

[2021] PBRA 153

## Application for Reconsideration by Pilotille

### Application

1. This is an application by Pilotille ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 27 September 2021, after an oral hearing on 23 September 2021, issued a decision not to direct his release on licence.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

### Background

3. The Applicant is now aged 39. He has a substantial criminal record, having been convicted of more than 100 offences since the age of 13. Many of his convictions have been for vehicle-related crime.
4. On 17 August 2012, at the age of 30, he received an extended sentence (7 years custodial term with a 3-year extended licence period) for causing death by dangerous driving. At the same time, he received shorter concurrent sentences for other offences including aggravated vehicle taking, driving while disqualified (x2) and failing to stop after an accident. In addition to the prison sentences, he was disqualified from driving for 10 years.
5. He was automatically released on licence on 6 July 2016 but was recalled to custody on 15 September 2016 as a result of further driving offences (aggravated vehicle taking, driving while disqualified, dangerous driving, driving without insurance and failing to provide a specimen). On 16 February 2017 he received an 18-month sentence (to run concurrently with his extended sentence) for those other offences. That sentence has of course now expired.
6. He was re-released on licence on 30 April 2018 but was recalled again on 6 March 2020 as a result of further driving offences (driving while disqualified, dangerous driving, driving without insurance and failing to provide a specimen). On 1 April 2020 he received a further 18-month sentence (to run concurrently with his extended sentence) for those new offences. But for the extended sentence he would have been released on licence from the second 18-month sentence in February 2021.
7. His case was referred by the Secretary of State to the Board to decide whether to direct another re-release on licence. In due course an oral hearing was directed and the case



was allocated to the panel. The panel comprised two independent members and a psychologist member of the Board.

8. The panel considered everything in the dossier provided by the Secretary of State, which ran to 197 pages (all of which had been disclosed to the Applicant). When the hearing took place on 23 September 2021 it took oral evidence from the Applicant and two professional witnesses: the official responsible for supervising the Applicant in prison (A) and the official prospectively responsible for supervising him in the community (B). The two professionals both supported re-release on licence.
9. On 27 September 2021, as related above, the panel issued its decision not to direct re-release on licence. On 15 October 2021 the Applicant's solicitors on his behalf submitted this application for reconsideration of that decision.

## **The Relevant Law**

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

10. The test for re-release on licence was whether the Applicant's continued confinement in prison was necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of its decision.

### ***The rules relating to reconsideration of decisions***

11. Under Rule 28(1) of the Parole Board Rules 2019 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.
12. 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)).
13. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.
14. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the ground of irrationality.

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

15. 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 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."*

16. 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.
17. 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.
18. The 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 **Preston [2019] PBRA 1** and other cases.

### **The Application for Reconsideration in this case**

19. The principal submissions made by the Applicant's solicitors in support of this application were that the panel:
- (a) Departed without good reason from the views of the two professional witnesses;
  - (b) Attached undue weight to the unpredictability of the Applicant's offending;
  - (c) Attached insufficient weight to evidence that impulsivity, mental health and alcohol were all factors which could be addressed in the community;
  - (d) Attached insufficient weight to the view of the professionals that the Applicant's risk was not imminent;
  - (e) Attached insufficient weight to the impact of his second recall on the Applicant and his changed attitudes; and
  - (f) Should have directed re-release at this stage, which would have safeguarded the public more effectively than re-release at a later stage.

### **Documents considered**

20. I have considered the following documents which have been provided for the purpose of this application:
- The dossier provided by the Secretary of State for the purpose of the case (which now runs to page 203 and includes the panel's decision letter);
  - The representations submitted by the Applicant's solicitors in support of the application for reconsideration; and
  - An e-mail from PPCS dated 26 October 2021 stating that on behalf of the Secretary of State they offer no representations in response to the application.

### **Discussion**

21. It is convenient to discuss separately the issues raised by each of each of the solicitors' submissions.

*Submission (1): The panel departed without good reason from the views of both professional witnesses*

22. It is well established that a panel of the Board is not bound to follow the unanimous opinions of professional witnesses. It is the panel's task to make its own independent assessment of the prisoner's risk of serious harm to the public and its manageability on licence in the community.
23. In making that assessment the panel must of course give careful consideration to the views of the professional witnesses, and if it disagrees with them it must give adequate and defensible reasons for so doing. If it gives reasons which do not stand up to close examination, that is likely to be a ground for reconsideration. Equally if it gives inadequate reasons, that is also likely to be a ground for reconsideration because the Reconsideration Panel (or Administrative Court if the decision is challenged by way of judicial review) will have no means of knowing whether there were any errors in the panel's reasoning.
24. All of this being so, I have carefully considered the reasons given by the panel in its decision letter for reaching a different conclusion from those of the professional witnesses.
25. Those reasons were detailed and certainly cannot be regarded as inadequate.
26. Equally I am unable to detect any flaw in the panel's reasons. In discussing the evidence of the professionals, the panel noted a number of points which afforded reasonable grounds for disagreeing with their recommendations.
27. In discussing A's evidence, the panel pointed out that he had had limited contact with the Applicant as a result of the COVID-19 restrictions. It recorded that A recommended re-release but that he also acknowledged that the Applicant had previously completed interventions and gone on to reoffend. A considered that the Applicant had been 'more reflective' on this occasion and was now in receipt of medication for anxiety, but the panel noted there had been no change in his medication since 2016. A believed that there would be warning signs of possible future offending and that they would include alcohol use, missing appointments and evidence of future driving: he acknowledged, however, that there had been no such warning signs prior to the Applicant's most recent offences.
28. B had been responsible for supervising the Applicant in the community during his last period on licence. When questioned by the panel he said that the Applicant had always presented as compliant and there was no evidence to suggest that his risk was escalating. He was therefore surprised when he heard that the Applicant had committed further driving offences. He regarded that as an impulsive action as a result of poor thinking skills when intoxicated. He commented that the Applicant had continued to offend in a similar manner to his previous offending and neither he nor the Applicant could account for why he had done so. He agreed that it was therefore difficult to address how to prevent future offending.



