

[2023] PBRA 53

## Application for Reconsideration by Middleton

### Application

1. This is an application by Middleton ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') which on 20 February 2023, after an oral hearing on 6 February 2023, issued a decision not to direct his release on licence.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

### Background and history of the case

3. The Applicant is now aged 41. He is serving a sentence of imprisonment for public protection ('IPP') for conspiracy to rob (the 'index offence'). That sentence was imposed on 26 September 2007 when he was aged 25. He had already accumulated a substantial criminal record before that, and in addition to the IPP sentence he received a concurrent 10-year determinate sentence for a separate serious offence (conspiracy to commit burglary).
4. His minimum term ('tariff') under his IPP sentence was fixed at 5 years less the time which he had spent in custody on remand. It expired in February 2012.
5. The index offence involved a series of robberies committed within a short period of the Applicant having been released from prison on licence. He was involved in 4 robberies. He was said to have carried a firearm during one of them. He was described by the sentencing judge as '*a very active member*' of the conspiracy though he was not the ringleader.
6. The burglary occurred at the home of a pregnant woman and her two children. It was described by the judge as '*terrifying*'.
7. By August 2012, the Applicant had progressed to an open prison but in June 2014 he absconded from prison and whilst unlawfully at large he committed other serious offences (aggravated burglary and dangerous driving). For those offences and escaping from lawful custody he received an 11½ year determinate sentence to run concurrently with his IPP sentence.
8. In November 2020 he again progressed to an open prison and in the following month



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his case was referred by the Secretary of State to the Parole Board ('the Board') to decide whether to direct his release on licence. In due course an oral hearing was directed to take place.

9. He has progressed well through the open prison regime. He achieved enhanced status and was permitted to spend time with family members on unaccompanied day releases. A number of adverse security reports were filed by members of staff but none of these resulted in any disciplinary action: when asked about them he denied them and suggested that the reports had been made maliciously by other prisoners.
10. On 13 August 2021 a search was carried out of his room and a number of unauthorised items were found concealed under the floorboards. Those included a lock knife and 5 mobile phones. As a result of this discovery the Applicant was returned to a closed prison.
11. The Applicant denied that the concealed items were anything to do with him or that he had any knowledge of them. He said that they could have been placed under the floorboards by a previous occupant of his room or by someone entering his room (which he did not keep locked) while he was away from it.
12. A police investigation was carried out but did not reveal any evidence linking the items to the Applicant. The Applicant was therefore never charged with any offence in relation to those items, nor was any disciplinary action taken against him by the prison authorities.
13. The oral hearing of the Applicant's case was delayed while the police investigation was carried out. It eventually took place on 6 February 2023. It was a 'face to face' hearing (though one panel member, who had tested positive for COVID, participated by telephone).
14. The Applicant has a significant speech impediment which is aggravated by stress. The panel agreed to a request by his solicitor for reasonable adjustments to be made to facilitate his active participation in the hearing. The panel agreed that he could provide his evidence in writing in response to questions from the panel. The questions were sent to the prison to pass on to the Applicant, and he duly provided his written responses. He was supported at the oral hearing by a peer support prisoner.
15. Oral evidence was taken by the panel from the Prison Offender Manager (responsible for his supervision in prison) and the Community Offender Manager (prospectively responsible for his supervision in the community).
16. As noted above the panel issued its decision on 20 February 2023. The panel did not direct the Applicant's release on licence but did recommend that he should be returned to the open prison. It is a matter for the Secretary of State to decide whether or not to accept that recommendation.
17. This application for reconsideration was made on 23 February 2023 by the Applicant's solicitor on his behalf.
18. It is clear that in making its decision the panel placed considerable weight on the finding



of the unauthorised items under the floorboards in the Applicant's room. It stated in its decision:

*'The panel accepted that there has been no evidence to directly link [the Applicant] to the items found in his room ... and that he has been consistent in denying any knowledge of them being there. However, the panel was concerned by the very limited forensic examination that had taken place and by the correlation between the intelligence reports and actual items found. In essence only a single item (the lock-knife) was forensically examined and this was a fingerprint analysis only, with no DNA analysis carried out .... The panel was unable to conclude that [the Applicant] has therefore been "cleared" of any involvement.'*

*'Whilst the panel is equally unable to make a finding of fact in regards to [the Applicant's] involvement, concerns remain over how the items could have been put in his room without his knowledge or participation at some level. No explanation has been provided for how or why such a quantity of contraband should have been hidden in his room, seemingly for several months, without his knowledge. It raises concerns that even were [the Applicant] not directly involved in placing the items there, he may have been associating with negative peers and engaging in criminal activity for financial gain, as he did in the index offences. The panel was therefore unable to disregard the allegations of his involvement in the contraband found in his room ... and placed considerable weight on the allegation in its assessment of risk..'*

19. In the 'Conclusion' section of its decision the panel reiterated these views as follows:

*'The panel accepted that there has been no proof of [the Applicant's] involvement in the contraband found in his room at [the open prison]. The panel did however have concerns about how the items came to be there and the unsatisfactory outcome of the police investigation with just one item having been forensically examined ....'*

*'Although the panel does not make any finding of fact in relation to items found in his cell it does not accept that that the outcome of the police investigation means that the Applicant has been "cleared". Whilst no forensic evidence was found, the examination carried out by [the police] was extremely limited. The panel could not discount the intelligence report dated 1 January 2021 to 23 July 2021 which relates to [the Applicant] and is specific on [several matters]. The fact that these items, along with knives and other contraband items were found in his room was therefore of significant concern to the panel.'*

## **The Relevant Law**

### ***The test for release on licence***

20. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

### ***The rules relating to reconsideration of decisions***

21. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is



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eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

22. Reconsideration will only be directed if one of more of the following three grounds is established:
- (a) It contains an error of law or
  - (b) It is irrational or
  - (c) It is procedurally unfair.
23. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
- (a) A paper panel (Rule 19(1)(a) or (b)) or
  - (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
  - (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).
24. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration.

