

[2022] PBRA 150

Application for Reconsideration by Edwards

Application

1. This is an application by [Liam Edwards](#) ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 12 September 2022, after an oral hearing on 25 August 2022, issued a decision not to direct his release on licence but to recommend that he should be transferred to an open prison.
2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

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Background and history of the case

3. The Applicant is aged 41. He is serving a sentence of imprisonment for public protection ('IPP') which was imposed on 26 August 2008, when he was aged 27, for an offence of attempted murder ('the index offence'). His tariff was set at 8 years less time served on remand. It expired on 12 February 2016.
4. The Applicant had a traumatic childhood in which he was subjected to physical and sexual abuse. Before the index offence he had accumulated a substantial criminal record which included several convictions for offences of violence. Much if not all of his offending was linked to his addiction to drugs and alcohol.
5. The index offence occurred in December 2007 when the Applicant was on bail for a previous assault. He and his co-defendant had been taking Class A drugs all day and, in the sentencing Judge's words, *'went on a rampage of violence over a few hours and carried out two completely unprovoked attacks on two inoffensive people which resulted in one victim being badly beaten up and the other suffering head injuries which led to him being unconscious for many months after the attack and permanent disabilities thereafter'*.

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6. During his sentence the Applicant has spent two periods in open conditions and four periods on licence in the community. The reasons for those failures are fully set out in the dossier and I need not set them out in much detail in this decision. It is sufficient to record that that (1) his first failure in open conditions was due to unauthorised possession of a mobile phone and the second one was due to drug use and possession of another mobile phone, and (2) his failures on licence in the community have all been linked to his misuse of substances, as follows

- (a) In 2017 he failed to complete the programme at a residential rehabilitation unit, lost his bed space there and then resided with a male family member, but had to be recalled to prison for anti-social behaviour and a relapse into substance abuse.
- (b) In 2018 he and another resident at the probation approved premises (AP) where he was residing, were arrested by the police at a property which was known to the police for drug activity. On his return to the AP he refused to be drug-tested. He then left the AP and did not return, remaining unlawfully at large for a couple of weeks.
- (c) In 2019 whilst again residing at the same AP he persisted in using drugs with the result that his bed space was withdrawn.
- (d) In 2021 whilst residing at a different AP he spent all his remaining money on alcohol and was found by the police injured and heavily intoxicated outside a night club.

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7. Following the Applicant's latest recall in 2021 the Secretary of State referred his case to the Parole Board to decide whether to direct his re-release on licence, and in December 2021 an oral hearing was directed. The case was allocated to the panel, and the hearing took place on 25 August 2022 as related above.

8. At the hearing evidence was given by three professional witnesses:

- (a) the official responsible for supervising the Applicant in prison [A];
- (b) the official prospectively responsible for supervising him in the community [B]; and
- (c) the principal clinical psychologist for a service which had offered psychological and occupational therapy support to the Applicant in the community on one of his previous releases on licence [C].

9. All three professional witnesses supported re-release on licence, but the panel did not agree and instead decided to recommend a further period in open conditions.

10. This application for reconsideration of the panel's decision was made on 4 October 2022 by the Applicant's legal representative on his behalf.

The Relevant Law



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The test for release on licence

11. 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

12. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) a decision is eligible for reconsideration if (but only if):

- (1) it is a decision that the prisoner is or is not suitable for release on licence and
- (2) one of more of the following three grounds is established:

- a) it contains an error of law;
- b) it is irrational; or
- c) it is procedurally unfair.

13. 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)).

14. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the ground of irrationality. It is not suggested that there was any procedural unfairness or error of law.

The test for irrationality

15. 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."

16. 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.

17. 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 Board in making decisions relating to parole.



18. 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**.

19. As the legal representative acknowledges, the fact that a panel departs from the unanimous evidence of the expert witnesses does not in itself mean that its decision is irrational. However, if the panel is going to take that course it needs to provide sufficient and defensible reasons for doing so.

The request for reconsideration in this case

20. In his concise and helpful representations, the legal representative has provided a number of arguments in favour of his submission that the panel's decision should be regarded as irrational. It will be convenient to consider each of those arguments in turn in the 'Discussion' section of this decision below.

