upon the evidence of the police, which was not provided directly to the Parole Board (in terms of oral evidence), that there was little camping equipment in the car. [the Applicant] stated to the panel that the car contained 'extensive camping equipment' [374]. [The Applicant] was not afforded the opportunity by the Parole Board to counter this evidence directly as no representatives of the police attended the hearing."

28.There is no evidence to indicate that a representative from the police was requested by the Applicant or his legal representative during the course of this review – neither the written submissions contained within the dossier or the closing written submissions following the oral hearing request the attendance of a police witness to enable the Applicant to counter this evidence directly.

29. I note that the panel outlines in the written decision that it “*finds it unlikely in the extreme that he was unaware of the weapons in the glove compartment*” and the panel makes no mention of making a finding regarding the Applicant’s possession (or control) of the weapons. It is apparent that the adverse finding of fact in relation to the Applicant’s awareness as to the weapons in the glove compartment of his vehicle was important to the panel’s decision not to direct release, though not the sole reason for it.
30. Was the panel entitled, given the evidence before it, to make that adverse finding of fact? I note that the panel assessed what the evidence amounted to, and where it came from. The panel also considered the uncontested evidence that a gun and knife were found in the vehicle; which the Applicant owned; and was driving; without a licence, insurance, MOT or tax. The panel considered, as it was entitled to, the Applicant’s evidence, and took that into account, in this instance against him, for reasons it explained.
31. In my judgement the panel approached this difficult exercise in accordance with the law as established by **Pearce**. The panel saw and heard the witnesses, and was not influenced by mere allegations, but by what it correctly considered to be solid evidence.
32. The panel’s conclusions on the facts were properly available on the evidence, and were within the range of findings that a reasonable panel, properly directing itself on the law, could have come to, taking into account the uncontested evidence. For clarity, in my judgment, it was not irrational to find, on the balance of probabilities, that the Applicant was aware of the weapons in the glove compartment of a vehicle he owned and was driving at the time of apprehension.
33. The Applicant’s awareness as to the weapons in the glove compartment was not the sole reason for the panel’s decision not to direct release as the panel’s conclusion elaborates:

*“4.5. The panel thought [the Applicant] had a tendency to tell listeners what he thought they wanted to hear.*

*4.6. The panel concluded [the Applicant] acted with a flagrant disregard for his licence conditions and for the safety of others when he drove the car. He has not been open and honest about the knife and imitation firearm found in the glove compartment. He has not been forthcoming about why he made contact with the other indeterminate sentence prisoner.”*

*“4.9. The panel takes into account Ms M’s view that [the Applicant] is able to identify with some accuracy his risk factors and appears to have taken away learning from the programmes he has completed. The problem is [the Applicant] then fails to apply that learning to risky situations. Ms M wondered whether that was because he had underestimated the gravity of the driving offences or whether his compliance had been superficial. She told the panel that superficial compliance was her biggest concern.*



*4.10. Ms M said the proposed risk management plan had been significantly strengthened by the addition of approved premises and GPS tagging but however robust a plan was, it could not address the problems of honesty and openness. Again, the panel accepts her assessment and takes the view of that although the risk management plan provides good external controls, [the Applicant's] intrinsic controls are deficient.*

*4.11. The panel has concluded that [the Applicant] has not yet demonstrated that he meets the test for release."*

34.I have considered the specific submissions of the Applicant. I am satisfied that this decision was not 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. I do not consider any of the points raised have succeeded. Consequently, the ground of irrationality fails.

35.The application for Reconsideration is refused.

**Katy Barrow**  
**21 March 2023**



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