

[2024] PBRA 44

## Application for Reconsideration by Rowland

### The Application

1. This is an application by Rowland (the Applicant) for reconsideration of a decision made by a panel of the Parole Board (the Panel) following an oral hearing decision refusing his application for release and making no recommendation to the Secretary of State (The Respondent) for a 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. This is an eligible case, and the application was made in time. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.
3. I have considered the application on the papers. These are the decision of the panel, the dossier and written submissions in support of the application prepared by the Applicant's representatives.

### Background

4. In March 2006 the Applicant, then aged 20, who had previous convictions in 2003 for attempted robbery and in 2006 for assault and failing to surrender, had planned a violent armed robbery together with another man who was never apprehended. They were both disguised as delivery men. The victim who was alone in the house and who was expecting a delivery opened the door. He was attacked immediately with considerable force. He was punched and kicked to the floor, jumped on, struck with a baseball bat, had pressure applied to his throat and was threatened by having a large knife put to his throat. The victim pointed to a money wallet, told his assailants where more could be found and handed over his gold chain. He was then bound with tape before the rest of the house was searched by the robbers before they left. The Applicant's DNA linked him to the offence. He was convicted following a trial.
5. The Applicant kept in touch with his accomplice who in January 2016 assisted the Applicant in effecting his escape from prison and who also made available to the Applicant associates to assist him while he was unlawfully at large for some two years.

### A Brief Chronology

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**March 2006:** The index offence.

**March 2007:** The Applicant was sentenced to an indeterminate sentence for public protection for the robbery, the tariff being set at 5 years 6 months based upon a notional determinate sentence of 11 years.

**November 2012:** Moved to open prison.

**May 2013:** Returned to closed conditions.

**October 2015:** Moved to open prison.

**January 2016:** Absconded from prison and remained at large for two years.

**January 2018:** Arrested following an allegation of harassment of a girlfriend. When the Applicant's address was searched weapons found included a large sword, a machete, an axe and a wooden baton.

**May 2018:** Sentenced for escape and harassment – an indefinite Restraining Order was imposed to protect the victim (his ex-partner).

**March 2021:** Psychological Assessment on behalf of PPCS.

**June 2021:** Released from prison.

**February 2022:** Police called to a hotel where Applicant was then residing when it was alleged he had behaved aggressively and threateningly to two women – one a member of staff.

**6 September 2022:** Allegations of serious threats directed at former girlfriend (JB) and her ex-husband.

**9 September 2022:** Applicant recalled to prison.

**11 September 2022:** Crime Report opened.

## The Current Parole Review

6. The case was referred to the Parole Board on 20 September 2022. The oral hearing before a two person panel comprising an independent member and a psychologist member was heard on 29 November 2023. The Panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM) and the Applicant himself who was represented by his solicitor. The Secretary of State elected not to be represented. The hearing overran and was brought to a close, without objection, at the request of prison staff. The Applicant's solicitor requested that he be allowed to present his closing submissions in writing and this he duly did on 6 December 2023. Regrettably, commitments meant that the panel were delayed in issuing their decision which it did on 8 January 2024.

## The Request for Reconsideration

7. The ground for seeking reconsideration is essentially that the decision is irrational and/or procedurally unfair in that:
  - (i) the panel failed to direct any further material to be sought and/or provided in support of the allegations,
  - (ii) the panel failed to direct an adjournment to enable there to be cross examination of witnesses, and
  - (iii) the panel were in error in attaching any weight to the unproven, untested, hearsay allegations made by JB in September 2022.

## The Relevant Law

*Parole Board Rules 2019 (as amended)*



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8. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
9. 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)).
10. 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*

11. 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."*
12. 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.
13. The DSD case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a 'more modern' test set out by Saini J in **Wells [2019] EWHC 2710 (Admin)**.
14. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that *"no reasonable panel could have reached the impugned decision"*. That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.



15. In the **Wells** case Saini J set out 'a more nuanced approach' at paragraph 32 of his judgment when he said:

*"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 regard 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".*

16. It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that *"this approach is simply another way of applying"* the Wednesbury irrationality test.

17. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a Judge dealing with a Judicial Review in the High Court – to substitute his or her view for that of the panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

18. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

19. Once that stage is reached, following the guidance provided by such cases as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

20. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

21. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

*"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".*

22. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk; importantly it was the panel



who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was Wednesbury unreasonable and/or procedurally unfair in some respect.

