

**[2023] PBRA 153****Application for Reconsideration by Brennan****Application**

- 1.This is an application by Brennan ('the Applicant') for reconsideration of the decision of a panel of the Parole Board who on 1 August 2023, after an oral hearing on 27 July 2023, issued a decision not to direct his release on licence and not to recommend a move to an open prison.
- 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's record of offending commenced at the age of 14, and as a teenager and a young man he accumulated many convictions including 14 for offences of violence. His lifestyle became increasingly chaotic, and he took to using drugs and alcohol.
- 4.His most recent conviction was for wounding with intent ('the index offence') for which he received an indeterminate sentence of imprisonment for public protection ('IPP') with a minimum term ('tariff') of three years and 159 days less time served on remand. He was aged 21 at the time of sentence for the index offence in July 2006 and is now aged 39. His tariff expired in December 2009. He has remained in closed prisons throughout his sentence and is thus many years "over tariff".
- 5.The index offence was committed soon after the Applicant had been released on licence from a four and a half year sentence which had been imposed when he was aged 17 for a robbery at a garage where the garage attendant was threatened with an imitation firearm.
- 6.The index offence itself was committed with another man. The victim was asleep in a flat (apparently belonging to a friend of his) when he was woken up by the Applicant and his co-accused shouting outside the flat and threatening to kill him. The door to the flat was kicked in and the victim was dragged from the flat, beaten, punched and stamped on. The Applicant cut the victim's face with a knife, causing severe injuries. He and his co-defendant were convicted after a contested trial.



7. The Applicant has completed a number of programmes in prison designed to reduce his risk of further offending. He has also completed a number of educational and vocational courses.
8. His conduct in prison has been mixed, with some periods of relatively good behaviour interspersed with others of poor behaviour. For the latter he has received a large number of proved adjudications for breaches of prison rules. These breaches have included assaults on staff, assaults on other prisoners, damaging prison property, disobeying lawful orders, possessing unauthorised items, using threatening or abusive words or behaviour and being under the influence of illegal substances. He has been transferred on a number of occasions from one prison to another because of this kind of behaviour.
9. In 2014 he spent a period in a special unit designed for prisoners with personality problems. He made some progress there but was ultimately “deselected” and returned to a normal prison location. Psychological assessments in 2017 concluded that his principal risk factor was his extreme difficulty in regulating his emotions.
10. The Applicant’s case has been reviewed by the Board on eight occasions during his sentence. The last review before the present one was completed in June 2021. At that stage the Applicant had spent more than a year at the same prison where he had shown some relatively recent improvement in his behaviour, but the at that time panel was unable to conclude that he met the test for release on licence or a recommendation for a move to an open prison.
11. Very soon after that panel’s decision the Applicant was moved to his present location where he settled much better than at his previous ones. In September 2021 he was moved to a special unit which utilises Enhanced Behaviour Monitoring (‘EBM’) within a community spirited environment. The unit has three stages which provide an opportunity for residents to evidence a commitment to making changes with the support of psychologists. Each stage provides more freedoms and privileges helping them (if they take advantage of that help) to demonstrate suitability for release.
12. This review of the Applicant’s case commenced on 24 May 2022 and an oral hearing was directed on 26 August 2022. The case was then allocated to the panel. The Applicant is concerned about the delay in the oral hearing taking place but it is unnecessary for present purposes to explore the reasons for it.
13. By January 2023 the Applicant had progressed to Stage 3 in the unit. He worked well with his key worker, the psychologist on the unit, the drug and alcohol service and trauma therapy counsellors. He had achieved enhanced status under the Incentives and Earned Privileges (‘IEP’) scheme.
14. It must have looked very much as if the Applicant was heading for a successful application for release on licence but several developments then arose which appear ultimately to have influenced the present panel’s decision not to direct his release. These developments will need to be discussed in detail below. To summarise they were:

- (a) Damaging prison property,
- (b) Climbing over the railing and refusing to climb down,
- (c) Using an illegal substance and,
- (d) Possessing an unauthorised item.

15.As noted above the oral hearing took place on 27 July 2023. The panel had considered the dossier provided by the Secretary of State which contained 640 numbered pages. At the hearing they considered a trauma therapy letter which was provided at that time. Oral evidence was given at the hearing by:

- (a) The Applicant himself,
- (b) His Prison Offender Manager, ('POM')
- (c) His key worker.
- (d) A prison psychologist.
- (e) A representative of a rehabilitation facility and
- (f) The Applicant's Community Offender Manager ('COM').