The Secretary of State's position

21. By e-mail dated 18 October 2022 the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

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

- The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 338 and includes a copy of the panel's decision letter;
- The representations submitted by the Applicant's legal representative in support of this application; and
- The e-mail from PPCS stating that the Secretary of State offers no representations in response to this application.

Discussion

23. I will consider in turn the various criticisms of the panel's decision which have been made by the legal representative.


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Submission: An open prison is not a suitable environment for the Applicant

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24. This submission is based on the Applicant's two failures in open conditions and the fact that the panels which considered his case after his first 3 failures on licence in the community directed his re-release on licence and did not regard a further period in open conditions as being necessary or appropriate.

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25. Each panel, including the present one, had of course to consider the Applicant's case on the basis of the evidence available to it and on its assessment of the manageability in the community of his risk of serious harm to the public. The previous 3 panels were fully entitled, on the evidence available to them, to conclude that the Applicant's risk would be manageable on licence with the risk management plans proposed. Unfortunately, that turned out not to be the case in any of the three instances when he was released on licence in accordance with their recommendations.

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26. The present panel concluded, on the evidence available to it, that the Applicant's risk would not be manageable on licence if he was re-released now with the currently proposed risk management plan. Having reached that conclusion, which I am satisfied was open to it on the evidence, the panel could not direct his release on licence, irrespective of the suitability or unsuitability of open conditions. If it had concluded, adversely to the Applicant, that the Applicant's risk would not be manageable in open conditions (or that for any other reason a recommendation for a move to such conditions was inappropriate) it would have been bound to recommend that the Applicant should remain in closed conditions. In fact, it took the course most favourable to the Applicant by recommending a move to open conditions.

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27. Whatever may have been the views of the previous panels, the present panel was fully entitled to regard a further period in open conditions as being not only appropriate but also essential to inform future decisions about release and to prepare for possible release on licence into the community. The panel explained that it regarded such a period as being necessary, in particular, to develop the Applicant's plans for resettlement in the area in the North of England where he wished to resettle ('the specified area') and to build links with a support service in that area. (The Applicant had built links with a support service in a completely different area in the South of England, as testified by C, but no referral had yet been made to the equivalent service in the specified area).

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28. I cannot see any real reason why open conditions at an establishment in the specified area should be regarded as unsuitable for him. The circumstances of his two previous failures in open conditions (referred to above and of a familiar nature) would not suggest that that would be the case. On the contrary another period in open conditions will provide the opportunity for further testing as well as building the platform for a more successful period on licence in the community this time.

Submission: the panel failed to acknowledge the full circumstances of the

Applicant's first recall

29. The panel simply stated in its summary of the history of the case that the Applicant *'was first released in 2017 to a residential rehabilitation unit, he was recalled after 4 months, his longest period on licence, after his place was withdrawn.'* The legal representative submits that the full picture was more complicated and more favourable to the Applicant than this suggests.

30. There are few contemporaneous records in the dossier recording what happened, but a picture can be pieced together from other documents. The Applicant engaged well in the programme at the rehabilitation unit for 3 months, abstaining from substance abuse, but unfortunately he breached the rules of the unit by starting an intimate relationship with a woman: that caused problems and ultimately led to his losing his bed space. He then, commendably, made every effort to obtain independent accommodation but was unsuccessful, so he was allowed by probation to live with a male family member. However, he soon relapsed into substance misuse and anti-social behaviour, resulting in a decision that he should no longer live with the male family member and should be returned to prison. So far as is known he did not commit any offences whilst on licence in the community.

31. The legal representative points out that this first period on licence was the only one where he was (a) residing in the North of England (though not in the specified area) and (b) not residing in an AP which housed sex offenders (due to his childhood experiences, he finds associating with sex offenders difficult).

32. The Applicant has subsequently shown some willingness to complete the programme but has not actually done so: the residential rehabilitation unit has declined to have him back and the current risk management plan is therefore based, once again, on release to AP.

