

**[2023] PBRA 144****Application for Reconsideration by Dunwoodie****Application**

1. This is an application by Dunwoodie (the Applicant) for reconsideration of a decision of the Board dated the 28 June 2023 not to direct release or recommend for open conditions following an oral hearing on 21 June 2023.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision contains an error of law (b) that the decision is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the application for reconsideration, the decision letter and the dossier which now runs to 629 pages.

**Background**

4. On 21 January 2008, when he was 17, the Applicant was sentenced to detention at Her Majesty's pleasure for an offence of murder. He was 16 at the time he committed the offence. The Judge ordered that he should serve 12 years before he was eligible for parole. The Applicant is now 33 years old. The victim was a friend of the Applicant who was only 15. The two of them had been drinking to excess. After an argument, and following his friend causing him a minor injury, the Applicant stabbed him 55 times with a knife that he found in the room they were in. He was released on licence on 9 March 2021 and was recalled on 25 October 2021 and returned to prison on 1 November 2021. He was recalled on suspicion of stabbing another man who he had had an altercation within a public house. Arising out of that incident, he was charged with s.18 wounding and possession of an offensive weapon. He was found not guilty of both charges by a jury on 27 July 2022. By agreement the parole hearing was adjourned until after the jury had returned verdicts.

**Request for Reconsideration**

5. The application for reconsideration is dated 18 July 2023.
6. The grounds for seeking a reconsideration are as follows: it is said that the decision was unlawful, procedurally unfair, and irrational, so the Applicant seeks reconsideration on all the available grounds. Essentially, the complaint is that the panel went behind the finding of the jury that they were not sure that the Applicant was not acting in lawful self-defence. The Applicant further complains that the prison psychologist on

whose evidence the panel relied on made an error in carrying out her HCR-20 test which the panel do not acknowledge in their decision letter.

### Current parole review

7. The Parole review was the first after the Applicant was recalled. It was adjourned until after the trial had taken place.
8. The panel heard from a prison psychologist; an independent psychologist instructed by the Applicant's legal representative; the Prison Offender Manager (POM) and the Community Offender Manager (COM). The panel included a psychologist.

### The Relevant Law

9. The panel correctly sets out in its decision letter dated 28 June 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

#### *Parole Board Rules 2019 (as amended)*

10. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

#### *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. In the case of **R(Wells)-v-the Parole Board [2019] EWHC (Admin) 2710** Saini J sets out what he describes as a 'modern' and 'more nuanced' approach to the test in public law for quashing a decision because there was no factual basis for it. As Saini J says it is the same test of 'irrationality' and as it was a Divisional Court who recently re-iterated the test in DSD, that is the test used by the Parole Board on re-considerations.

#### *Procedural unfairness*



14. 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.
15. 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.
16. The overriding objective is to ensure that the Applicant's case was dealt with justly.

#### *Error of law*

17. Error of law means that the panel has misapplied the relevant law in some way.

#### **The reply on behalf of the Secretary of State (the Respondent)**

18. The Respondent has made no representations in response to this application.

#### **Discussion**

19. The issue at the centre of this application is whether the panel were entitled to use the facts of the stabbing which led to recall in the way they did in reaching their decision.
20. Where there has been a trial and the prisoner has been acquitted, the Board cannot make a decision or act on a basis that is contrary to what must have been the findings of the jury. In this case the Applicant was acquitted of s. 18 wounding. It was accepted that the Applicant wounded the other man, but he denied that the wounding was unlawful on the basis that he acted in self-defence. The jury would have been directed by the Judge that in order to find the Applicant guilty they would need to be sure that the Applicant either did not believe that it was necessary to use force to defend himself from an actual or threatened attack or that the amount of force used by the Applicant was not reasonable in the circumstances as the Applicant believed them to be.
21. The panel considered it was relevant to their considerations that the Applicant had returned to the pub where he had a previous altercation with another customer. At 4.10 the panel said, *"it supported the concerns of [the prison psychologist] and [the COM] that this was a highly risky situation in which [the Applicant] had placed himself in the early hours of the morning and having drunk alcohol"*. The jury's verdict involved no express or implied finding as to this and the panel were entitled to take that into account. A prisoner on licence can be expected to avoid risky situations and if he does not, that may imply that he needs further training.
22. At 4.12 the panel said that it was *"concerned at [the Applicant's] decision to go unlawfully at large"*. Again, the jury's verdict does not affect this aspect of the case



and the panel were perfectly entitled to take it into account as it might be said to demonstrate an irresponsible attitude by a prisoner on parole.

23. I am concerned however at the observations made by the panel at para 4.11. 4.11 reads as follows: "*When considering [the Applicant's] consequential thinking the panel was also concerned that he had been unable to find alternatives to using the knife to stab [the victim]. He could have run away from the pub. He could have run away when [the victim] fell to the floor. Having decided to pick up the knife, he could have thrown it away, he could have run away*". The panel considered that there were other options available to the Applicant at the time which he was unable to call upon in the heat of the moment and which he was unable to identify in his evidence to the panel.
24. It is difficult, if not impossible, to reconcile that finding with the verdict of the jury who were not satisfied that the amount of force used was unreasonable. If the jury had concluded that it was reasonable in all the circumstances for the Applicant to have run away and avoid the confrontation or to have thrown away the knife, then it would have been extremely unlikely that it could have reached its verdict of not guilty. While I well understand why the panel took the view that they did, I have concluded that they should not have taken the contents of 4.11 into account in the way that they did. It should also be remembered that the jury would have had much more information including CCTV on which to make their decision. The panel only had the prosecution opening, the defence case statement and the Applicant's evidence which may well not have accurately reflected how the evidence came out.
25. I have also considered whether the decision of the panel would have been the same even if they had not taken the contents of para 4.11 into account. If I was convinced that would have been the case, I would have dismissed the application. However, because what happened on that night was important in the consideration of future risk, I cannot be sure that the decision would have been the same. If the facts of the stabbing had been excluded and the error was capable of being material to the ultimate decision of the panel.

## Decision

26. Accordingly, I find that there was procedural unfairness and an error of law in the decision making of the panel. I therefore direct that the matter is reconsidered.

**John Saunders**  
**14 August 2023**

