

[2023] PBRA 24

## Application for Reconsideration by Tonge

### Application

1. This is an application by Tonge ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') which decided not to direct his release on licence and not to recommend a move to an open prison. The panel's decision was issued on 1 December 2022 after an oral hearing on 11 November 2022.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

### Background and history of the case

3. The Applicant is aged 34. He is serving a sentence of imprisonment for public protection ('IPP') for attempting to cause grievous bodily harm ('the index offence'). The sentence was imposed on 3 December 2010, when the Applicant was aged 22, and his tariff was set at 30 months less the time which he had served in custody on remand.
4. He had previously accumulated a significant criminal record. His first conviction was at the age of 17, by which time he was associating with negative peers and misusing drugs and alcohol. His use of drugs had begun with cannabis and later progressed to other drugs including those in Class A (the most dangerous category). He also suffered from mental health problems, including paranoia which appears to have resulted from some of the substances which he was misusing. His previous record of offending included a number of convictions for offences of violence. Most of his convictions were linked to his misuse of drugs or alcohol.
5. On the day of the index offence the Applicant and his cousin were in a block of flats. They were making a lot of noise. The victim came out of his flat. The Applicant told him he was waiting for his neighbour. The victim invited the Applicant into his flat to wait. While there the Applicant started searching parts of the flat. He then left but broke into another flat where he stole a knife and a hat. The victim saw him leaving that flat and challenged him. The Applicant stabbed him four or five times in the back and threatened to kill him. The knife broke but the Applicant then stabbed the victim in the head with the broken knife before leaving. He has stated that before the attack he had drunk at least a bottle of vodka and a bottle of cider, as well as using Class A drugs.
6. The Applicant pleaded guilty to the index offence. He also pleaded guilty to associated offences of burglary and assaulting a police officer by spitting at him



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during his arrest. For those other offences he received determinate sentences which expired long ago.

7. He has been released on licence twice and recalled to prison twice during his IPP sentence.
8. His first release on licence was in April 2020. He was recalled on 30 December of that year. He had been residing, as required, at a probation hostel where he had done well for a time. However, things began to go wrong towards the end of the year. He used illegal drugs but admitted it to probation. Before Christmas he obtained permission to go and visit family members in a different part of the country. While there he met a girl he knew and went back to her house where they had sex. He then went out walking all night and met someone else who gave him a Class A drug, with which he injected himself. His family members apparently did not want him to return to their house so he went to stay with a sibling. A few days later he handed himself in to the authorities.
9. He was re-released on licence on 5 January 2022, to another probation hostel, but was recalled again on 14 March 2022. There had been a series of problems which culminated in a decision to withdraw his bed space at the hostel and a decision by probation that his risk to the public could not be managed safely in any other accommodation in the community. These developments will be discussed in more detail below.
10. The Applicant's case was referred to the Board in April 2022 and in the following month a direction was made by a single member of the Board that it should proceed to an oral hearing.
11. At the oral hearing on 11 November 2022 evidence was given by the Applicant and by three professional witnesses. The professional witnesses were:
  - a prison Psychologist (Ms A);
  - the Applicant's Prison Offender Manager ('POM') (Ms B) who is responsible for his supervision in prison; and
  - his Community Offender Manager ('COM') (Ms C) who will be responsible for his supervision in the community if and when he is released on licence.
12. As noted above the panel's decision was issued on 1 December 2022. This application for reconsideration of that decision was submitted on 13 December 2022 by the Applicant's solicitors on his behalf.

## **The Relevant Law**

### ***The test for release on licence***

13. 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***



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14. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
15. Reconsideration will only be directed if one of more of the following three grounds is established:
- (a) It contains an error of law or,
  - (b) It is irrational or,
  - (c) It is procedurally unfair.
16. 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)).
17. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. Its decision not to recommend a move to open conditions is not eligible for reconsideration by the Board: any request for a move to open conditions, contrary to the panel's recommendation, must be made to the Secretary of State.

### ***The test for irrationality***

18. 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."*

19. 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.
20. The Administrative 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.
21. 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**.

