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**[2024] PBRA 24**

**Application for Reconsideration by Green**

## Application

1. This is an application by Green (the *Applicant*) for reconsideration of a decision issued on 30 November 2023 of a panel of the Parole Board (the *Panel*) following an oral hearing held remotely by video on 15 November 2023. The Panel decided not to direct the Applicant's release and did not make a recommendation for his transfer to open conditions.

2. Rule 28(1) of the Parole Board Rules 2019, as amended by the Parole Board (Amendment) Rules 2022, (the *Parole Board Rules*) provides that applications for reconsideration may be made in eligible cases (as set out in Rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the following papers:

   - an application for reconsideration dated 20 December 2023 (the *application*) submitted by the Applicant's solicitors;
   - the Panel's decision issued on 30 November 2023; and
   - a dossier of 418 pages.

4. I have also listened to the recording of the oral hearing which was available in two parts. The recording was incomplete as the evidence of the Applicant had not been recorded and the chair's microphone was either not functioning or had not been turned on which meant that the chair's voice could not be heard on the recording.

## The reply on behalf of the Secretary of State

5. The Secretary of State did not make any submissions.

## Background

6. The Applicant was convicted of the murder of a criminal associate. He shot the victim twice with a sawn-off shotgun and then buried his body in the garden with the help of a family member. Later a patio was laid over the victim's grave. The murder was uncovered in the course of investigations into unrelated firearms offences for which the Applicant was also convicted.

7. On 29 March 2000, the Applicant was given a mandatory life sentence for the murder with a minimum tariff of 14 years. His tariff expired in February 2013. He was also given a life sentence for possession of a firearm with intent to endanger life and four concurrent determinate sentences for other firearm offences at the same time.

8. The Applicant's offending history evidences entrenched pro-criminal attitudes from a young age and a pattern of serious violence and weapon use.

**Request for Reconsideration**

9. The application for reconsideration is dated 20 December 2023.

10. The application was not made on the published form CPD 2 but I have accepted it as a valid application.

11. The main ground for seeking a reconsideration is that the Panel's decision was irrational. It is submitted that the Panel made a series of irrational decisions and that its approach to the evidence amounted to procedural unfairness.

**Ground 1: Irrationality**

12. It is submitted that the Panel made two "*evidential leaps*" which were not supported by the evidence and which "*were given significant weight by the panel in rejecting the professional opinions of the POM, COM, and independent psychologist*".

    (a) The first evidential leap the Panel is said to have made was to conclude that a female prison chaplain (*chaplain*) may have suffered physical or psychological harm as a result of the Applicant's behaviour in conjunction with others during an incident in October 2023. The Panel is said to have rejected without "*substantiating evidence*" the Applicant's testimony that he had asked the chaplain politely what was going on. The application states that there was no evidence in the dossier or at the hearing to suggest the chaplain may have suffered harm or psychological harm. The application describes this evidential leap as significant.

    (b) The second evidential leap the Panel is said to have made was to conclude that security intelligence that was graded high must have been generated by officers who were familiar with the Applicant's walk, speech, and behaviour. The application describes this evidential leap as a mistake of fact which was fundamental.

13. It is submitted that there was some mischaracterisation of the evidence given by the Applicant and certain witnesses. The Panel recorded in its decision that the Applicant stated that he had no risk factors and, on that basis, it concluded that this demonstrated a lack of insight on the Applicant's part. It is submitted that the Applicant made this statement in the context of active risk factors and that he had "*adopted the same line as did his POM, COM and the [prisoner-commissioned psychologist]*".

14. It is submitted that the Panel was wrong to conclude that the Applicant's prison offender manager (*POM*) omitted security information in her report. It is pointed out that the POM could not have included information about the incident involving the chaplain because it took place in October 2023 after she had submitted her report in June 2023.

15. It is submitted that the Panel made a factual mistake in stating that "*All agreed that he [the Applicant] needs consolidation work such as in a PIPE*" because only the prison psychologist had suggested that consolidation should take place in a PIPE.

16. It is submitted that the Panel unfairly impugned the credibility of the Applicant's community offender manager (*COM*) and the POM.

**Ground 2: Procedural Unfairness**

17. It is submitted that the Panel should have obtained further information about the incident involving the chaplain to enable them to make a sound and reasoned decision. This is because the facts were disputed and there was evidence which potentially supported the Applicant's account. This evidence includes that he had not been adjudicated and that the POM told the Panel said officers present at the incident had informed her that they did not consider that the Applicant had been aggressive or "*done anything wrong*". It is submitted that the Panel could have adjourned to obtain evidence from the chaplain and from the officers present at the incident.