### *Procedural unfairness*

23. In conducting its proceedings the Board must comply with the requirements of procedural fairness which is the modern term for the rules of natural justice. 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 to the issue of irrationality which focusses on the actual decision.

24. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

- (a) express procedures laid down by law were not followed in the making of the relevant decision;
- (b) they were not given a fair hearing;
- (c) they were not properly informed of the case against them;
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

25. The overriding objective is to ensure that the Applicant's case was dealt with justly.

### *Open Conditions*

26. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

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

27. The Respondent has made no submissions in response to this application.

### **Discussion**



28. It is submitted on behalf of the Applicant in written submissions dated 6 December 2023 that the Panel, in the manner in which it handled the allegations, acted in breach of the Board's guidance on the treatment of allegations in parole proceedings and the judgment of the Supreme Court in the case of **Pearce [2023] UKSC 13** in the following respects:

- (i) By relying on an unproven, untested, hearsay statement which provided the only evidence/information in support of the allegations that led to recall, the Panel acted irrationally;
- (ii) By failing to adjourn the oral hearing in order to seek further evidence/information in support of the allegations and by failing to direct any further reports or witnesses to give evidence, the Panel acted in a procedurally unfair manner.

29. In light of these submissions focusing as they do solely upon the way in which the Panel dealt with the allegations that led to the Applicant's recall it is in my judgment necessary to consider the following:

- (i) The relevant material and information that was before the Panel concerning the allegations;
- (ii) The closing submissions made on the Applicant's behalf;
- (iii) The current position in law regarding the use of allegations in a risk assessment carried out by the Board and;
- (iv) An examination of the manner in which the review generally and the issue of the allegations in particular were dealt with by the Panel in its Decision.

### **The material/information before the Panel regarding the allegations**

30. **First**, the Psychological Assessment Report dated March 2021 prepared on behalf of HMPPS Psychological Services. The report writer was not requested by either party to give evidence to the Panel. The reporting psychologist indicated that for the purposes of carrying out her assessment she met with the Applicant for approximately 5 hours across two separate interviews. The Applicant is reported to have engaged well in both interviews and had spoken candidly about his offending and his decision to abscond. He discussed his shame regarding the harassment offence against his ex-partner whilst he was at large, adding that he had re-read the content of his text messages and felt "*embarrassed and disgusted with himself for what they say*".

31. Elsewhere in the psychologist's report the Applicant is reported to have accepted that he had become controlling towards the victim of the harassment and said that he understood why she would have been scared of him. He is reported to have said that the harassment had occurred across a period of four days following the break-up of their relationship and related to text messages he sent which included explicit threats to harm her. He appeared to have accepted in interview with the psychologist that his ex-partner's threat to go to the police triggered in him extreme anger due to his belief that this would result in his being returned to prison. The report notes that the Applicant made clear to the psychologist, as indeed he had to other professionals, that he in fact had no intention of carrying out his threats. He





conceded that his former partner could not have known that, and would he agreed have been extremely frightened by his behaviour.

32. **Secondly**, an earlier decision of a differently constituted panel in April 2021, records that the Applicant gave evidence and is recorded as having told the previous panel that he regretted sending the messages and that they were sent in what is described in that decision as a "*spiral of emotional turmoil*".

33. **Thirdly**, the dossier contains what is described as a 'Police Report' prepared by the Kent Police dated 20 April 2023. This document was prepared following a direction from the panel for an explanation as to why no criminal charges were preferred. Clearly, the report was not prepared by the officer who actually dealt with JB on 11 September 2022 when she made her allegations. From enquiries I have caused to be made, I am given to understand that the police report was the only document before the panel that dealt with the information provided by JB when she made her allegations. I have therefore proceeded on the basis (which indeed has been confirmed) that it is this document to which the Applicant's representatives refer, describing it in their submissions as being "*the only evidence available...the hearsay statement of a Detective Constable*".

34. The report summarised the allegations made by JB and records other matters relevant to the panel's direction for information regarding the absence of criminal proceedings. I summarise its contents as follows:

- JB disclosed two incidents (i) "*engaging in controlling / coercive behaviour in an intimate family relationship*" between specific dates in March and December 2022 and (ii) "*intentional strangulation*" between specific dates in June and September 2022.
- JB said that there were texts on her phone from the Applicant which were shown to the police.
- She refused to give details of the Applicant because she was in fear of reprisals if he were to be returned to prison.
- The officer who dealt with her recorded that JB was in fear and very upset when making her complaint.
- She refused to provide any further details about the person responsible.
- The report noted that there was no corroborating evidence, no additional witnesses, no CCTV and no "forensics". JB is reported to have refused to allow her phone to be downloaded.
- She said she did not want to support a prosecution.
- The report refers to the only available evidence therefore being "*a hearsay statement completed by Trainee Detective Constable*".
- The report concluded by noting that evidential difficulties prevented further action and that JB did not support, or had withdrawn her support for any further police action.