16.The POM and the prison psychologist both supported the Applicant's release on licence.

17.The COM, when asked by the panel about her recommendation, said it was a difficult issue. She would have been in favour of a more gradual resettlement into the community which would be afforded by a progressive move to open conditions. She said this would have been her preference. However, for reasons explained in paragraph 25 below, that was not an option.

18.When asked at the hearing about the Applicant's risk to the public, the COM said that there would be triggers to an increased risk of violence and those could be monitored. She considered there would be alerts to any alcohol or drug use, instability or signs of motivation for financial gain. She (like the other professionals) did not consider there was any more core risk reduction work to be undertaken in custody.

19.As noted above the panel's decision was issued on 1 August 2023 and this application for reconsideration was made on 16 August 2023.

### **The Relevant Law**

20.As indicated above the test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

*The Parole Board Rules 2019 (as amended)*

21.Under Rule 28(1) 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.

22.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.

23. 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)).

24. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on all three grounds.

25. The panel's decision not to recommend a move to an open prison is not eligible for reconsideration so I do not have to consider it. I should mention, however, that the panel would have been prepared to recommend such a move if the Applicant had not been strongly opposed to it and unwilling to comply with the conditions to which he would be subject in an open prison. His reasons for that stance are not unreasonable but his stance clearly made it impossible for the panel to recommend a move to an open prison or for the Secretary of State (whose responsibility it is to decide where a prisoner should be located) to accept any such recommendation if it had been made.

### ***Irrationality***

26. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out as follows 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."*

27. 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. 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 Board in making decisions relating to parole.

28. The Parole Board, when deciding whether or not to direct a reconsideration application, 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**.

29.The reasons why a panel’s decision may be found to be irrational include the giving of manifestly disproportionate or inadequate weight to a relevant consideration.

### **Procedural unfairness**

30.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 from the issue of irrationality which focuses on the actual decision.

31.The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

32.The overriding objective in any consideration of a prisoner’s case is to ensure that the case is dealt with fairly.

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

33.The application was made by the Applicant’s solicitors. It was accompanied by the personal representations by the Applicant himself and a letter of support written by the POM. The Applicant was helpfully assisted in preparing his personal representations by the psychologist allocated to him at the unit where he resides.

### **The position of the Secretary of State (the Respondent)**

34.By e-mail dated 21 August 2023 the Public Protection Casework Section (‘PPCS’) on behalf of the Respondent stated that he offers no representations in relation to the application.

### **Documents considered**

35.I have considered the following documents for the purpose of this application:

- i) The dossier provided by the Respondent for the Applicant’s case, which now runs to 662 pages and includes a copy of the panel’s decision.
- ii) The application for reconsideration and the supporting documents (the personal representations and POM’s letter of support);
- iii)PPCS email of 21 August 2023.

### **Discussion**

36.A number of grounds are advanced in support of this application but I have found it helpful to focus initially on the complaint of irrationality and specifically on the



issue whether the panel attached disproportionate weight to any or all of the developments referred to in paragraph 15 above. If I am persuaded that that is the case, this application must succeed and it is unnecessary to address the other grounds. It is necessary to examine the four developments in a little detail.

*Development one: Damaging property in a workshop (6 January 2023)*

37.The panel recorded this incident in their decision as follows:

*"[The Applicant] was working with another prisoner in the workshop when there was a disagreement as to a work procedure between them. [The Applicant] told the panel that he had the greater experience and the prisoner orderly was telling him what to do. A cup of coffee or tea was spilt over the recycling materials. From this relatively minor event, matters spiralled. [The Applicant] said that he had not acted deliberately, but he was treated as though he had done so. He was dismissed from this employment. He objected to the fact that the other prisoner was allowed to keep his employment. [The Applicant] considered he had been unfairly treated. His POM said she thought the staff member' [i.e. the staff member who made the decision to dismiss the Applicant from his job] 'had misjudged the situation and this person has now left the prison.'*

38.The panel mistakenly stated in their decision that the Applicant had been adjudicated for this incident. In her letter supporting this application the POM explained that he was not adjudicated for the incident because staff only had the word of the prison orderly and the Applicant for what exactly had occurred. The list of adjudications in the dossier confirms that there was no adjudication for the incident. There is reference in the list to a disciplinary charge laid on 17 January 2023 (for disobeying a lawful order) but that charge was recorded as having been dismissed.