**Current parole review**

18. The Secretary of State referred the Applicant's case to the Parole Board in September 2022. The case was directed to an oral hearing in December 2022. A remote hearing by video took place on 15 November 2023. This was the Applicant's seventh review and he was seeking release.

19. The Panel comprised a judicial member as chair, a psychologist member, and an independent member. Evidence was taken from the POM, the prisoner-commissioned psychologist, the prison psychologist, and the COM. The Applicant also gave evidence to the Panel.

20. The Applicant was located in a Category A prison at the time of the review and had been located in a Category A prison throughout his sentence. He had undertaken several accredited programmes to address his risks including the Enhanced Thinking Skills programme and CALM (Controlling Anger and Learning to Manage it). He had also spent time on the Dangerous and Severe Personality Disorder Unit from 2010 to 2014.

**The Relevant Law**

21. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The Panel correctly sets out the test for release in its decision letter issued on 30 November 2023. However, it does not set out the correct test for considering a recommendation to the Secretary of State for a progressive move to open conditions. The decision letter outlines a previous

test which had changed with effect from 1 August 2023. In addition, one of the members of the Panel stated in the hearing that the test includes an assessment of whether there is wholly persuasive case for the Applicant's transfer to open conditions. This does not form part of the Parole Board's test even though it is a factor which the Secretary of State takes into account in considering any recommendation for open conditions made by the Parole Board.

*Parole Board Rules 2019 (as amended)*

22. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A).

23. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (Rule 28(2)(a)), extended sentences (Rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (Rule 28(2)(c)) and serious terrorism sentences (Rule 28(2)(d)).

24. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

*Irrationality*

25. 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 paragraph 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."*

26. 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.

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

*Procedural unfairness*

28. 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.

29. 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.

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

*Other*

31. 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.

32. 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 draftsmanship.*"

33. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral

hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

**Discussion**

34. The application submits that the Panel's decision was irrational and/or procedurally unfair. References to paragraphs are to paragraphs in the Panel's decision. In considering irrationality, I have taken account of the matters set out below.

    (a) The reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be interfered with lightly. It is also not a means by which the member carrying out the reconsideration is entitled to substitute his or her view of the facts for the view of 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.

    (b) When deciding whether the Panel's decision was irrational, due deference has to be given to the expertise of the Panel in making decisions relating to parole.

    (c) Where the Panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that it 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.

    (d) 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.

35. **Ground 1: Irrationality** - I will address each submission made based on the evidence available to me.

36. The application refers to the first sentence of paragraph 3.53, "*On 16th October, [the Applicant] joined 11 others in behaviour which may have caused the lady chaplain harm or psychological harm possibly serious.*" and argues that there was no evidence in the dossier or at the hearing to suggest that the chaplain may have been caused harm or psychological harm. The submission points out that the Applicant was not adjudicated and that he met with the chaplain after the incident to apologise.

37. I consider this submission to be misconceived. The Panel explored the incident involving the chaplain thoroughly. The prison psychologist reported that the chaplain had described feeling threatened by the Applicant and had said that he had been personally abusive to her. The prison psychologist considered that the Applicant had been "*swept up*" in the situation and had responded to it impulsively.

The prison psychologist said that the risk in that situation "*was around psychological harm*" but pointed out that there had been officers at the scene who had been able to "*diffuse the situation*". This she told the Panel raised a concern for her about how the situation might have escalated had officers not been present to contain the situation. The Panel records, "*She [the chaplain] was escorted through the door by the officers*". The prison psychologist went on to express doubts about the Applicant's ability to apply his learning and skills to de-escalate or prevent escalation. I am satisfied that the Panel was seeking to draw attention to the Applicant's response to the incident and to convey that the Applicant's behaviour *was capable of* causing the chaplain harm or psychological harm. The Panel was not suggesting that the Applicant had actually caused the chaplain harm, either physical or psychological.

38. The submission states that the Panel rejected the Applicant's evidence that "*he was politely asking"* the chaplain what was going on with no substantiating evidence. I do not agree. The POM told the Panel that the Applicant had been waving his arms and speaking loudly while walking towards the chaplain. The chaplain reported feeling threatened leading to a negative behaviour entry being made on his record. Nothing suggests that the Applicant had spoken to the chaplain politely and, as the Panel pointed out, he met her after the incident to apologise to her. That suggests to me that he had reflected on his behaviour and having discussed it with the POM decided that an apology and an explanation were warranted. I conclude that the Panel did not make "*an evidential leap*" and that its decision in relation to this incident was reasoned and rational.

