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**[2024] PBRA 88**

# Application for Reconsideration by Bidar

## Application

1. This is an application by Bidar (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 28 March 2024. The decision of the panel was not to direct release.

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, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are the dossier consisting of 899 pages; the application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

## Background

4. On the 3 July 2009 the Applicant was sentenced in relation to offences of robbery and using a firearm to resist arrest. The Applicant was sentenced to an indeterminate sentence for public protection. The minimum term fixed by the judge was eight years and expired in July 2017.

5. The Applicant was on licence at the time of committing the index offences, having been earlier released from prison. The offences related to robberies, involving large amounts of cash. The Applicant and others targeted cash in transit security guards, he told a panel that he would take victims by surprise, snatching cash boxes. At one robbery the Applicant fired shots from a shotgun, in the vicinity of chasing police, to scare them.

6. In 2012, whilst serving his prison sentence, the Applicant was sentenced to three years and eight months in custody following his conviction for escape, attempted robbery, two further assaults occasioning actual bodily harm and three assaults of prison custody officers.

7. The Applicant was 21 at the time of sentence, he is now 36 years old.

## Request for Reconsideration

8. The application for Reconsideration is dated the 12 April 2024

9. The grounds for seeking a reconsideration are set out below. The application was in a narrative form. I have extracted individual grounds from the narrative.

**Current parole review**

10. This was the Applicant's third review. The Applicant was detained in a category A prison. The hearing took place over two days. The first day was a public hearing. The applicant had applied for a public hearing. The second day was held in private. The hearing was by video link.

**Oral Hearing**

11. The review was conducted by an independent Chair of the Parole Board, a psychology member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist, a prisoner instructed psychologist, a Community Offender Manager (COM) and a prison officer. The Applicant was represented by a solicitor.

12. A dossier consisting of 872 pages was considered.

**The Relevant Law**

13. The panel correctly sets out in its decision letter dated 28 March 2024 the test for release and the issues to be addressed in making a recommendation to the Respondent for a progressive move to open conditions.

*Parole Board Rules 2019 (as amended)*

14. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).

15. 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*

16. 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."*

17. 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.

18. 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*

19. 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.

20. 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.

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

22. 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.*"

23. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

**The reply on behalf of the Respondent**

24. The Respondent offered no representations.

## Reconsideration grounds and discussion

### Ground 1

25. The Applicant's legal adviser indicates that there was a lack of proven and/or accepted custodial (mis)conduct in this case that crossed the risk of serious harm threshold.

### Discussion

26. The argument that is adduced on behalf of the Applicant appears to be that because behavioural concerns in custody, as highlighted by the panel, did not result in serious harm in prison, those incidents should not have been considered as relevant when assessing risk and the statutory test.

27. With respect, this appears to me to be a simplistic approach, it is well established that the regime in a category A prison is organised in such a way to reduce and prevent serious harm to staff or other prisoners. The panel, however, noted that the Applicant repeatedly indulged in behaviour which was deliberately aimed at challenging the compliance rules within the prison. The panel took the view that the deliberate acts aimed at non compliance, and behaviour which may have reflected a loss of emotional control, were matters directly associated with the potential risk of serious harm. The panel's concern was that, within an unstructured community setting, such behaviour would not be immediately controlled (as in a category A prison) and therefore might lead to serious harm. Conversely an understanding, by the Applicant, of the need for compliance and a demonstration of a period of stable behaviour would be likely to go to demonstrating a reduction of the risk of serious harm.

28. The panel accepted that there had been no acts of violence for some years. However, the assessment of the risk of serious harm was not entirely dependent upon the absence of applied violence. The panel approached the assessment of the risk of serious harm on a broader basis and importantly on the basis of assessing whether the Applicant had the capacity to maintain stability and a reduced propensity to serious harm when in an unstructured community setting.

29. I am not persuaded that the absence of evidence of applied violent behaviour is sufficient to support an argument that the decision was irrational.

### Ground 2

30. The Applicant's legal adviser submits that the panel, within the decision, cited a number of behavioural elements and at no point dealt with how they considered that the conduct potentially crossed the risk of serious harm threshold.