### Closing Submissions on behalf of the Applicant

35. As I have mentioned, these were received following the oral hearing and before the panel issued their decision.



36. It is noteworthy that in the closing submissions there was no application for an adjournment made to the panel and no application for further enquiries to be made or for any further witnesses to be called.

### The use of allegations in the Parole Board's assessment of risk

37. The High Court has been required to consider on a number of occasions the issue that lies at the heart of this application, namely, how the Parole Board should treat allegations of misconduct or criminal offending which have not been proved either in civil proceedings or in the criminal courts.

38. The law regarding how a panel should approach the use of allegations in its decisions is settled and is as stated by the Supreme Court in the case of **Pearce v The Parole Board [2023] UKSC 13 (Pearce)**. Parole Board members are further assisted by Guidance prepared by the Board – the most recent version of which is dated September 2023, published following the Judgment in **Pearce**.

39. What follows is a very brief summary of four of the conclusions reached by the Supreme Court that I consider to be particularly relevant to this application, given the nature of the challenge made to the panel's approach:

- (i) The function of the Parole Board is not to find a prisoner guilty or innocent of any criminal offence or other misconduct. Its function is to assess the risk that would be created if the prisoner is released on licence.
- (ii) The Board is not bound by the rules of evidence which apply in a criminal trial. It is entitled to take hearsay into account (and does so routinely) together with other evidence or information regarding misconduct or criminal offences. It must also take into account information or evidence regarding the good conduct of a prisoner, whenever it took place. Therefore, in making what has been described as a "*global assessment of risk*" a panel's assessment is bound to have regard to all the relevant information placed before it provided that the prisoner is given a proper opportunity to respond. Therefore, there is no limit placed on the Board as to the nature and character of the information it takes into account in assessing risk, provided that the Board in all respects act fairly.
- (iii) The weight to be given to the evidence or information received is and remains a matter entirely for the Board. If weight is to be given to an allegation of criminal or other misbehaviour the panel's first task is to examine the facts and consider if it is able to make a finding on the truthfulness or otherwise of the allegation. If, as often happens, a panel is not able to make such a finding, it should then examine the facts and consider if it can make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner that is relevant to the assessment of risk giving it as much weight as it considers appropriate following an assessment of all of the information before it.
- (iv) At all times a panel must proceed with considerable caution which includes giving the prisoner the opportunity of making submissions on how the panel should proceed.

### The Panel's Decision



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### *Risk Factors*

39. The panel identified a number of risk factors as being relevant in the Applicant's case. They included a lack of suitable accommodation; chaotic lifestyle and negative associates; alcohol and drug misuse; poor thinking skills; pro-criminal attitudes; attitudes and beliefs that condone the use of violence and weapons; difficulties in intimate relationships; controlling behaviours towards partners; isolation and boredom; lack of structure; poor emotional control; impulsivity; lack of consequential thinking; poor problem-solving skills and poor coping skills.
40. The panel noted that the Applicant has been diagnosed with antisocial personality disorder along with traits of personality borderline disorder.

### *The opinions of the professionals*

41. The Panel recorded that the COM was satisfied that the Applicant's risk could be managed in the community in the short to medium term and so supported release while commenting that he remained concerned that there may be more substance to the allegations that led to recall than was indicated by the absence of a criminal charge being preferred. The POM was also in favour of release as per the risk management plan. The POM is recorded as having told the Panel that he was unable to comment on the allegations which lead to recall because he had never discussed them with the Applicant. When pressed on whether he would recommend release if there was a possibility that the Applicant had done what was alleged, the POM confirmed that he would because of his positive custodial behaviour and the fact that a particular programme could not be completed in custody. The reporting psychologist who as I have already mentioned did not give evidence, was also supportive of release.
42. The COM told the panel that the Applicant's presentation to the Panel was consistent with how over a period of 11 years he had presented himself to the COM who observed that in his view the emphasis needed to be on managing the Applicant's presentation to others, his anger and how he deals with situations of conflict.

