

[2023] PBRA 187

## Application for Reconsideration by Anderson

### Application

1. This is an application by Anderson (the Applicant) for reconsideration of a decision of a Parole Board Member dated 4 October 2023 (the October Decision) not to terminate the Applicant's Imprisonment for Public Protection (IPP) Licence and not to suspend the supervisory elements of that licence.
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 either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the application for reconsideration, the application to the Parole Board by the Secretary of State (the Respondent) under section 31A of the Crime (Sentences) Act 1997 (the 1997 Act), the October Decision, the email dated 19 October 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that no representations will be made by the Respondent in response to the application for reconsideration and the Applicant's dossier containing 266 pages.
4. The grounds for seeking reconsideration are that the decisions in the October Decision not to terminate the Applicant's Imprisonment for Public Protection (IPP) Licence and not to suspend the supervisory elements of that licence are irrational because:
  - (a) The "*reasons the [for the October Decision] seem to have now changed to [the Applicant] being impulsive and not open with his Community Offender Manager [COM]*" (Ground 1); and because
  - (b) "*a lot of weight has been placed [in the October Decision] on the current recall reasons, in particular his relationship with his ex-partner, without the Parole Board Member considering the fact that that he has not committed a violent offence since the IPP sentence was imposed*" (Ground 2).

### Background

5. On 7 August 2008, the Applicant, who was then 24 years old, received an indeterminate sentence of imprisonment for public protection with a specified minimum term of 4 years for the index offence which was an offence of robbery with assaults with intent to rob.
6. Prior to the commission of the index offence, the Applicant had made 17 court appearances which were mainly for acquisitive and vehicle-related crimes which

included convictions for attempted robbery and affray (2004), escaping from lawful custody (2007), kidnap and robbery (2007) as well as regularly offending on bail and acting in breach of bail conditions, community orders and licence.

7. The Applicant committed the index offence of robbery when he, together with three others, two of whom were armed with knives, entered the private quarters of a public house during the night and stole money from the landlord at knife point. One of the residents was stabbed in the leg.
8. The Applicant was first released on life licence on 7 August 2012. He received a warning in 2013 after he had been convicted of driving with excess alcohol and he was recalled to custody in 2014 after he had been charged with theft (the charge was later dismissed) and after he had tested positive for cocaine.
9. The Applicant was released for a second time in March 2015 following a Parole Board Review, but he was recalled to custody in January 2017 after he had been charged with two robberies and after he had again tested positive for cocaine. In 2016 during the Applicant's time in the community and prior to his second recall, the police had been called after allegations of domestic abuse had been made against the Applicant by his then partner. The Applicant was acquitted of the robbery and his second recall was reviewed by a panel of the Parole Board in December 2017 who concluded that the Applicant satisfied the test for release. The Board noted that the offending behaviour work which the Applicant had completed included drug and alcohol relapse work and a refresher of the Thinking Skills programme (TSP). The panel also noted the Applicant's positive behaviour in custody as well as his motivation to succeed in the community.
10. In March 2018, the Applicant was released for a third time, and he remained in the community until he was recalled for a third time after recall action was taken on 13 December 2018. He did not return to custody until 29 December 2018 having been unlawfully at large for that period. He later explained that he had wanted to spend Christmas in 2018 with his family. The Applicant's COM at the time described the Applicant's behaviour as *"dishonest regarding his drug use, lifestyle and stated willingness to change"*.
11. A panel in 2019 noted that the Applicant's Prison Offender Manager (POM) and his COM supported a decision releasing the Applicant but with a more robust risk management plan (RMP) with the addition of GPS tagging. He was duly released for a fourth time on this sentence in January 2020. He remained in the community until he was recalled on 20 May 2022. His recall was *"linked to cocaine misuse and placing himself outside of supervision"*. Indeed, he did not in fact return to custody until 23 June 2022 having spent five weeks unlawfully at large. He had been released on four occasions during his sentence and on each occasion, he had been recalled to custody.

### **The Secretary of State's Referral**

12. On 23 January 2023, the Applicant's case was referred to the Parole Board by the Respondent under section 31A of the 1997 Act to consider whether or not it would be appropriate to terminate his licence. In the event of the Board not agreeing to terminate the Applicant's licence, it was also asked to consider whether or not it would

be appropriate to suspend the supervisory elements of the licence or add/amend/vary any additional conditions contained within the licence.