### **The request for reconsideration in this case**



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22. This application for reconsideration is made on the ground of irrationality. No error of law or procedural unfairness is suggested. The solicitors advance a number of reasons in support of their submission that the panel's decision not to direct the Applicant's release on licence was irrational. Those reasons may be summarised as follows:

- (1) The panel's decision was not consistent with the evidence given by the witnesses at the hearing;
- (2) The panel's conclusion that any risk management plan was likely to be ineffective was not consistent with the evidence of the professionals;
- (3) The Applicant was only recalled for the second time because his bed space had been removed: his risk had been manageable up to that point;
- (4) A suggestion by the panel that the Applicant had only engaged with community drug services in the community in order to obtain a prescription for a substitute for illegal drugs was not justified;
- (5) Although the Applicant had returned to using drugs his behaviour was otherwise good and not '*risk escalating*';
- (6) Although at one stage whilst on licence the Applicant disengaged from professionals he re-engaged and was engaging well when he was recalled;
- (7) Since his recall the Applicant has engaged well with drug services in prison; and
- (8) Since his recall there has been no '*offence paralleling*' behaviour.

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

23. The Public Protection Casework Section ('PPCS') on behalf of the Secretary of State has stated by e-mail that he offers no representations in response to the application.

### **Documents considered**

24. I have considered the following documents which have been provided for the purpose of this application:

- (a) The dossier provided by the Secretary of State for the Applicant's case, which runs to page 276 and includes a copy of the panel's decision letter;
- (c) The representations submitted by the Applicant's solicitor in support of this application; and
- (d) The e-mail from PPCS referred to above.

### **Discussion**

25. The solicitors' submissions are admirably concise and to the point. They do however need to be examined along with the evidence in the case. It is necessary to set out a little more detail about that evidence than the brief summary in the first section of this decision, and then to consider each of the solicitors' points in turn.

### **The Applicant's second period on licence**

26. The Applicant arrived at the probation hostel on 5 January 2022.



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27. On 9 and 11 February 2022 he tested positive for Class A drugs (he later admitted having used one drug but not any others). The hostel staff were also concerned about his associates and the amount of time he spent away from the hostel at undisclosed locations without saying who he was with. He was later to admit spending time with other drug users.

28. He then failed to attend a meeting with his keyworker and the hostel manager. He was said to have been rude and aggressive towards his then COM, and his engagement was reported to have generally declined. In the circumstances an application was made to the Parole Board to vary his licence conditions to include electronic monitoring of his movements. It was felt that with that, and increased drug testing, his risk could still be managed in the community.

29. On 1 March 2022 the Applicant again tested positive for Class A drugs. However, his engagement with hostel and probation staff had shown some improvement. It was agreed that he could move to supported accommodation, but he correctly reported that the proposed accommodation was unsuitable so his place at the hostel was reinstated while alternative accommodation was sought.

30. He was engaging with the local substance misuse service and was given a prescription for a substance designed as a lawful substitute for illegal drugs. However, he continued to use illegal drugs as well as the substitute. Information from the substance misuse service showed that his illegal drug use had increased to include daily use of a Class A drug.

31. The electronic monitoring condition was agreed by the Parole Board. However, it appears that on 8 March 2022 he did not keep the battery charged as required.

32. The Applicant was recalled on 14 March 2022 after staff at the probation hostel reported concerns that he was attempting to intimidate and indirectly threaten another resident into providing him with money. He was also reported to have been aggressive to staff who suspected him of stealing DVDs. They also said that they had found tinfoil with an imprint of a table in his room (which he denied).

33. It had been part of the plan for supporting the Applicant in the community that he would engage with a specific Intensive Intervention and Risk Management Service ('IIRMS') which was run in the relevant area in conjunction with the NHS. This project provides all-round support including psychological intervention, substance misuse support, housing advice, Community Mental Health support, and more besides. It has a team of probation officers one of whom was assigned to co-work the case with the Applicant's then COM. Participation in that project is voluntary and therefore could not be made the subject of a specific licence condition. It had been anticipated, however, that the licence condition requiring the Applicant to address his offending behaviour would ensure that he adhered to the requirements of the project.

34. That appears to have turned out not to be the case. Whilst the Applicant's then COM reported that he had engaged positively with probation appointments (not always attending in person as required but staying in contact by telephone) and



he was engaging with the appropriate substance misuse service, his engagement with IIRMS was poor: he attended one group session but his behaviour was said to have been too chaotic to continue with the group. It was therefore decided that he should attend for one-to-one sessions, but he did not attend when one was arranged.