### *The Applicant's evidence*

43. The panel set out in detail the evidence given by the Applicant. Referring to JB and the allegations she had made, he denied strangling her or committing any act of physical violence. He accepted that they had very heated arguments, that they were getting in each other's faces and saying things that were hurtful. He described their relationship as having begun very well but that it had become toxic. He told the panel that he had told JB about his IPP licence. He suggested to the panel that having given JB this information she must have used it against him. The panel noted that the Applicant was unable to say why JB had chosen not to name him to the police if she was, as he had suggested, motivated to seek revenge. The Applicant gave evidence of the incident at the hotel where he was staying and evidence regarding his future plans. When asked to reflect on his presentation to the panel, he recognised that he came across as an aggressive person, that he looked unapproachable and could be loud. He told the panel he would refuse to go to open conditions because for him it would be a backward harder move.

### *Analysis of future risk*

44. The panel agreed that the Applicant was correctly assessed as presenting a high risk of serious harm to the public and known adults and noted that without having



addressed his presentation and anger management issues and without developing insight and strategies to manage healthy relationships, their assessment was that the likelihood and speed of intimate partner violence would increase to high.

### *The Risk Management Plan*

45. The panel went on to consider the proposed risk management plan. It is well understood that a risk management plan is designed to provide external controls to reduce a prisoner's risk of serious harm to the public. External controls cannot on their own reduce the prisoner's risk: there needs to be a combination of internal and external controls if risk is to be effectively managed. The panel found the risk management plan to be not sufficiently robust to manage the Applicant on IPP licence. The reason for this finding was primarily that the panel considered that the plan left key areas of risk unaddressed and outstanding. It concluded that the risks the Applicant presented could not be mitigated by external controls alone. The panel described itself as "*underwhelmed*" with the Applicant's resettlement plans which in their view lacked specificity, finding that this was relevant given that the Applicant had identified boredom and isolation as key areas of his risk. The panel went on to observe that, as was the case on initial release, the Applicant continued to place significant reliance on family members to provide practical, emotional and financial support. The panel found that the Applicant presented himself as a bystander in effect waiting for things to happen which in their opinion showed a lack of motivation and preparation for release on his part. In the panel's judgment this had the almost certain potential to increase risk when the Applicant, after a period in professionally monitored accommodation, moved on to alternative accommodation which was potentially less supportive, offering little or no professional monitoring. The panel found that if re-released the Applicant posed a greater than minimal risk of causing serious harm. The panel was wholly unpersuaded that the Applicant's risk could be managed by the proposed internal and external controls which it found, as I have said, were not sufficiently robust.

### *The Allegations and Recall*

46. I turn to summarise the panel's findings and conclusions regarding the allegations and recall.

47. The panel began by noting its duty to consider the appropriateness of the recall of the Applicant to prison. The panel further noted that the Applicant did not challenge the appropriateness of the recall and further that there was no evidence to suggest that the recall was anything other than appropriate.

48. The panel noted the statutory test for release and went on to confirm that it had considered the written submissions from the solicitor representing the Applicant. It made clear that it considered the seriousness of the index offence, the Applicant's previous convictions, the circumstances leading to his recall, his progress and achievements during his sentence, the current risk assessments, the risk management plan and the recommendations of professional witnesses.

49. The panel confirmed it had considered the 'Guidance on Allegations' issued by the Board in September 2023. It deemed the allegations made by JB to be relevant to its assessment of risk because they alleged harm (strangulation) caused to JB. The panel noted that the Applicant had the opportunity to give evidence and to make submissions about the allegations all of which evidence the panel confirmed it had



duly considered. The panel took note that the Applicant continued to refute the allegations, was not charged with any offence and that no further action was taken against him.

50. Because of its central importance to this application I shall quote in full the panel's findings regarding the allegations:

*"4.4 The Panel finds that there is a serious possibility/likelihood that the allegation of harmful behaviour may be true for the following reasons:*

*4.4.1 The injured party (JB) attended the office and made a report to a Detective Constable (Trainee) of domestic harm and receiving text messages threatening to harm her husband from whom she was separated.*

*4.4.2 JB was aware that [the Applicant] was serving a custodial sentence and confirmed that they met and lived on the same caravan site, the latter ...confirmed by [the Applicant] in his evidence.*

*4.4.3 JB refused to identify/name [the Applicant] because she was fearful of reprisals if he was subsequently returned to prison.*

*4.4.4 [The Applicant] accepts being in an intimate relationship with JB.*

*4.4.5 [The Applicant] accepts that his relationship with JB was "toxic" and that they had "heated arguments".*