13. On 9 June 2023, the Parole Board Member considered the application by the Respondent and concluded that she was unable to make a determination with regard to the referral by the Respondent because it was unclear whether the Applicant *"is aware of the report dated 31 March 2023 or that he had an opportunity to make representations regarding the amended IPP Termination application form provided by the Probation Service"*.
14. An additional direction was made by the Parole Board Member on 9 June 2023 who concluded that *"the recall review should take place first followed by consideration of the IPP Termination Application"*.
15. After the Applicant's most recent recall, his oral hearing was held on 25 August 2023 after which the panel's fifth release was ordered with a number of conditions imposed on him with the earliest release date being October 2023 to an approved premises. The panel found that the Applicant's fourth recall was *"appropriate"*.
16. An IPP Progression Panel met on 5 September 2023, and it did not support the suspension of supervision due to *"ongoing concerns with regard to risk taking and reckless decisions/ behaviour"* on the part of the Applicant. It was explained that these concerns were *"further exacerbated by ongoing cocaine and alcohol use, problems in managing his relationship with others, including recent safeguarding concerns with known adults and children"*. In addition, it was pointed out that the Applicant *"struggles to access and constantly engage with or consolidate the skills he has for recovery"*. According to the panel, further indicator of the risk posed by the Applicant is that he *"gravitates to negative associates"*. All these matters *constituted "identifiable indicators of a risk of serious harm, and [were] likely to give rise to a further offence, the nature of which is likely to cause serious harm"*.
17. After the Applicant's recall, he has engaged well with the prison regime and with the offending behaviour work available to him as well as completing a TSP refresher workbook, a training course addressing decision making and better ways of thinking which received positive feedback. In addition, he had participated in a group, programme lasting four weeks entitled NUDGE which focusses on lifestyle skills and making changes. He has also engaged with drug and alcohol work as well as taking medication for anxiety and referring himself for bereavement counselling. This work will hereinafter be referred to as the *"the Applicant's positive engagement factors"*.

### **Current parole review**

18. A Parole Board Member considered a dossier consisting of 264 pages which included an application for the Termination of an IPP licence dated 20 September 2023 and the Respondent's referral dated 23 January 2023.
19. The Applicant's solicitor made written representations. The Respondent did not make any representations. No victim impact statement was provided. There was no evidence which could not be provided to the Applicant.

## The October Decision of the Parole Board Member

20. The Parole Board Member was satisfied that it was necessary for the protection of the public that the Applicant be subject to his IPP licence as there was *"insufficient evidence that [the Applicant] can self-manage risk when the monitoring and supervision is removed."* The Parole Board Member also did not recommend that there should be suspension or amendment or variation of the supervisory elements of the Applicant's IPP licence *"for similar reasons."*

21. The reasoning of the Parole Board Member was that:

- (a) Although the Parole Board Member recorded and did not challenge the submission that *"in the time [the Applicant] has been on(sic) the community on licence [he] has not committed any further violent offence and is no longer a danger to the public"* or the Applicant's positive engagement factors, nevertheless, the Applicant's behaviour at the time of his recent recall in 2022 was assessed as *"highly concerning ..due to the fact that he continued to place himself in risky situations, his inability to implement strategies to avoid alcohol and misuse and his relapse into cocaine misuse and a failure to seek support to address this"*; and also that
- (b) Despite the Applicant *"participating in interventions and treatment on past periods in custody and the community, [he] appears unwilling or unable to implement skills and strategies for managing his use of cocaine and making better decisions"*.
- (c) Although after recall the Applicant *"engaged well with the prison regime and with the offender behaviour work available to him"* which includes completing a TSP refresher workbook with positive feedback and engaged well with much drug, alcohol and other offender behaviour work available to him, *"there is no clarity why he cannot desist from drug misuse after lengthy periods in the community"*;
- (d) The Applicant has been recalled to custody on four occasions during his current sentence, on two of those four occasions on which the Applicant was recalled he was unlawfully at large and on one of those occasion, he was unlawfully at large for five weeks while on the other occasion he was unlawfully at large for more than two weeks;
- (e) The Applicant was then currently assessed to pose a medium risk of violent reoffending and if he does commit another offence, he was then assessed to pose a high risk of causing serious harm;
- (f) The Parole Board Member *"is satisfied it is necessary for the protection of the public that [the Applicant] be subject to his IPP licence [and there is insufficient evidence that the Applicant can self-manage risk when the monitoring and supervision is removed]"*; and that
- (g) *"for similar reasons, the Duty Member does not recommend that supervision be suspended."*

