the Parole Board

working with others to protect the public

**[2023] PBRA 6**

**Application for Reconsideration by Beckham**

## Application

1. This is an application by Beckham (the Applicant) for reconsideration of a decision of an oral hearing dated 28 November 2022 not to direct release.

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 Decision Letter, dated 28 November 2022;
    - Reconsideration Representations, dated 5 December 2022; and
    - The Dossier, which now consists of 471 numbered pages, ending with the Decision Letter.

## Background

4. The Applicant is now 24 years old. In 2018, when he was 20, he received an extended custodial sentence, consisting of a custodial period of 6 years and 4 months and an extension period of 4 years. He became eligible for parole in May 2022. His conditional release date is in September 2023, and the sentence expiry date is November 2028.

5. The index offences were knife-point robberies committed in the street against lone males, at night-time, in the vicinity of pubs and clubs, in order to steal phones. He committed some of the offences in company with a younger man. The Applicant was affected by drink and drugs at the time of the robberies. He wore a hood. His face was covered. One of the offences was committed on bail. He had been released from custody 16 days before the first offence, although he was not on licence, because he had been recalled to custody following his release during a previous sentence for a similar robbery. The sentencing judge found that, in addition to being motivated by financial gain, the Applicant *"appeared to have a dark enjoyment involved … fuelled by the control and power of bullying the victims."*

6. In addition to his earlier conviction for robbery the Applicant had an established pattern of possessing weapons and committing offences while subject to licence and community orders. He has never successfully completed a period on licence.

**Request for Reconsideration**

7. The application for reconsideration is dated 5 December 2022.

8. The grounds for seeking a reconsideration are that the panel failed to address key evidence within its decision, with the result that the panel's conclusion is irrational.

9. The grounds are formulated in lengthy and detailed Representations, covering over 12 pages and 41 paragraphs. The essence of the complaint seems to be that the panel did not take on board the factual matters referred to in written submissions on behalf of the Applicant. The point is made that the hearing took place on 22 November 2022; the written submissions were put forward that same afternoon; but "*despite having 14 days to make their decision, the panel disclosed their decision on 28 November 2022*." The implication seems to be that the panel did not take the submissions into account at all, despite specifically referring to them: "*it is submitted [in the Representations] that key evidence has been overlooked and there is no evidence to suggest it has been engaged with in order for the decision to be formulated*."

10. It is accepted in the Representations that the panel was not obligated to address the closing submissions in full, because they are unlikely to add anything to the evidence which the panel heard: see **Oyston**, below. However, the Representations submit in terms that "*the panel's failure to address key evidence within their decision indicates a failure to engage with the evidence at all in forming their decision*." There are two possible interpretations of this submission: one is that the panel's decision is not based on the evidence at all. This is a remarkable to assertion to make, if it is being made, about a decision letter that contains more than five pages of discussion of the evidence given at the hearing, as well as nearly two pages of discussion of the reports in the dossier. I therefore take it that the other interpretation is to be preferred, consistent with the thrust of the Representations as a whole: that is, that the panel failed to take account of what are, and were, submitted to be key points of the evidence that favoured a decision to release. This is the way the Representations summarise the issue: "*the decision not to release [the Applicant] would not have been made as there is no evidence to reasonably suggest that the test for release had not been met … Key evidence has been overlooked and as such the decision has been made on the review of incomplete testimony*."

11. Whether as part of the general complaint, or separately (it is not easy to tell from the Representations), the submission is made that the panel erred in finding that the Risk Management Plan (RMP) was insufficiently robust to manage the Applicant, when the Community Offender Manager (COM) explicitly said it was in answer to the Applicant's representative.

12. Again, it may be a separate ground for seeking reconsideration that it was irrational for the panel to conclude that the Applicant needed to do additional work before

release, when the evidence was that all work was accessible in the community and experts agreed it would largely be consolidatory. There was, it is submitted, no evidence that there was core risk reduction work to be done before release.

**Current parole review**

13. The reference by the Secretary of State for Justice was for consideration of early release from an extended sentence of imprisonment. This was the first such review.