33. The panel must have been fully aware of the matters referred to by the legal representative, but I find it difficult to believe that, even if specific weight had been given to them in the panel's decision, they could have affected that decision. Events since the Applicant's first period on licence have demonstrated that, despite a great deal of support from professionals, he has been unable to avoid relapsing into serious substance abuse. As the panel observed in its decision, even with a highly supportive and robust risk management plan he was overwhelmed on each occasion when he was released into the community.

Submission: Insufficient weight was given to the fact that the Applicant has not committed any offence of violence in recent years, even when living in the community

34. The panel acknowledged that this was the case but added: *'Although [the Applicant] has not been convicted of violence for many years, he has continued to engage in risky*



behaviour which could escalate to a similar situation to the index offence. On his last release, he lapsed almost immediately into alcohol misuse, drinking such a large volume that he could not remember how he came to be injured. The lack of understanding as to what caused him to be involved in an altercation is concerning as it limits the management of that risk. The evidence of the current and previous recalls is that [the Applicant] is not able to put into practice in the community what he has learnt in custody.'

35. It is difficult to disagree with that observation. The problem is that, when the Applicant is out of control as a result of serious substance misuse and his judgment is impaired by it, there must always be always a real risk that he will resort to serious violence in the community. B told the panel that in his view, whilst there had been no violent convictions for some time now, it would be premature to reduce the Applicant's assessed level of risk of serious harm to the public (currently assessed as high) as he had not been able to show a period of stability in the community. The panel agreed with that assessment. I too agree with it.

Submission: prior to all the Applicant's recalls to custody there had been warning signs, and there would be likely to be warning signs in the future if his risk were to increase

36. It is certainly correct that on each occasion when he had been on licence in the community the Applicant was recalled before he caused any serious harm to anybody. However, it would be dangerous to release him into the community relying on the likelihood of warning signs resulting in further recalls before any harm was done. There is always the risk that an altercation may occur out of the blue (as indeed appears to have been the case in the incident resulting in his latest recall) and that it may quickly escalate to the point at which serious harm results.

Submission: inconsistent approaches taken by the panel to the incident resulting in the Applicant's latest recall, and irrationality in one of those approaches

37. The legal representative points to two passages in the panel's decision which appear to be inconsistent with each other. These passages refer to the incident resulting in the Applicant's latest recall.

38. In the first passage the panel stated that it did not find it plausible that the Applicant did not remember anything about the substantial period of time culminating in an altercation in which he received a significant injury resulting in his being taken to hospital by the police. In the second passage the panel stated that it was of concern that the Applicant relapsed into alcohol use so quickly and to such an extent that he did not remember how he came to be assaulted.

39. The legal representative submits that the panel's conclusion in the first passage was irrational given that on any view the Applicant had consumed an enormous amount of alcohol, and consumption of such a large amount is well known to be capable of leaving the drinker with no memory of the events which occurred while he was seriously intoxicated. I agree with this submission.

40. I also agree that there is an inconsistency between the two passages. However, I do not believe that that inconsistency (or the irrationality of the conclusion in the first passage) has any real relevance to the assessment of the Applicant's risk of serious harm to the public. Whichever explanation is correct the Applicant had placed himself in a highly risky situation in which he or somebody else might well have ended up with a serious injury. It will probably never be known which is the correct explanation, or who started the violence which certainly seems to have occurred. On one explanation the Applicant knows what happened but does not want to reveal it: on the other he does not know what happened but had got himself into a state in which a serious injury might have occurred to himself or somebody else. Either situation would have given cause for serious concern.

Submission: The panel unreasonably accused the Applicant of 'a lack of understanding of the need for his risks to be managed and the risks he could present if they are not.'

41. The panel stated in its decision that *'whilst [the Applicant] shows some insight into his risks, he made an interesting comment as, when asked about his preferred option for release, he said 'ideally release with no licence' although appreciated that would not happen.'* The panel observed that *'What this demonstrates is a lack of understanding of the need for his risks to be managed and the risks that he could present if they are not.'*

42. The legal representative states: *'It is suggested that this is an irrational conclusion given the other evidence that [the panel] heard, particularly the evidence of [the Applicant's] remorse for his index offence, his desire to engage in restorative justice and the evidence he gave about his willingness to engage with an array of external controls as part of his licence. It is suggested that given this other evidence it is clear that this was simply a direct answer to the question of what he would like rather than an indication of his view on his risk and what is in actual fact appropriate for him.'*

43. I am inclined to agree with this analysis. However, this is only a relatively small point and I do not believe it played any significant part in the panel's overall assessment of risk or in its decision.