*4.4.6 The Sentencing Remarks (2018) state that [the Applicant] committed a further offence of harassment of his partner, putting her in fear of violence. In addition, he persistently sent her messages "that threatened serious violence towards her and her household".*

*4.4.7 The current allegations share similarities with the previous conviction and therefore add credence and weight to their likelihood of having taken place."*

51. The panel's Decision goes on to make further observations and findings which again, because of their importance, I shall quote in full:

*"4.5 It is to [the Applicant's] credit that he accepts his presentation can come across as aggressive and intimidating. However, the Panel assesses [the Applicant] to lose sight of this when in an intimate relationship. Also, as far as the Panel is concerned he lacks insight into developing and maintaining healthy relationships. This may be because he has yet to complete offence-focused work regarding intimate partner violence. The Panel struggled to find evidence that he had addressed his intimidating, threatening and violent behaviour and poor emotional control. The panel assesses these areas of risk to be unexplored and unaddressed. The panel is not persuaded that [the Applicant's] risk can be managed while he undertakes work in the community. This is because he has demonstrated while UAL (Unauthorised Absence without Leave) and upon initial release, that he quickly entered into relationships with women and therefore the possibility of this practice being repeated if re-released is not insignificant. Also, the panel cannot assume that [the Applicant] will be found suitable for an intervention, or indeed successfully complete it on licence and this would likely elevate his risk.*

*4. [The Applicant] is credited for retrospectively recognising that his alcohol consumption was increasing and he was experiencing difficulties with his mental state. However, it is concerning that he did not speak to professionals about this. He has not engaged with substance misuse services or the mental team*



*and the Panel was unable to identify any improvements in his thinking and coping skills.”*

### Open Conditions

52. Albeit not eligible for consideration in this application, simply for the sake of completeness, it is appropriate to record that the panel dealt with the suitability of the Applicant for open conditions which the panel found itself wholly unable to support, not least because the Applicant himself made it clear to the panel he would refuse to transfer to open conditions and because he had previously absconded from open conditions and remained at large for two years which came to an end not because he handed himself in, but because he was arrested as a result of the report of further offending.

### The Applicant’s submissions in more detail

53. As I understand it, the application that the panel’s Decision was both irrational and procedurally unfair focuses exclusively on the panel’s treatment of the allegations made by JB which led to the Applicant’s recall. It is accepted on the Applicant’s behalf that the allegations were serious and that recall to prison was appropriate and that the Applicant was given the opportunity of responding to the allegations when giving evidence to the panel.

54. In finding that there is a serious possibility that the allegations may be true it is submitted that the panel did not follow the Parole Board Guidance on Allegations. It is submitted that the Guidance provides that the panel must satisfy itself that it has “adequate information” on which to base any finding they made. It is submitted that the absence of adequate information meant that the panel finding was without foundation, demonstrated by the fact that the only available evidence to support it was untested hearsay.

55. It is submitted that the panel erred significantly in attaching any weight at all to the untested hearsay statement and therefore the allegations. If I have understood the Applicant’s submission correctly that is because, in effect, the content of the police report was not considered to be sufficiently reliable or credible to commence a criminal investigation leading to a criminal prosecution and therefore neither could it nor should it have provided the panel with sufficient to make any finding against the Applicant.

### Analysis and Conclusions

#### *Irrationality*

56. In this case the panel decided that no finding of fact was possible. Therefore, the Panel were required to consider whether there was a serious possibility that the allegation(s) may be true. The standard of proof that must be met before a panel find a fact proved is the civil standard. That is the balance of probabilities. A panel must be satisfied on all of the information available that it is more likely than not that the fact or facts occurred. When no finding of fact is possible the Board’s Guidance makes it clear that an assessment as to whether there is a serious possibility that the allegation (s) may be true does not meet the required standard of proof. However, that does not mean that the allegation has to be discounted. As the Guidance says in paragraph 7.3:



*"The likelihood that the alleged behaviour occurred together with the seriousness of the allegation will be relevant to the amount of weight that a panel can place on the allegation".*

57. The panel was not able to make findings of fact essentially no doubt because the complainant claimed to be in fear of the Applicant and as a result was unwilling to provide enough information to the police to support a prosecution. If the Applicant's submission is correct then that should have brought an end to any further consideration of the allegations. That is not my understanding of the Board's Guidance or the judgment of the Supreme Court in Pearce. The Parole Board does not have the power nor the resources to carry out a criminal investigation. It is not the role of the Board to determine guilt in respect of further allegations but "evidence of other offending" can be "considered as part and parcel of a global risk assessment" (See: **DSD v The Parole Board**).