29. B pointed out to the panel that during the Applicant's time in the community he had had ample opportunity to drive and there was no evidence that he was doing so regularly for thrill seeking behaviour. B believed that the Applicant had shown greater insight into his alcohol misuse, impulsive behaviour and poor decision making than he had previously shown. He also believed that the second recall had a salutary effect on the Applicant. This, coupled with the Applicant's increased maturity and completion of in-cell work, had persuaded B to support re-release as he did not assess the risk of serious harm to be imminent. B accepted that due to the impulsive nature of the Applicant's actions it would be difficult to identify the warning signs so he planned to focus on managing the Applicant's impulsivity in supervision sessions.

30. It may well be that other panels might have agreed with the professional witnesses and reached conclusions which differed from those of the panel charged with the responsibility of deciding this case. However, that is not the test for reconsideration. Risk assessment is not an exact science, and reconsideration should not be ordered unless the panel's conclusions can fairly be described as irrational within the meaning explained above. In this case there was ample evidence to justify the panel's decision to depart from the views of the professionals. That decision cannot therefore be regarded as irrational.

*Submission (2): The panel attached undue weight to the unpredictability of the Applicant's offending*

31. It is not surprising that the panel was concerned by the unpredictability of the Applicant's past offending and its relevance for the future. There were no warning signs suggesting that, despite having been responsible for causing one death by driving dangerously and having been disqualified from driving for 10 years, the Applicant might (not once but twice) choose to drive again and to do so in a dangerous manner. There was no real explanation for the impulsivity which led to that behaviour.

32. The panel was fully entitled on the evidence to attach a great deal of weight to that particular factor, and it is impossible to say that it was irrational for it to do so. It is always difficult to argue, when a panel was clearly entitled to attach substantial weight to a factor, that it attached more weight to that factor than it should have done.

*Submission (3): The panel attached insufficient weight to evidence that the factors of impulsivity, mental health and alcohol could all be addressed in the community*

33. The panel was well aware of these factors and clearly took them fully into account but was entitled to its view that they were outweighed by the factors pointing against re-release.

34. Thus the panel was entitled to take a sceptical view of the likely effectiveness of B's plan to focus on managing the Applicant's impulsivity in supervision sessions. Support to address the Applicant's mental health and substance misuse difficulties had been available before and had little effect in assisting him to avoid serious re-offending. There is no doubt that the Applicant is currently well motivated to avoid re-offending, but the panel was entitled to its view that "based on the substantial risk period to be considered, the panel were not persuaded that [the Applicant has] the skills and ability to desist from future driving and thereby manage [his] risk of serious harm in the community".



*Submission (4): The panel attached insufficient weight to the view of the professionals that the Applicant's risk was not imminent*

35. There is sometimes a misunderstanding about the relevance of imminence of risk or the lack of it. If risk is imminent, the test for release on licence is unlikely to be met. The converse is not necessarily true. The Board's duty to assess risk is not limited to the prisoner's short-term risk. The longer-term risk must also be considered.

36. That being so, in this case the panel needed to consider the risk that at some time in the future whilst on licence in the community the Applicant might decide to drive again in breach of his disqualification and might in that event drive in a manner liable to cause serious harm to other people. That had happened before and the panel was entitled to its view that the Applicant did not have the skills to avoid it happening again.

*Submission (5): The panel attached insufficient weight to the impact of his second recall on the Applicant and his changed attitudes*

37. The panel was fully aware of the evidence about these matters and clearly gave them some weight. It stated in its decision: *"The panel give [the Applicant] credit for the progress made in the community, [his] positive engagement with supervision, good custodial conduct since recall, the in-cell work completed and recognise that [he] appear genuinely remorseful for [his] behaviour and that [he has] shown insight into the offending that led to recall".*

38. Despite these positive factors the panel was entitled to conclude that they were outweighed by the factors pointing against re-release on licence.

*Submission (6): The panel should have directed re-release at this stage which would safeguard the public more effectively than re-release at a later stage.*

39. There is no doubt that the Applicant might have benefited from a substantial period of supervision on licence before his sentence expiry date. That is a matter frequently relied upon on behalf of a prisoner. However, the difficulty with that argument is that it does not address the statutory test for release on licence. If that test is not met (as the panel concluded in this case) the Board cannot properly direct release on licence, whatever benefits the prisoner may stand to gain from a substantial period on licence before release.

## Decision

40. For the reasons explained above I cannot find any evidence of irrationality in the panel's approach to this case. This is a case which might have been decided either way on the evidence. Other panels might have reached a different decision, but this panel's decision falls well short of the high threshold for a finding of irrationality. I must therefore refuse this application.

**Jeremy Roberts**  
**2 November 2021**



3rd Floor, 10 South Colonnade, London E14 4PU



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[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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0203 880 0885