### ***The Applicant's progress since his second recall***

35. On arrival at the prison following his recall the Applicant admitted recent use of Class A drugs which he had injected intravenously. He immediately engaged with the prison substance abuse team. To his great credit he has now managed not only to abstain from illegal drugs but also to wean himself off the substitute substance.
36. Unfortunately, he was not so co-operative with his then COM and the clinical lead for the IIRMS service who had hoped he would be willing to re-engage with supervision and support services. He declined to attend a video link with them.
37. Ms C, who became his new COM in May 2022, managed to establish contact with him and interviewed him by video link in July 2022. He was said to have taken no responsibility for his recall, blaming his previous COM and the staff at the probation hostel for not understanding him, and a family member for going on holiday. The panel noted that this remained his stance when he gave evidence at the hearing.
38. According to Ms C he became agitated in his video link interview and struggled to understand why staff might find him aggressive. A further video link arranged in August 2022 was abandoned when the Applicant left before the meeting began. However, he did make two telephone calls to IIRMS in which he asked about what he should do in custody to secure release.
39. The Applicant engaged with the psychological risk assessment by Ms A in August 2022 but refused to meet with Ms A without a particular prison officer present and walked out of the disclosure meeting (he has said that he walked out because he had been taught to take flight rather than fight if he felt stressed, and he did not want to get angry).
40. His behaviour on the wing in prison was reported to have been good. He had a proved adjudication, for possession of a knife, but it was accepted that its purpose was to harm himself, not anybody else. It was clear that his mental health fluctuated and on a number of occasions steps were taken by the prison authorities to reduce the risk of self-harm.

### ***The points made by the Applicant's solicitors***

#### **Point 1: The panel's decision was inconsistent with the evidence given by the witnesses at the hearing**

41. Under the present rules made by the Secretary of State the professional witnesses are no longer permitted to make recommendations as to whether a prisoner should or should not be released on licence. That is a matter entirely for



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the Parole Board to decide, having considered the whole of the evidence and all relevant factors. As has been pointed out, the Board's assessment of a prisoner's suitability for release on licence is a 'multi-factorial' and 'multi-dimensional' one. Professional witnesses can of course, give their opinions about the level of the prisoner's risk of serious harm to the public and such matters as its imminence or otherwise, which are among the matters which the Parole Board will wish to consider.

42. Parts of the evidence given by the professional witnesses in this case were quite favourable to the Applicant, but others were less so.
43. Ms A produced a detailed report in August 2022 following her assessment of the Applicant's risk. She assessed his risk of future violence as being at the moderate (as opposed to high or low) level. She believed that he needed help to enable him to progress and to manage his risks, and that he would benefit from developing his coping, emotional management and problem-solving skills. It was, in her view, clear (from his previous offending and his recent failures on release and the problems he had experienced on return to custody) that he has struggled to cope when he is faced with external stressors. This has led to a downward spiral in his mental health and caused him to return to substance use or other unhelpful coping mechanisms.
44. The necessary work, she wrote, could be accessed in closed conditions or in open conditions or in the community. The avenue through which he might access it in the community would be the IIRMS service which is, as noted above, a voluntary one. She observed that, whilst the Applicant had expressed a desire to work with that service again, he might choose not to engage in it, or to engage inconsistently. It was not clear to her what else could be offered in the community if that happened. Despite the risk management plan being robust, she believed that it might not suffice without the Applicant's engagement in the holistic and therapeutic service offered by IIRMS.
45. She concluded her report by writing: *'If release is recommended for [the Applicant], I assess his risk of breach of licence to be moderate-high. This is based on his previous two releases where he has experienced difficulty in coping with daily life stressors .... It should be noted however that [he] has managed other stressful situations well, such as arriving to his move-on accommodation and finding it littered with drug paraphernalia - he contacted his COM immediately and left the accommodation on her instruction. [His] ability to cope appears to depend on how he is managing his mental health, his levels of loneliness and boredom, and his perceived access to support. If he engages fully and productively with [IIRMS] as soon as possible, this risk would be mitigated to a degree.'*
46. In her oral evidence Ms A said that the Applicant has quite good insight into his mental health difficulties and recognises his triggers, but that he forgets how to respond effectively to those triggers when he is distracted by others in the community and, although he is medicated for his mental health issues, he still experiences coping problems when he is taking it.