39. The second sentence of paragraph 3.52 states, "*The panel took into account that the security reports must have been generated by officers who were familiar with [the Applicant's] walk, speech, and behaviour because the sources were all graded high*." It is submitted that there was no evidence to support the assertion that the officers who generated the security intelligence were familiar with the Applicant's presentation. I must agree. According to prison service instructions published by the Ministry of Justice, security intelligence which is graded high is usually (i) derived from a source that is always reliable or mostly reliable; and (ii) information that is known to be true without reservation or known personally to the source but not to the officer. Although the Panel stated in paragraph 3.28 that the COM "*accepted that they [the adverse security reports] were obviously made by staff who knew [the Applicant] well and it followed that those references to "slurring and swaying" must have been behaviour out of the ordinary*", there is no information (and nor would I expect the prison's security department to disclose this information) about the sources of the security intelligence. I agree therefore that on this narrow point the Panel's decision was not rational but I do not agree that this mistake of fact was fundamental.

40. It is submitted that there was some mischaracterisation of the evidence given by the Applicant and certain witnesses. In its conclusion, which unfortunately is not paragraphed, the Panel stated, *"[The Applicant] has said that he has no risk factors. The Panel is concerned that his belief demonstrates a lack of insight. [The COM] and [the POM] have also stated that he has no risk factors and taking into account all the evidence in the dossier and at the hearing, the panel concludes that they underestimate the level of risk posed by [the Applicant]."*

41. I believe that in its attempt the summarise its thinking in the conclusion section of its decision, the Panel's drafting became rather imprecise. Having read the entirety of the Panel's decision, the Panel clearly records its understanding that the Applicant, the COM, the POM, and indeed the prisoner-commissioned psychologist were referring to current risk factors. In paragraph 3.19, the Panel sets out the Applicant's view of his risk factors, "*he did not think the list of risk factors set out by the previous panel of the Parole Board was relevant now*". In paragraph 3.9. the Panel records, "*[The POM] did not consider that any of the Risk Factors found by the previous panel of the Parole Board were relevant now. Indeed in her opinion there were no current risks to the public…"*. In paragraph 3.26, the Panel states, "*It was her [the COM's] opinion that [the Applicant] posed no current risk to the public although it was assessed as high in her report because he was as yet untested*". The Panel also records the prisoner-commissioned psychologist's position in paragraph 3.22, "*She too considered that none of the Risk Factors set out by the previous panel (07/01/21) were currently active."* I do not agree therefore that the Panel mischaracterised the evidence of the Applicant, the POM or the COM on risk factors.

42. On the issue of risk, the Panel considered that the COM and the POM had underestimated the Applicant's risk and provided justification for its view throughout the decision. One of the Panel's principal concerns was that the Applicant had been in a Category A prison since being sentenced in March 2000 and that a culture change could destabilise him since his management and reaction in a less restrictive environment were untested. The Panel noted that "*he has no pro-social life to return to, no particular skills or habit of abiding by the law*" and that the Applicant had "*limited protective factors*" and his family's support was untested.

43. It is submitted that the Panel was wrong to conclude that the POM omitted security information in her report. I do not agree. The POM submitted her report in June 2023 and did not include the security intelligence recorded on 4, 8, and 10 March 2023. In her evidence to the Panel, the POM acknowledged that she had not included this security intelligence in her report because she believed it was incorrect and there was no clear evidence that the Applicant had used illicit substances. The POM also did not include reference to a security report dated 1 March 2023 which was read out to the Panel by the prison psychologist.

44. It is submitted that the Panel made a factual mistake in stating that "*All agreed that he [the Applicant] needs consolidation work such as in a PIPE*" because only the prison psychologist had suggested that consolidation should take place in a PIPE. It is clear to me that the reference to the PIPE is given by way of example by the Panel and that the misunderstanding has arisen as a result of poor drafting.

45. It is submitted that the Panel unfairly impugned the credibility of the COM and the POM. I do not accept that this is a fair criticism of the Panel. While the Panel's choice of words in the conclusion section of its decision may be considered to be injudicious and somewhat strident, the Panel did not impugn the credibility of either witness. The Panel gives clear examples of why it decided to view the evidence of the COM and the POM "*with caution*".

46. **Ground 2: Procedural Unfairness** – it is submitted that the Panel should have obtained further information about the incident involving the chaplain to enable them to make a sound and reasoned decision because the facts were disputed and there was evidence which potentially supported the Applicant's account. I have discussed this incident and analysed the Panel's approach and consideration of the evidence. I am satisfied that the Panel had sufficient evidence to make its decision including evidence from the prison psychologist who had spoken directly to the chaplain. Therefore, there are no grounds to support the submission of procedural unfairness.

**Decision**

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

**H Emrys**
**23 January 2024**