(These reasons will hereinafter collectively be referred to as *"the Parole Board Member's Conclusions"*)

## The Relevant Law

*Parole Board Rules 2019 (as amended)*

*Irrationality*

22. 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,

- a. *"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."*

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

*Other*

24. 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.

25. 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 craftsmanship."*

**The reply on behalf of the Respondent**

26. PPCS stated in an email dated 19 October 2023 that the Respondent was not making any representations in response to the Applicant's reconsideration application.



## Discussion

27. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those 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.
28. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.
29. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they 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.
30. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.
31. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

## Ground 1

32. The first ground of challenge is that reasons for the decisions are irrational because the *"reasons for the [for the Decisions] seem to have now changed to [the Applicant] being impulsive and not open with his Community Offender Manager [COM]"*. I have concluded that this ground must be rejected for four reasons which individually and cumulatively show why there is no merit in this ground.
33. The first reason why this ground fails is because there is no evidence which supports the contention that the reasons for the October Decision *"seem to have now changed"* to the Applicant *"being impulsive and not open with his [COM]"*. Indeed, crucially, the Parole Board Member put forward in the October Decision totally different clear reasons from those complained of in ground 1 for not terminating or suspending the Applicant's IPP licence. It is noteworthy that when explaining the October Decision under challenge in that decision section of the October Decision, the Duty Member explained the justification for those conclusions was that *"it is necessary for the protection of the public that the Applicant be subject to his IPP licence [and that] there is insufficient evidence that [the Applicant] can self manage when monitoring and supervision is removed"*. Those cogent factors continue to be the reasons for the decision, and it has not been argued, let alone established, that

the Parole Board Member was irritational and/or was not entitled to rely on those reasons for making the decision or that they did not rely on those factors.

34. A second or alternative reason why this ground cannot succeed is that nothing has been contended, let alone established, to show that it would have been irrational for the Parole Board Member to rely on these factors specified in her explanation and referred to in the last paragraph or in the Parole Board Member's conclusions (which are set out in paragraph 21 above) even if the reasons for the decision "*seem to have now changed to the Applicant being impulsive and not open with his [COM]*".
35. Nothing has been put forward to show that relying on these two matters was irrational in the light of the Applicant's admissions especially as it is explained in the October Decision that the Applicant "*accepts that he avoids being open and honest with the supervising officer, but he cannot accept why he does this [and] he admits he is somewhat impulsive*". In other words, the Applicant accepts that the matters set out in ground 1 are correct. In addition, the grounds for the Applicant's four recalls to custody, his ongoing cocaine and alcohol use and his decision to go absent without leave together with the reasons for failing to return to prison show clearly that he has acted impulsively.
36. To show that the changes were irrational, the Applicant would have to establish that appearing to change the reasons for the October Decision not to terminate the Applicant's licence or to add, amend or vary it was irrational as being in the words of the Divisional Court in the **DSD case** set out in paragraph 22 above "*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.*" In the light of the evidence and especially the Applicant's admissions and the Parole Board Member's reasons, the Applicant fails to establish that it was irrational either to change the reasons or to rely on the impulsive conduct of the Applicant or his lack of openness with his COM.
37. A third further or alternative reason why this ground fails is because, as has been explained in paragraph 27 above, reconsideration should not be ordered unless 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. So it becomes necessary to consider if the fact that the reasons for the ground under challenge seem to have now changed to being impulsive and the fact that the Applicant was not open with his COM constitutes an error of fact of an egregious nature and which can also be shown to have *directly contributed* to the conclusion arrived at by the panel to refuse to terminate or to suspend the Applicant's licence.
38. Even if the panel's alleged error sets out in ground 1 constituted an error of fact of an egregious nature, I do not consider that this error or alleged error *directly contributed* to the decision under challenge and that is because apart from the ground 1 complaints, there was an extremely powerful case in support of the conclusion that the panel was entitled to reach the decisions under challenge as set out in the Parole Board Member's Conclusions in paragraph 23 above. Those reasons include the facts that there was cogent evidence that (i) the Applicant was recalled 4 times and it has not been contended (let alone established) that these recalls were wrong; (ii) he was unable to desist from drug misuse; (iii) on two of the four