39.The Applicant had an excellent record working in this workshop. Although there was no adjudication for the incident it appears that on 17 January 2023 an IEP review resulted in his IEP status being reduced from enhanced to standard. It is clear that prison staff did not handle this incident very well and the Applicant had a legitimate feeling that he had been unfairly treated. He was subsequently given a job in another workshop where he again attracted good reports.

40.This incident would appear in itself to have little if any relevance to the Applicant's current risk of serious harm to the public but the way it was dealt with by the staff no doubt played a part in his motivation for the next incident.

*Development two: Climbing over the railings and refusing to climb down (18 January 2023)*

41.This incident was described by the panel as follows:

*"[The Applicant] clearly brooded over his perceived injustice. On 18 January 2023 he threw his TV and a chair over the railings onto the landing. After this he climbed over the railings and refused an order to climb back. He spent about 4 hours over the railings and only came back when the national C & R (Care and Restraint)*





team arrived on the scene. [The Applicant] said that he had wanted to talk to them and had been talking to the prison negotiator before this. His key worker was not on duty on this day. When he climbed back, he handed over the razor blades which he had been holding in his mouth and which he was threatening to use against himself.

The POM said that she had been monitoring the situation on CCTV. She said that there was no violence threatened or used towards anyone else. She told the panel that [the Applicant] had been emotionally roused but he later considered that he could have approached this situation differently. [The Applicant] told the panel that there had been a build-up of factors and it was not just losing his job."

42.The Applicant has expanded on this explanation in his personal representations. He states:

"At that time I was primarily upset about the injustice of the IPP sentence, and the recent decision by the Government not to review/revoke the IPP sentence when promises were made that this was going to be looked at. I therefore felt I was being treated unjustly by the Government, which was why I made the decision to go over the railings and remain there until the 'Nationals' came out. I wanted to waste Government time, money and resources in the same way that they are wasting my life. I appreciate that this was not the right thing to do, but I felt completely hopeless and helpless at the time and felt the need to express my feelings. Although perhaps misguided, I did consider that this was a peaceful way to protest."

43.It is clear from the evidence that for many years, like many other IPP prisoners, the Applicant has suffered from feelings of hopelessness and helplessness as a result of the indeterminate nature of an IPP sentence. He and other prisoners are of course well aware of the extensive criticisms of the IPP scheme published in the media and of the report of the House of Commons Justice Committee in September 2022 which made a number of recommendations to ameliorate the unfairness of the system. I have read in the newspapers very recently that the Secretary of State is now considering changes to the system.

44.The Parole Board is of course obliged to follow the law as currently laid down by Parliament, which it has always faithfully done. Its duty is to assess an IPP prisoner's risk of serious harm to the public if he is released into the community, and in doing so it must consider his conduct in prison. In performing that exercise it needs to make a careful examination of that conduct so as to evaluate its relevance to his future conduct in the community.

45.In that connection it is pertinent to consider the following observations made by the POM in her letter of support to this application:

"[The Applicant] completed a peaceful protest about the recent IPP rulings, when he went over the railings, he said that he felt that was the only way he could get his voice heard. He co-operated with the prison negotiator, but he said that he wanted to wait for the Nationals. [The Applicant] said that he was not doing anything different to the public sector that are continually striking which is



*reported on the news. [The Applicant] did not hurt anyone, and he had no intention of hurting anybody. This is prison behaviour and [the Applicant] will never evidence perfect behaviour because he himself admits that he isn't perfect, however it is the opinion of all prison staff who work with [the Applicant], which includes his keyworker, drug and alcohol worker, work supervisor, psychologists, Community Offender Manager, and I, that [the Applicant] is the "best version of [himself] that he has been and probably will ever be". Prison is not a real-life experience; he is more likely to be provoked in custody than in the community."*

46. I will return to that topic below. It should be pointed out at this point, however, that although the Applicant was adjudicated for his behaviour in this instance (on three charges of endangering the safety of others and one of disobeying a lawful order) the only immediate penalty imposed was for disobeying a lawful order, the penalties for the other offences being suspended. Furthermore, although he had been reduced from Stage 3 to Stage 2 in the unit his subsequent compliance and good behaviour enabled him to achieve a return to Stage 3.