## Discussion

31. This ground is one which overlaps with ground 1 above. Within the dossier the panel acknowledge that there had been no physical violence used by the Applicant since 2011. However those acts of violence (in 2011) were serious. They involved punching a prison Governor and assaulting three other officers. In 2012, while on trial for these assaults the Applicant escaped from the court room and attempted to take over a car from a woman driver.

32. In reaching their conclusion the panel noted that the '*key themes'* upon which they based their decision were alcohol misuse, poor compliance, aggression/threats and inappropriate behaviour. The panel adopted the view of the prison instructed psychologist that these matters evidenced concerns relating to poor emotional management and also concerning behaviour when alcohol is suspected to have been taken. In the light of the extremely serious index offences, involving firearms and direct threats with a firearm to police officers, coupled with the offences (noted above) in prison custody, it was clear that the panel regarded compliance and an understanding of the necessity to demonstrate compliance, as highly relevant to the future risk of serious harm.

33. The Applicant's instructed psychologist had taken a differing view. The psychologist suggested that the behavioural issues were likely to be associated with frustration about incarceration generally, and that these concerns were likely to fall away if the Applicant were in the community. The panel rejected that view, the hypothesis was not supported by any evidence from testing. The Applicant, as noted by the panel, was held in the strict conditions of a category A prison. The panel indicated that there was an absence of evidence to support the contention that, once in the community, the Applicant's inability to manage emotional distress and his propensity to adopt negative strategies, would disappear.

34. The view of the COM appeared to shift (during the course of the hearing) from a recommendation that open conditions were appropriate to recommending release. A release, directly into the community, of a prisoner who has hitherto served his entire sentence in a category A prison would be unusual and clearly required careful consideration. The Applicant had no experience of managing in the community for a number of years. The panel had no evidence of the Applicant's ability to manage his risk of serious harm in the community.

35. The panel rejected the recommendations of the COM and prisoner instructed psychologist. The panel indicated that they took the view that the recommendations (for immediate release) were more likely to be associated with concerns about the Applicant's difficulties in navigating the prison system, rather than the application of the statutory test which was the sole duty of the panel.

36. Historically, the Applicant had demonstrated a propensity to commit very serious acts of violence. During his sentence there was clearly evidence of improved behaviour and of the completion of interventions. Absent, was any evidence of the Applicant's ability to manage in the community. There was however evidence of an inability to manage emotions leading to impulsive behavioural outbursts. In my determination the panel adequately explained why it reached the conclusion that the Applicant's risk of serious harm remained at a level to warrant his detention. As indicated above, the panel took the view that behaviour in prison was concerning

and, in the unstructured environment of the community could lead to the elevation of the risk of serious harm.

**Ground 3**

37. The Applicant's legal adviser argues that none of the behavioural incidents, which were given weight by the panel, were insufficiently serious to cross the risk of the serious harm threshold. The Applicant's legal adviser noted that there was no evidence in the dossier or oral evidence of any psychological harm being caused from the verbal or behavioural threats, comments and incidents.

**Discussion**

38. This point can be taken shortly and is clearly associated with ground 1 and 2. The panel noted that the Applicant was detained in a category A prison with a strict behaviour regime. The panel also noted that their concern was the inability of the Applicant to manage emotional distress, frustration and anger with appropriate coping strategies. The obvious point, noted by the panel, was that outside the confines of a strict prison regime, the inappropriate reactions to emotionally upsetting incidents or situations where the Applicant felt his needs were not being met or his behaviour was being challenged, could, in the light of the history of violence, lead to very serious outcomes in the community.

**Ground 4**

39. The panel, when referring to their concerns about the behavioural issues, (as noted within the dossier), appeared to record their concerns as being relevant "*to risk*" rather than a concern relevant to the "*risk of serious harm*". Thus misapplying the relevant test.

**Discussion**

40. This is not a point I find has merit. The panel clearly referred, throughout the decision, to the statutory test and to the risk of serious harm. The use of the word risk, in decisions of this sort is often a short hand for the full definition. There is no evidence that the panel mistakenly took account of a differing test or standard in their decision or assessments.