### ***The test for irrationality***

25. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)** (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

*"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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.
27. The Administrative 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 Board in making decisions relating to parole.
28. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

### ***The test for procedural unfairness***

29. 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 from the issue of irrationality which focuses on the actual decision.



30. The kind of things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
  - (b) A failure to conduct the hearing fairly;
  - (c) A failure to allow one party to put its case properly;
  - (d) A failure properly to inform the prisoner of the case against him or her; and/or
  - (e) Lack of impartiality.
31. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

### The request for reconsideration in this case

32. The Applicant's solicitor makes a single point in support of this application. He submits that the panel's approach to the allegation concerning the items found under the floorboards of the Applicant's room is directly contrary to the decision of the Court of Appeal in the case of **Pearce (2022) EWCA 4**.
33. It is worth quoting, almost in full, the way in which this submission is put:

*"The case of **Pearce** ... sets out quite clearly the legal test that must be applied to disputed allegations. It is helpful to start with the succinct summary of the issue provided by the Administrative Court in the case of **Delaney** (which was specifically approved by the Court of Appeal in **Pearce**)...":*

*"...the panel cannot rely simply on the fact, nature, or seriousness of the allegation as leading to any conclusion one way or the other. In such a case as the present, the panel must in reality either disregard the allegation as being so far as it can see no more than an allegation, or undertake an investigation and consideration of any evidence that may be presented to it of the conduct of the offender, enabling it to make at least some findings of fact as to what did happen by reference to which, as a factual basis for any conclusions, it might then consider the question of risk."*

*"In **Pearce**, the Court of Appeal addressed the previous Guidance issued by the Parole Board on disputed allegations and made it clear that panels of the Parole Board must make a finding of fact to inform the risk assessment .... : [Lady Justice Macur stated:]*

*"I agree with [counsel for Mr Pearce] that this [the Guidance] is to approve an entirely unorthodox 'sliding scale' of the balance of probabilities which is said to be warranted for reasons of public protection. To attempt to justify this as acceptable on the basis that the panel is an expert body and will deal with the matters of risk fairly is a circuitous argument.*

*"Paragraph 15 of the Guidance provides that the panel should apply the civil standard of proof in making findings of fact. Furthermore, I cannot conceive how the touchstone of 'public law fairness' can operate in the circumstances in which an allegation which is not proved on the balance of probabilities is taken into consideration in the assessment of risk."*

*"The judgment goes onto make an express finding that it is not lawful for a panel to make a finding that an allegation can give rise to a "level of concern" that informs their*



*risk assessment. That paragraph goes on to make the simple statement that: "In short, if the panel cannot be satisfied on the balance of probabilities that the prisoner was frequenting the playground at all [i.e. the allegation made], the allegation should be disregarded."*

*"Applying the law to the decision in this case, the panel has fallen into this precise error. The panel accepts that it was not able to make a factual finding that [the Applicant] had any knowledge of the items discovered during the search."*

*"Despite accepting that no adverse finding could be made, the panel proceeded to conduct the risk assessment on the grounds that it "raises concerns". This was then repeated later in the decision: "the panel did however have concerns..."*

*"This wording almost precisely mirrors the reasoning that the Court of Appeal found to be unlawful in the analysis of the previous Parole Board Guidance. [The Court of Appeal stated of that Guidance:] "The offending paragraphs are all concerned with the assessment of the relevance, weight, and impact that an unproven allegation is to have on the parole review. The majority of them appear in a section entitled 'Making an Assessment of the Level of Concern'. This section uses the undefined and vague concept of 'concerns' arising from or attaching to an allegation in respect of which findings of fact are not possible as a means of factoring that unproven allegation into the parole review ..."*

*"The decision in [the Applicant's] case makes a clear and unequivocal finding that the allegation has not been proved but then proceeds to make a finding that the relevant incident raises "concerns" that risk is not manageable in the community. This is inconsistent with the judgment of the Court of Appeal in **Pearce** and as such represents an error of law and/or procedural unfairness in the decision-making process."*

## The Respondent's position

34. By e-mail dated 10 March 2023 the Public Protection Casework Section ('PPCS') on behalf of the Respondent stated that he offers no representations in response to the application.

## Documents considered

35. I have considered the following documents for the purpose of this application:

- (i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 478 and includes a copy of the panel's decision letter;
- (ii) The representations submitted by the Applicant's solicitor in support of this application;
- (iii) The e-mail from PPCS stating that the Secretary of State offers no representations in response to the application.

## Decision



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36. I can deal with this application quite briefly. I can see no answer to the submission made by the Applicant's solicitor. In attaching '*considerable weight*' to the unproven allegation the panel, unfortunately, fell into the error identified by the Court of Appeal in **Pearce**. If the panel had (as the decision in that case required it to do) disregarded the allegation relating to the items found under the floorboards, its decision might well have been different. There was therefore a material error of law and I must grant this application on that ground.

37. This case will therefore now be reconsidered.

38. The decision of the Court of Appeal in **Pearce** is currently the subject of an appeal to the Supreme Court. There has been a hearing and the Court's judgment is awaited. It is possible that by the time of the rehearing of this case the law will have changed but unless and until that happens, we must follow the Court of Appeal's ruling.

**Jeremy Roberts**  
**28 March 2023**