*Development three: Using illegal substances (April 2023)*

47. The details of this were described by the panel as follows:

*"The POM told the panel that there was no testing, prison confirmation or adjudication, but it was reported that [the Applicant] was "under the influence" when observed, and that he had said it was just because he was "restless." His key worker had contacted healthcare who had kept him under observation. When he gave evidence, [the Applicant] confirmed that he had taken NPS [New Psychoactive Substance]. He said that he had become dispirited over reports that the generic IPP sentence was not going to be reviewed [as was the case at that stage], and he thought this was an injustice and felt strongly about it."*

48. This appears to have been the only instance of the Applicant using an illegal substance at his current establishment and he has engaged well with the drug and alcohol service.

*Development four: Being in unlawful possession of an item of prison property (May 2023)*

49. This was an unfortunate incident. The Applicant worked in the kitchens where he was highly regarded by staff. He was accustomed to taking food items back to his wing where he would cook or consume them. He would then pay for them later. On this occasion he was taking cakes and frozen burgers back to the wing, carrying the cakes and putting the burgers in his pocket. There had been a spate of thefts by other prisoners and he was searched. The burgers were found in his pocket. As he had not paid for them he was treated as being in unlawful possession of them and was dismissed from his job. He was understandably upset by that but dealt with his disappointment appropriately. His key worker knew he was a very hardworking and well regarded worker, and arranged a meeting with the chef to see if he could be reinstated. The chef thanked him for his work but explained that he could not give him his job back.





50. The Applicant was charged with a disciplinary offence in relation to this matter but the charge was understandably not proceeded with.

51. Before discussing whether the panel attached disproportionate weight to any or all of the above matters I need to refer to a number of positive matters relied upon in support of this application.

52. The Applicant's general behaviour in the 26 months during which he has been at his present establishment has improved greatly, and his relationships with staff have been good. He has had only 3 proved adjudications:

- (a) An adjudication on 1 September 2021 for fighting.
- (b) An adjudication on 3 February 2022 for disobeying 2 lawful orders and
- (c) The adjudications on 21 January 2023 for the "railings" incident.

53. The COM has examined the paperwork for the September 2021 adjudication from which it is clear that another prisoner was the aggressor and the Applicant was acting in self-defence. The Governor was obliged to find the charge proved as the Applicant admitted knowing that fighting (even in self-defence) was contrary to prison rules. However, the Governor accepted that the Applicant was the victim, and observed that he was a polite and well-mannered kitchen worker. He suspended any penalty for the offence.

54. In those circumstances it is fair to say that the Applicant has not committed any real offence of violence at his present establishment.

55. The Applicant clearly worked well with the various professionals throughout his time at this establishment and it is to his credit that after the "railings" incident he was returned to Stage 3.

56. There are two alternative release and risk management plans, one involving release to a specialised probation hostel and the other involving release to a rehabilitation facility whose services are described as follows:

*"The accommodation they offer is shared accommodation in small units. Residents attend a rehabilitation course held offsite and are expected to attend group meetings of AA (Alcoholics Anonymous,) CA (Cocaine Anonymous) and NA (Narcotics Anonymous). The Applicant is eligible. He would be regularly drug tested and there would be support in a structured setting. After three months, there is move-on accommodation where there is no residential staff member."*

57. Preference seems to be for the rehabilitation facility. It is of some interest that the service manager at that facility has been visiting the Applicant in prison and, as the panel recorded, is of the view that the Applicant is well motivated and "deep within him is a caring human being". If the Applicant goes to the rehabilitation facility the manager hopes to be able to bring this aspect of his personality to the fore.

58. The Applicant remains in regular contact with his sister and brothers who are



said to be very supportive of him. This will be important whenever he is released on licence.