Submission: In its assessment of the manageability of the Applicant's risk the panel attached insufficient weight to two features of the risk

management plan which differed from previous plans

44. The legal representative points out that under the plan currently proposed: (1) the Applicant would not (as had previously occurred) be placed in a probation AP which housed sex offenders and (2) he would be residing close to the support which he would be receiving from female family members. The legal representative submits that these factors increased the likely effectiveness of the plan.

45. The panel was clearly fully aware of both these factors, and certainly took them into account, but there were other factors which pointed in a different direction. The panel observed that the proposed risk management plan was currently less thorough than the previous one. It stated that, although it could adjourn for some elements to be put in place, it was not convinced that any risk management plan would be likely to be effective in managing the Applicant's risks given his pattern of recalls. It was, of course, a matter for the panel's discretion whether or not it should adjourn for further information.

46. One of the weaknesses in the proposed risk management plan was that, whereas the necessary psychological and occupational therapy support in the community had been available when the Applicant had last been released on licence in the South of England and he would have been able to take advantage of it if he had not been recalled after a very short time, no arrangements had yet been made with the corresponding service in the specified area in the North of England.

47. In the circumstances I am not persuaded by this particular submission.

Submission: the panel attached undue weight to the evidence of one witness that a period in open conditions would be 'helpful'

48. The passage in question appears in the section of the decision which contains the panel's assessment of the manageability of the Applicant's risk. That passage reads:

'[B] considered that a period in open conditions could be helpful in terms of re-establishing [the Applicant] in the [specified area] although noted that it would delay release. [A] did not consider that there were significant benefits of a move to open conditions as there would be more support available in [AP]. [The Applicant] considered that a move to open was a waste of taxpayers' money and his time. The panel did not agree with [A] or [the Applicant]. [The Applicant] is institutionalised and is proposing to resettle in a new area. Both these factors point to benefits of a gradual return to the community so that he can test and develop his resettlement plan.'

49. This passage, read as a whole, makes it clear that the panel carefully considered the competing views about the likely benefits of (and need for) a period in open conditions,

and reached its own conclusion that such a period was necessary. I am not, therefore, persuaded by this particular criticism of the decision.

Submission: the panel erroneously referred to the specified area as a 'new area'

50. The legal representative points out that the Applicant has historic and family connections in the specified area and that his most successful release was to another area in the North of England. He submits that this means that it was irrational for the panel to conclude that a resettlement period in open conditions with temporary releases to the specified area was necessary.

51. Examination of the Applicant's record of convictions shows that apart from odd periods between 1996 and 2001 he had been living in the South of England since his offending began: his last conviction in the specified area was in 2001. His lifestyle for many years before the start of his current prison sentence had been an anti-social one dominated by substance abuse and anti-social associates. When first released on licence in 2017 he had been living at the residential rehabilitation unit in the North of England before a fairly short period living with a male family member and relapsing into his previous anti-social lifestyle.

52. Whilst, therefore, the specified area was not an entirely new area for the Applicant, he certainly needs to develop a pro-social lifestyle with pro-social connections in that area, so any inaccuracy on the panel's part in its reference to the area does not invalidate its conclusion that a staged resettlement period in that area is necessary.

Decision

53. This is an unusual and difficult case, in which it is not surprising to find views genuinely and reasonably differing. I have reminded myself of the test for irrationality in considering reconsideration applications and, whilst other panels might have reached different decisions from the present panel's one, at the end of the day I am unable to find that that test is met in this case. The panel's reasons for differing from the views of the professionals are clearly set out and, I believe, entirely defensible. I hope that my reasons for being unable to accept this request for reconsideration are clear from the discussion above.

54. My decision, with all due respect to the representations persuasively presented by the legal representative, must therefore be to refuse this application.

Jeremy Roberts
31 October 2022