**Ground 5**

41. The panel gave weight to one prison officer's view, officer (G), and less to a second prison officer's view, officer (P). Officer (P) had taken the view in one reference that the Applicant could be safely living in the community.

**Discussion**

42. It is noted that officer (P) indicated in one reference that he could not comment on risk factors as he was not trained in the area and would not wish to comment. In a

subsequent reference officer (P) then suggested that he "*believed*" that the Applicant could be successfully managed in the community. Officer (G) gave a positive reference and indicated that the Applicant was ready for "*the next step*". The panel were entitled to make an assessment of evidence from officers. Their experience of day to day behaviour of prisoners is often of assistance, however, their views would be unlikely to be the basis upon which an assessment of risk in the community could be firmly rested. There is no evidence of undue reliance upon this evidence so as to amount to unfairness or irrationality.

**Ground 6**

43. It is submitted on behalf of the Applicant that, in assessing the professional evidence, the panel preferred the evidence of the prison instructed psychologist to that of the prisoner instructed psychologist despite the fact that the prison instructed psychologist had no experience of managing clients in the community.

**Discussion**

44. Challenging the credibility of professional witnesses is a matter which the panel at the hearing are best placed to judge. Any concerns about professional credibility of any witness should be raised by the parties at or before the hearing.

45. In this case the prisoner instructed psychologist had worked with mentally disordered prisoners for 30 years and had an expertise in the management of personality disordered prisoners in the community. The prison instructed psychologist was the Head of Psychology services at a large prison. This psychologist had 26 years of experience and was accredited in a range of interventions and tools.

46. Both psychologists were highly experienced and had the required backgrounds to assist the panel in their deliberations. Psychologists use a Structured Professional Judgement (SPJ) approach in cases of this kind. This involves the use of tools to assess risk, overlaid with formulations and judgement based upon professional expertise. The psychologists, in this case, agreed with each other in a number of areas. Particularly confirmation that no further behavioural work was indicated.

47. The area of disagreement between the professionals was clearly identified by the panel. Namely, whether the behavioural difficulties in prison were a matter which would impact upon the management of the Applicant's risk of serious harm in the community. There were competing views.

48. The prisoner instructed psychologist contended that the behavioural matters were entirely or substantially related to frustration in prison rather than related to broader issues. The belief of the prisoner instructed psychologist was that these concerns would fall away once the Applicant was in the community.

49. The prison instructed psychologist disagreed with this contention. The view of the prison instructed psychologist was that the behaviour was evidence of an inability to manage emotions and stress and that outside the confines of a controlled prison environment those behaviours might lead to serious harm if unchecked.

50. The panel were entitled to accept the view of one psychologist over another. The panel would have been unlikely to base any final decision upon the number of years a particular psychologist had worked in any particular field of activity. As professionals the psychologist's role was to present their views and findings and to support those findings with evidence.

51. So far as the COM was concerned the panel noted that, during the course of the hearing, the position of the COM appeared to alter. Whilst it was perfectly acceptable to change a position or recommendation, the panel may well have approached the revised recommendation with understandable care in the light of the changed position.

52. I am not persuaded that the experience or qualifications of the psychological witnesses in this case were of significant relevance in terms of the assessment of risk. Both psychologists were highly experienced and had substantial knowledge and understanding in the area of the assessment of risk. A difference of opinion is not unusual. The panel were obliged, as they did, to assess the entirety of the evidence presented and to reach a conclusion as to the weight to be applied to that evidence. The decision, in my determination, indicates that the panel did just this.

**Ground 7**

53. The panel failed to explain why they took the view that risk would escalate very quickly and warning signs would not be identifiable in time.

**Discussion**

54. Whilst the panel did not spell out the reasoning for this conclusion the entire tenor of the decision addressed the point. The Applicant's behaviour both serious (earlier assaults) and less serious (behavioural matters) all appeared to have occurred without warning and spontaneously, in circumstances which appeared to be a sudden reaction to an emotional or other difficulty. Both the historical evidence, and the more recent evidence, supported the view that the Applicant's negative behaviour was impulsive and could escalate. This is not a ground which can be said to amount to irrationality.