47. She confirmed her view that the Applicant needs to consolidate skills in the areas of coping, emotional management and problem solving. She noted that he struggles with external stressors. She considered that his strategy to avoid substance misuse is reliant on external factors and is *'not quite enough at the moment.'*
48. Ms A was concerned that two of her attempts to meet with the Applicant had been rebuffed. She had hoped to attend the review of the measures designed to reduce his risk of self-harm but he had refused to agree to that. She expressed the opinion that the Applicant disengages from people if he does not think they will help him to progress.
49. Ms B told the panel that the Applicant could see the benefits of IIRMS in the community but, as the engagement could only be on a voluntary basis, he had lacked the motivation to engage. The Applicant himself reiterated that to the panel in his evidence, suggesting that he would need it to be a licence condition (which is not possible) if he were to comply with it.
50. Ms B said that non-engagement with licence conditions would be a *'massive risk'*. She described the Applicant as impulsive (which appears to be consistent with the evidence) and said that it was difficult to get information out of him. She accepted that his recognition of what went wrong on licence had *'massively improved'* but believed that he should complete one-to-one consolidation work which could be done either in closed or in open prison conditions.
51. Ms C explained in her evidence that her role is as part of the IIRMS cluster of supervision and support services, and she will only remain the Applicant's COM while he engages with IIRMS (otherwise his supervision will revert to probation in his home area). She said that the Applicant had made further contact with IIRMS since his two calls referred to above, and she had responded to him but he had not replied. She found that there were discrepancies between the Applicant's actions and behaviours and his stated intentions, which would make it hard to manage him. She was concerned by his conduct in custody and did not know what would be different if he were to be released now. She pointed out that when he was last on licence he had had *'everything at his disposal'* (i.e. the support services) but had not taken advantage of it.
52. Ms C saw some benefit in the Applicant moving to an open prison. She had not been able to explore the benefits of that with him because of his disengagement while in custody. She noted that on the two occasions on which he had been released on licence it had been straight from closed conditions, which had not been a success, and that a staged progression for him would be advantageous.

### ***The panel's conclusions***

53. A panel of the Board is, of course, not bound to accept the evidence (whether factual or opinion) of professional witnesses, even if they are unanimous. It is however well established that if a panel is going to reject factual or opinion evidence it needs to provide defensible reasons for doing so.





54.I have carefully considered the evidence of the professional witnesses in this case, which I have summarised above, and I am afraid I am not persuaded that the panel's decision was in any way inconsistent with that evidence: the panel has provided clear and persuasive reasons for its own conclusions. It is worth setting out the panel's reasons in full: they were as follows:

*'[The Applicant] has repeated a long-evidenced pattern of substance misuse which is inextricably linked to his risk of causing serious harm. The panel acknowledged [that the Applicant] has not been violent in a long time, but his risk factors are present in the form of poor coping strategies, substance misuse, poor insight into the causes of his offending and what he must do to prevent further offending. Despite assurances that he would engage in supervision, including to previous panels of the Parole Board on two occasions, [the Applicant] has not been able to deliver on his promises.'*

*'[The Applicant] told the panel that without being obligated to engage with [IIRMS] he did not have the motivation to do so. This is concerning as the panel cannot impose conditions for treatment and the [IIRMS] service is voluntary. [The Applicant] has shown little motivation for engaging with his COM [whilst] in custody and has shown that he will disengage with anyone who he considers is not helping him in the way he wants them to, for example in his interaction with Ms [A] and Ms [C]. While [the Applicant] describes his engagement differently, the panel were satisfied that he has shown a pattern of behaviour over a number of years where [he] excuses or denies his negative conduct.'*

*'[The Applicant] minimised his responsibility for his failures; this is a pattern which is notable throughout his sentence. [The Applicant] should not be a passive participant in his life, although it is understandable (if unacceptable) that an indeterminate sentenced prisoner may respond in this way. However, given the interventions he has taken part in and the opportunities that have been provided to [him] in the community these can only help so much without [the Applicant's] buy-in.'*

*'[The Applicant's] mental health has been poor. He has self-harmed repeatedly and was still doing so only a few weeks before the hearing. This instability is concerning and the panel were not satisfied his mental health was sufficiently robust to be able to cope in the community. [The Applicant] had told the panel that his substance use relapse was partly as a result of his father going away on holiday. The panel considered this level of dependence to be of concern, and [the Applicant's] inability to turn to professionals who were invested in ensuring he made a success of his release shows very poor judgement and a lack of trust. The panel did not have evidence that any significant progress had been made in this regard since his recall as he has displayed similar behaviours since.'*

*'[While the risk management plan is as robust as it reasonably can be, it obviously relies exclusively on external controls. The panel noted that [the Applicant] was recalled before any serious harm could occur, but it also took into account [his] repeated failures both in open conditions and on release. Although [the Applicant] denied it, the panel saw parallels with*



*his alleged bullying behaviour at the [probation hostel] and his prior offending. The panel considered without significant progress on [the Applicant's] ability to utilise his own internal controls that any risk management plan is likely to be ineffective. Accordingly, the panel did not consider that [the Applicant] met the test for release and did not direct his release.]'*

55. These reasons cannot, I believe, be faulted and were entirely consistent with the evidence.

**Point 2: The panel's conclusion that any risk management plan was likely to be ineffective was not consistent with the evidence of the professionals**

56. For the reasons explained above I am not persuaded that that is the case, and if there had been any inconsistency the panel was fully entitled to its own conclusion.