occasions when he was recalled, he was unlawfully at large for more than 2 weeks; (iv) he is assessed as posing a high risk of serious harm if he were to be released; and/or (v) there is insufficient evidence that the Applicant would be able to manage himself the risk he would pose after the removal, suspension, amendment or variation of the monitoring and supervision regime to which he is now subject.

39. A fourth and alternative reason why this ground must be rejected is that due deference has to be given to the expertise of the panel in making its decisions under challenge, including in deciding on the risk that would be posed by the Applicant if the Applicant's IPP Licence was to be terminated or if the supervisory elements of that licence were suspended.

## Ground 2

40. This ground is that the October Decision were irrational *because "a lot of weight has been placed [in the October Decision] on the current recall reasons, in particular his relationship with his ex-partner, without the Parole Board Member considering the fact that that he has not committed a violent offence since the IPP sentence was imposed"*. I have carefully considered the submissions of the Applicant and his legal representative before concluding that this ground must be rejected for five reasons which individually and cumulatively show why there is no merit in this ground.

41. First, the Parole Board member, who was considering how the Applicant would behave in the community, recorded in the decision without contradiction the submission of the Applicant's legal representative that *"in the time [the Applicant] has been on(sic) the community on licence [he] has not committed any further violent offence"*. This would show that the Parole Board Member considered this matter.

42. Second, there is no evidence that *"a lot of weight has been placed [in the Decision] on the current recall reasons, in particular his relationship with his ex-partner"*. As I have already explained, the Parole Board member did not mention these matters in the decision when instead she explained that the Applicant's IPP licence *"is necessary for the protection of the public [and that] there is insufficient evidence that [the Applicant] can self manage when monitoring and supervision is removed"*. Those cogent factors were the reasons for the decision, and it has not been argued, let alone established that the Duty Member was not entitled to rely on those reasons for making the decision or that it was irrational to do so.

43. Third, for ground 2 to show that the decision was irrational, the Applicant would have to establish that by placing *"a lot of weight on the current recall reasons, in particular his relationship with his ex-partner"* the Parole Board Member satisfied the high test for irrationality set out in the **DSD** case which requires that the panel Board Member's conduct has to be *"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."* In the light of the evidence and especially the panel's reasons, the Applicant has failed to identify any cogent factors which establish that it was irrational to have placed *"a lot of weight on the current recall reasons, in particular his relationship with his ex-partner."*



44. A fourth or alternative reason why ground 2 fails is, as has been explained in paragraph 29 above, reconsideration should not be ordered unless 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. So, it becomes necessary to consider if the Parole Board Member made error of fact of an egregious nature by placing "*a lot of weight on the current recall reasons, in particular his relationship with his ex-partner*" and that this can be shown to have *directly contributed* to the conclusion arrived at by the panel to refuse to terminate or to suspend the Applicant's licence.
45. I have concluded that even if the panel's alleged errors sets out in ground 2 constituted an error of fact of an egregious nature, I do not consider that this error *directly contributed* to the decision under challenge and that is because apart from the alleged error, there was an extremely powerful case in support of the conclusion that the panel was entitled to reach the decisions under challenge as set out in the panel's factors in paragraph 23 above. Those reasons include the matters previously stated in the last sentence of paragraph 38 above.
46. Fifthly, an additional or an alternative reason why this ground must be rejected because due deference has to be given to the expertise of the panel in making its decisions under challenge for the reasons explained in paragraph 39 above.
47. I am conscious that the Applicant has been and remains subject to the IPP licence for more than 15 years which is more than 11 years after his tariff expired and if the Applicant's behaviour improves, a further application might be made in the near future to terminate the Applicant's IPP Licence and/or to suspend the supervisory elements of that licence.

## Conclusion

48. For all these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber**  
**3 November 2023**