**Ground 8**

55. The Applicant's legal adviser argues that the panel failed to address in detail an issue concerning behaviour in the past. In particular an incident where the Applicant tried to kick at the roof top escape hatch in a prison van. The Applicant's legal adviser noted that an earlier panel had made "*no finding*" that the Applicant had acted in this way.

**Discussion**

56. This incident (kicking the roof of a van) was referenced in the dossier. The incident had taken place before an earlier Parole Board hearing in 2021. This incident was addressed by that 2021 panel. That panel had asked the Applicant about this incident and the Applicant was recorded as having said "*You [the Applicant] said your behaviour was impulsive, and was driven by your desire to remain at HMP [X] where you could be close to your family. You now regret your actions. You said that there was no risk you would abscond from open conditions".* The position was clearly set out in the dossier. The Applicant himself had accepted (according to the earlier panel) that the incident had occurred and that he had acted in a way that he regretted. The earlier panel were not obliged to make a finding as the Applicant had accepted that his behaviour was impulsive and that he regretted it. The oral hearing process relies on prisoners and their lawyers broadly identifying areas of dispute in the dossier and raising them with a panel. The current panel (2024) accepted that this incident was unlikely to have been a credible escape attempt, but was a clear example of poor management of issues with authority. The 2024 panel commented as follows "*it (the incident) evidences concerning behaviour that [the Applicant] is willing to engage in at times of difficulties in his life*."

57. As noted, the 2024 panel accepted that this incident was unlikely to amount to an escape attempt. I am not persuaded that the panel acted irrationally in taking account of this incident in the way they set out in the decision. Namely that it was evidence of poor coping strategies leading to concerning behaviour. I am not persuaded that the panel acted unfairly or irrationally in taking account of the recorded and unchallenged views of the Applicant from an earlier panel hearing.

**Ground 9**

58. The panel made an "*evidential leap*" when noting that a razor blade melted into the handle of a toothbrush was found in his cell.

**Discussion**

59. The panel noted this incident. There is no evidence that the panel relied upon the incident in reaching their decision. I do not find it irrational to note the incident.

**Ground 10**

60. It is submitted by the Applicant's legal adviser that the decision was insufficiently intelligible or adequate to enable the reader to understand why it had been reached.

**Discussion**

61. This was a difficult case. The Applicant is many years past his tariff date. He is serving a sentence of imprisonment for public protection. He remains a category A prisoner, despite the views of a number of staff in the prison service that he could be managed at a lower category. His position is exacerbated by the fact that he has made one attempt at escape and indulged in behaviour, on a second occasion, which the prison service appear to consider is related to escape. He is therefore highly unlikely to be offered a place in an open prison. He has completed a number of

behavioural interventions, and the accepted position is that he is not suitable for and does not need to undertake any further formal interventions.

62. The Applicant has continued to display concerning behaviours and impulsive acts of non compliance. None (in recent times) have resulted in injury to staff or prisoners, however the actions clearly raise concerns about compliance. The suggested sentence path is that he joins a specialised wing of a prison aimed at demonstrating that he is able to live incident free and develop the capacity to manage emotional difficulties without threats or disruptive behaviour. The panel, in a very full and carefully drafted decision, commented in some depth upon the current position of the Applicant. The major concern being the reluctance to reclassify. Although this is a matter entirely for the Respondent, the panel understandably indicated that in the Applicant's case classification is inextricably linked to progression through the parole process.

63. I have considered the submission that the panel failed to explain the basis or reasoning for reaching its decision. I do not support that view. The decision sets out in detail the various issues in this case. Account is taken of positive factors and of the arguments of professionals on both sides. The reasoning is clear. The panel were not obliged to follow the recommendation of any particular professional. They fulfilled their duty however to consider the views of all professionals and to set out why they had accepted or rejected any particular view. I do not find that the decision is irrational.

**Decision**

64. In all the circumstances therefore I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

**HH S Dawson**
**8 May 2024**