**Point 3: The Applicant was only recalled for the second time because his bed space had been removed: his risk had been manageable up to that point**

57. This is, up to a point, correct but does not mean that the panel was not entitled to its conclusion. Probation had been very patient, in the face of repeated failures by the Applicant to do what was reasonably expected of him. They were faced with the familiar difficulty of deciding whether the Applicant had crossed the line at which recall was necessary. They had given him a series of chances but eventually decided that the line had been crossed. Whilst on the surface engaging with the community substance abuse service and receiving the substitute for illegal drugs, he had continued to misuse Class A drugs, and he had failed to take advantage of the other kinds of support available to him through the IIRMS (which would no doubt have been more challenging).

58. The panel concluded, and was entitled on the evidence to conclude, that the decision to recall the Applicant (on the basis that his risk to the public had become unmanageable in the community) was appropriate. The panel then went on to consider the present position, and for the reasons explained above it was entitled to conclude, as it did, that the Applicant's risk still remained unmanageable.

**Point 4: A suggestion by the panel that the Applicant had only engaged with community drug services to obtain a prescription was not justified**

59. One reason for the Applicant's engagement with drug services was certainly to obtain a prescription for the (legal) substitute substance. He may have had a genuine intention to reduce his dependence on drugs, but his continued (and increasing) use of illegal Class A drugs while using the substitute substance would seem to cast doubt on that. If his intention was genuine, he was completely unable to carry it into effect. Even if there was some force in the solicitors' criticism of the panel's interpretation of his intentions, this was only a small point and the panel's decision would clearly not have been any different if it had taken a more charitable view of the Applicant's intentions.



**Point 5: Although the Applicant had returned to using drugs his behaviour was otherwise good and not 'risk escalating'**

60. His behaviour was certainly otherwise good but, as the panel pointed out in its decision, his risk factors remain present in the form of poor coping strategies, substance misuse, poor insight into the causes of his offending and what he must do to prevent further offending. He was recalled (as he had been on the previous occasion) before he could cause any serious harm to anyone, but that did not mean that he did not pose a continuing risk of such harm. The panel was entitled to its view that, for the reasons clearly expressed in its decision, he does still pose such a risk.

**Point 6: Although at one stage the Applicant disengaged from professionals he re-engaged and was engaging well when he was recalled**

61. This is correct but it did not mean that his recall was inappropriate or that he did not (and does not) pose a risk of serious harm to the public in the community.

62. As related above, the Applicant's engagement with professionals remains patchy and in particular there are serious doubts about his willingness and ability to engage with the services offered in the community by IIRMS.

**Point 7: Since his recall the Applicant has engaged well with drug services**

63. This again is true and very much to the Applicant's credit, but for reasons explained above the panel was entitled to its view that more than engagement with drug services is required if the Applicant is to succeed in establishing a pro-social and offence-free life in the community. That is where the other services offered by IIRMS might fill the gap if the Applicant could be relied upon to take advantage of them. The panel was entitled to its view that he could not.

**Point 8: Since the Applicant's recall there has been no 'offence paralleling' behaviour**

64. This again is true. The problem with this point is, however, that in a case like this the absence of offence paralleling behaviour in prison carries relatively little weight when the prisoner's principal risk is of another failure on licence in the community resulting from substance misuse and other associated risk factors.

**Decision**

65. I have given very anxious consideration to this case, especially as the Applicant is an IPP prisoner who is many years 'over tariff'. It is impossible not to have considerable sympathy for him. However, the statutory test for release must be applied, and in considering this reconsideration application I have to remind myself of the test for reconsideration which is laid down in the Rules.



66. This is a case in which views might reasonably differ. Some panels might have decided it differently but I cannot see any basis for finding that this panel's decision was in any way irrational. The panel clearly examined and assessed the evidence and concluded that the test for release was not met. I cannot find any fault in its reasoning or conclusion. I must therefore refuse this application.
67. The solicitors conclude their submissions by stating: '*The decision is so odd that the panel have not even been able to put forward what they would want for [the Applicant] to actually achieve in order to satisfy a future application for release.*' In fact it is not within the Board's remit to make recommendations about future work to be completed in prison by a prisoner: it is a matter for the Secretary of State to decide what should be offered to him. A number of options are referred to by Ms A in her report, and the Secretary of State will no doubt wish to consider those.

**Jeremy Roberts**  
**10 February 2023**



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