59. The panel explained in its decision its reasons for not directing the Applicant's release on licence. Its reasons were as follows:

*"The panel have to look at the pattern of offending. [The Applicant] is assessed as a high risk of an offence of violence and this is of primary concern. Moreover, although [the Applicant] has engaged in core risk reduction work... [the Applicant] displays a high level of aggressive behaviour. He can become angry quite quickly and can struggle to return to a calm state.*

*There have been a number of concerning incidents over the years, but since moving to [his present establishment the Applicant] has shown considerable progress. The [unit where he resides] has been a good environment for him.*

*The incidents during 2023 were examined during the oral hearing. Altercations between prisoners are to be expected in the close quarters of living and working together in a prison. However, the reaction by [the Applicant] to his perceived injustice in losing his workshop employment in throwing items over the railings and then deliberately spending 4 hours there himself was troubling. This was behaviour designed to draw attention to himself and to make noise to get his own way. The national team was called in, a fact that [the Applicant] was clearly seeking and was manipulative as well as attention seeking behaviour. He threatened to harm himself. The panel finds this to be risk raising behaviour and is not assuaged by the fact that no one else was harmed at that time.*

*Given his previous history of offending and the serious nature of the index offences, the panel consider that the high-risk assessment is a realistic assessment of his risk of serious harm. The panel considers that a future offence committed by [the Applicant] is likely to occur if his emotions are raised, for example if he perceived injustice and decided to take matters into his own hands, or if he sought financial gain and engaged in violent and aggressive behaviour towards males. The nature of the risk is likely to be physical, emotional and psychological harm and would be made worse by the use of weapons to secure compliance.*

*The panel consider that the risk in the community could be reduced if [the Applicant] in the future was to show consistent compliance in the prison system, to engage and comply with consolidation of the interventions which he has already undertaken and future engagement with drug rehabilitation would reduce his risk."*

60. I am not sure that it is accurate to say that the Applicant "displays a high level of aggressive behaviour". That was certainly the case in the past but I am not sure that it is fair to describe his behaviour at his present establishment in that way.

61. Although the panel referred to "the 2023 incidents" it made no specific reference in the above passage to the first, third and fourth of those incidents. In the light of the evidence summarised above it is hard to see how any significant weight



could be attached to any of those three incidents in assessing the Applicant's current risk of serious harm to the public.

62. The first incident was, as the panel appear to have recognised, something which is prone to occur in prisons and there does not appear to have been any evidence that the Applicant was significantly at fault. The third incident was an isolated instance of substance misuse in stressful circumstances on the part of a prisoner who has otherwise been consistent for a long time in addressing his drug problem. The third instance was a minor infringement of the rules which can hardly have any real relevance to his future risk of serious harm to the public.
63. That leaves us with the second incident (the "*railings*" incident). That was more serious than the others but needs to be seen in its context (which includes the Applicant's general good behaviour since his arrival at his present establishment). As regards the incident itself I agree with the POM that it was essentially a peaceful protest.
64. It was certainly misguided but it was not intended to cause any serious harm to anyone and did not do so. The Applicant, as he clearly now recognises, should not have behaved as he did by causing deliberate expense and inconvenience to the authorities. He is not alone in criticising the IPP system and the fact that it remains in force but he should not have acted as he did. That he did so can be regarded (in conjunction with his unreasonable dismissal from his job) as a sign of some difficulty in emotional regulation.
65. It is fair to say that he has clearly over time learned to handle his emotions much better than in the past, and certainly to avoid violent responses. In this particular situation he should have realised that his actions were wrong and indeed unwise and ultimately counter productive. The risk of any similar situation arising again if he is released on licence is limited but he will need to be on the alert for the consequences if he takes matters into his own hands again. He is of course well aware of the need to be very careful to avoid breaching his licence, as he explains in his personal representations.
66. In all these circumstances I am persuaded that, whilst it was certainly appropriate to attach some weight to the "*railings*" incident, the amount of weight which the panel attached to it was disproportionate.
67. Reference was made by the panel to the results of the risk assessment tools used by probation. The panel stated that it agreed with those results and agreed that the Applicant's risk of future convictions and his risk of causing serious harm to others were both high.
68. It is not uncommon for the Board to direct the release on licence of a prisoner whose risks are assessed by probation as high. In this case the panel's assessments were not shared by the POM and the Prison Psychologist, both of whom believed that the Applicant's risks would with an appropriate risk management plan in place, be safely manageable in the community. The panel's assessment of the Applicant's risks must, I think, have been significantly influenced by the weight which they attached to "*the 2023 incidents*". Their



assessment might well have been different if they had not attached so much weight to those incidents.

## Decision

69. For the reasons which I have explained I am satisfied that this application must succeed on the basis that the panel attached disproportionate weight to the 2023 incidents and its decision was therefore irrational. It must therefore be reconsidered on that ground. In these circumstances I do not need to consider the other grounds advanced in support of the application.

**Jeremy Roberts**  
**06 September 2023**