14. The panel consisted of two independent and one psychiatrist member of the Parole Board. The panel heard evidence from the prison-based psychologist, the Prisoner Offender Manager (POM), the COM and the Applicant. The Applicant was represented throughout by a solicitor, who asked questions of the witnesses and made written submissions at the close of the hearing. The panel considered a dossier which then contained 453 pages, to which were added over 7 pages of written submissions after the hearing.

**The Relevant Law**

15. The panel correctly sets out in its decision letter dated 28 November 2022 the test for release.

16. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

17. 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)*

18. 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)).

19. 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)). The Applicant's sentence is eligible for reconsideration.

20. The only issue raised in the Application is irrationality.

*Irrationality*

21. 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."*

22. 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.

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

24. 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."*

25. 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.

26. 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 summarise 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 draftsmanship.*"

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

27. The Secretary of State has indicated that he does not wish to make any submissions in this case.

**Discussion**

28. I have done my best to summarise above the general grounds for the Application as I understand them to be.

29. It is necessary to bear the following points in mind. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that it 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. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as 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.

30. I set out the panel's conclusion:

> *"4.1.[The Applicant] is serving an extended sentence for serious offences of acquisitive violence involving the use of a weapon. He has a history of offending and violent behaviour from a young age. [The Applicant's] offending and substance misuse are linked to his deep-rooted problems arising from his childhood experiences.*
>
> *4.2.To his credit, [the Applicant] has made substantial good progress during his sentence so far. He has engaged in therapy and he now has improved insight into the reasons for his offending and substance misuse. He has shown that he can abstain from drug use for a significant length of time. substance misuse team. He has gained some limited experience of* employment and for a while he had a position as a drugs representative. *He has engaged consistently with the mental health team.*

*4.3.At the hearing, [the Applicant] answered questions in a mature and insightful manner His behaviour in custody and his evidence to the panel demonstrates that there has been a shift in his thinking and attitudes.*

*4.4.In his evidence and through his legal representative's closing submissions, [the Applicant] made an application for release. He accepted that there are outstanding issues that he needs to address, but he believes that he will be able to undertake any necessary further work in the community.*

*4.5.Having carefully considered all the evidence, the panel concludes that core risk reduction work remains outstanding. The panel considers that it is necessary for the outstanding work to take place in custody. The panel considers that [the Applicant] poses a high risk of serious harm and reoffending. It noted the incidents during the summer of 2022 when [the Applicant]demonstrated that he still has problems with managing his emotions and with his conflict resolution skills. This did not escalate to using physical violence but the panel noted that this was within the confines of prison. Whilst he has developed some internal risk management skills the panel considers that further interventions and consolidation work is necessary to strengthen them The panel considers that the proposed risk management plan may not be fully effective if [the Applicant] is released following this review, as he continues to have high support needs and active risk factors.*

*4.6.The panel concluded that it remains necessary for the protection of the public that [the Applicant] is confined in prison."*

31. Looking at Paragraphs 4.2. and 4.3. above, it is impossible to maintain that the panel did not give consideration to the evidence favourable to the Applicant. The question raised is, whether in coming to the conclusion it did, the panel unreasonably overlooked crucial evidence or failed to give proper weight to the evidence as a whole. The other possibility, of course, is that the Applicant simply disagrees with the panel's findings: which is not a basis on which I can find its decision to be irrational.

32. The first complaint in the Representations is that the panel referred to the judge's finding that there was an element of "*dark enjoyment*" in the Applicant's offending, without also referring to his ability to reflect on this aspect of the case. I cannot find that this omission, if it can properly be described as such, has any relevance to the panel's conclusions.

33. The same applies to the complaint that the panel failed specifically to note that during the relative lack of support imposed by the Covid pandemic his behaviour did not falter.

34. Complaint is made that the panel noted the Applicant's positive drug test in June 2022 without specifically recording that the POM said that the amount detected was negligible and would not have been the result of deliberate oral ingestion. Again, this does not impact on the panel's conclusion. Even if it did, the fact is that at Paragraph 2.10. of the decision letter the panel specifically records the evidence of the POM that there was only a trace of the drug in his sample and that she had no information that led her to question that it was not as a result of him taking authorised medication, despite his other medication being an anti-fungal treatment. The Representations put the POM's evidence slightly differently, suggesting that the POM went on to confirm that Healthcare believed it to be the result of anti-fungal medication that was prescribed. No material has been put forward to substantiate the Representations' account of the POM's evidence. It is not discussed in the written submissions. His explanation does feature in the most recent psychologist's report, without comment, and was considered by the panel. There is nothing in this complaint.