58. The submissions on the Applicant's behalf are essentially that the allegations stood alone. I am unable to agree. While of obvious importance – not least because they led to the recall to prison of the Applicant - they were by no means determinative of this review as a whole as is suggested. In my judgment, the Panel's Decision demonstrates clearly that it placed the issue of the allegations in their proper place in the context of a very wide ranging assessment of the Applicant and his risks. The panel had the advantage of not only hearing from the Applicant but also of assessing the previous accounts he had given in answer to the allegations made by JB. The panel set out in considerable detail its findings and the various bases upon which it reached the conclusion that there was in its judgment a serious possibility that the allegations may have been true. In my judgment, the panel was entitled to approach the allegations in this manner and in doing so reached reasonable conclusions that they were perfectly entitled to reach.

#### *Procedural Unfairness*

59. If I may say so, the suggestion of the need for an adjournment or an application for an adjournment for further evidence/information to be sought came late in the day. No application appears to have been suggested or made at the oral hearing or immediately after it in the Applicant's closing written submissions. The suggestion or the possibility seems to have made its first appearance on 29 January 2023 in submissions in support of the application for reconsideration.

60. By way of a general observation it is important to appreciate that the Parole Board cannot itself compel a reluctant witness to attend a Board hearing other than in the most exceptional circumstances. (See: **Pearce v Parole Board [2023] UKSC 13 paragraph 76**).

61. Parole Board Guidance makes clear that panels must make objective decisions based on all the information provided to them (see **Rule 16 of the Parole Board Rules**) which imposes a duty on the Secretary of State to serve on the Board and the prisoner all information that is relevant to risk. The Guidance reminds panels that its decisions are also based on a panel's inquiries, recognising the important fact that panels themselves have a responsibility to make reasonable enquiries. That said, I am in no doubt that this very experienced panel would not have hesitated to initiate further enquiries if it had thought, in fairness to the Applicant, that they would or might have provided any further information of value to the review.





62. The reality that the parties and the Panel faced was that the single report in the dossier was the only evidence available of the allegations by JB who had made it abundantly clear that she was unwilling to support a prosecution. The position was that there was no other available evidence to place before the panel regarding the allegations themselves except of course the evidence freely given by the Applicant which the Panel was under a duty to assess, and then to accept or reject. It is clear that the Applicant was fully aware of the allegations being made and was fully able and willing to respond to them. If, for example, he had indicated that he did not wish to answer any questions on the allegations then it is possible that the panel may have considered this aspect of the review differently. However, that was not the position. Uniquely placed to consider and assess the Applicant's evidence of denial, if they rejected that denial (as it seems they must have done), the panel then had available to it some evidence to weigh against the account that JB had given.
63. I can see no basis on which it can be credibly asserted that what is submitted by the Applicant amounts to procedural unfairness. There was nothing procedurally unfair in the way the hearing was conducted and this application in my judgment stands or falls on whether the decision was irrational.
64. As I have already said, a panel are not obliged to follow the recommendations of professional witnesses, even if they are unanimous as they were in this case. It is the panel's responsibility to make their own assessment of the prisoner's risk of serious harm and its manageability on licence in the community. However, if they depart from the recommendations of the professionals as they did in this case they must explain their reasons for doing so. Upon my reading of the Decision as a whole I am in no doubt that the panel fully and adequately explained why it found itself differing from the recommendations made by the professional witnesses.
65. In my judgment, a very experienced panel with commendable thoroughness provided a carefully constructed, balanced and fair-minded analysis of all the evidence and information before them. It was the panel's duty to consider every relevant aspect of the review. It is in my judgment abundantly clear from the decision that the panel did just that and placed the allegations appropriately into the context of the review as a whole when carrying out its global assessment of the Applicant's risks. The panel had serious concerns about several very other important aspects of the management of the Applicant's risks if released into the community.
66. The panel applied the established principles of law, followed the Board's guidance available to them and satisfied their public law duty to provide evidence based reasons that adequately and sufficiently explained the conclusion that was reached to refuse release.
67. In my judgment, it cannot sensibly be argued that this was a decision that no reasonable panel could have come to and accordingly I find the decision is not irrational.

## Decision



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68. For the reasons I have given, I do not consider the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**HH Michael Topolski KC**  
**26 February 2024**