35. The Representations complain that the panel referred to a period of two to three months following June 2022 when the Applicant's behaviour deteriorated and "*he received several negative entries*." The Representations aver that there was only one negative entry and one adjudication which was ultimately dismissed. The panel referred to two negative entries due to the Applicant having heated exchanges with other prisoners which were perceived by staff to be threatening and aggressive, and on one occasion to making a threat to another prisoner. In July 2022, the panel noted, he reported that he was struggling with feelings of anger and aggression, and he expressed concerns that he might become violent. In August 2022 he produced a positive random drug test, although the resulting adjudication was dismissed. The complaint is that the Applicant accepted full responsibility for these incidents and that neither of them led to any form of physical violence, but the panel nonetheless concluded that the situation was only de-escalated due to the intervention of others and the overall prison environment.

36. It is plain from the decision letter that the panel accepted that the incidents being discussed did not result in the Applicant using violence, as he probably would have done 5 years ago. The panel duly recorded the psychologist's evidence as being that some of his internal mechanisms came into place but there could have been an escalation into violence if others had not intervened. There is no reason for me to not to prefer this balanced account of the evidence to that of the Representations.

37. In the Representations this passage concludes as follows: "*This was clarified within closing submissions, however, it has not been noted within the decision*." What actually appear in the closing submissions is this: "*When questioned on this in evidence, [the Applicant's] COM … confirmed that [the Applicant] possessed the internal skills to help him manage his emotions and had shown his ability to utilise them*."

38. In any event, the psychologist's opinion on whether there would or would not have been an escalation into violence may fairly be considered not quite as informative as it would have been had she been present at the incidents.

39. Having looked at this section of the complaint in detail, I am unable to find anything irrational in the panel's approach to the evidence. The issues raised either had no impact on the decision, or do not accurately reflect the decision letter, or both.

40. Complaint is made that the panel was irrational in deciding that core risk reduction work remains outstanding and should be completed before release. The COM considered that the licence would provide protective factors if the Applicant were to be released, but that it would be preferable, as the panel accurately recorded her evidence, for further work to be completed in custody.

41. The evidence was that the Applicant poses a high risk of serious harm to the public and a medium risk of serious harm to a known adult, prisoners and staff. The COM, basing her opinion on the Applicant's record, considered his capacity for serious violence to be high. She considered the actuarial assessments to be reasonable: there was a high likelihood of re-offending. The panel said in terms that the Applicant had made good progress, but that Covid had limited the extent of his therapy and that the incidents during the summer of 2022 confirmed that he has outstanding problems that still need to be addressed. Bearing in mind the Applicant's history of offending, the panel considered that he continues to pose a high risk of serious harm and re-offending at this stage of his sentence. All of these were conclusions properly available to the panel on the evidence and cannot be characterised as irrational.

42. It is not, as the Representations acknowledge, for the Parole Board to do sentence planning. If the only available work that can be carried out in custody is consolidation, and it is necessary before the Applicant can be safely released, then that is work that must be carried out before release, whether it is defined as core risk reduction work or not. The panel was obliged to make its own assessment of risk, and was entitled to come to the view that further work was necessary, not just preferable, before release.

43. Again, the panel noted that the RMP is not likely to provide the intensity of support that the Applicant currently receives in prison (he is at present in a therapeutically focused closed establishment), particularly in relation to mental health and therapeutic support, although it would be more robust while he was at designated accommodation. The panel said that whilst the Applicant had improved his internal risk management skills, the panel assessed that they were not yet at the level necessary for him to be managed in the community over the longer term. Since the case of **Johnson** (above) the Parole Board must consider risk beyond the

Conditional Release Date. The panel's conclusion that the RMP was insufficient was based on the evidence, and not irrational.

44. Looking at the position overall, I cannot find that the panel's decision was irrational in the sense defined above. I have been provided with no material on the basis of which I can properly prefer the Applicant's representative's version of the evidence to that of the panel. I do not know if the representative has listened to the official recording of the hearing. If she has, she has not referred me to any part of it in support of the assertions in the Application, only to her own submissions.

**Decision**

45. 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**
**05 January 2023**