

[2023] PBRA 92

## Application for Reconsideration by Wilson

### Application

1. This is an application by Wilson ('the Applicant') for reconsideration of a decision of the Parole Board dated 5 April 2023 not to direct his release. The decision followed an oral hearing which took place on 14 March 2023.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the grounds that the decision contains an error of law, or is irrational, or is procedurally unfair.
3. I have considered the application on the papers. These are (1) the dossier, now running to some 1158 pages including the decision; and (2) the application for reconsideration dated 19 April 2023, handwritten by the Applicant. I have also listened to the recording of the oral hearing.


### Background

4. On 15 June 1989 the Applicant, then aged 20, was sentenced to custody for life for murder. The minimum term for his sentence was set at 12 years. This minimum term expired on 25 January 2000.
5. The index offence took place in December 1987. The Applicant's victim was a man with whom he shared a room in bed and breakfast accommodation. He and his victim had both consumed a considerable amount of alcohol the night before the murder. In the morning he pursued the victim from the accommodation with a knife; a confrontation took place and he stabbed the victim in the stomach and chest. The Applicant has stated that he was angry with the victim because the victim had touched him inappropriately as he woke in the morning.
6. The Applicant had recently come to England from Northern Ireland. After his arrival from Northern Ireland, he was also sentenced to 6 months' imprisonment for assault occasioning actual bodily harm, an offence which is reported to have occurred after he and his co-defendant had been drinking excessively.
7. The Applicant was first released on licence in March 2010. He accrued convictions for drink driving, battery and possession of a stun gun; but was not recalled for any of these. Then, however, in March 2017 he was recalled, having committed an

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offence of violence against an elderly fellow occupant of accommodation where there was a shared kitchen. When he was the worse for drink he assaulted his victim, putting him into a headlock and injuring his jaw, which is said to have been broken. The offence is described in the Applicant's PNC record as an offence against section 20 of the Offences Against the Person Act 1861; it is described elsewhere as an offence against section 18. The essential facts – the drinking, the headlock, and the nature of the victim – are not disputed by the Applicant. He was sentenced to 16 months' imprisonment.

8. The Applicant was released again on 7 December 2020 to approved premises. He had stated prior to release that he would abstain from alcohol. However, he relapsed, drank to excess when he was frustrated by difficulties in securing accommodation, behaved aggressively to staff and absconded. After 6 weeks at large he was returned to prison on 27 April 2021.

### Request for Reconsideration

9. I will develop the Applicant's grounds more fully in the discussion below. In broad outline, he makes the following main points:

(1) The hearing was unfair and unlawful because the psychologist and the Community Offender Manager ('COM') considered that they were under instructions from the Secretary of State for Justice ('SSJ') not to give a recommendation – a stance found to be unlawful in **R (On the Application of Bailey and another) v Secretary of State for Justice** [2023] EWHC 555 (Admin) (16 March 2023)("Bailey").

(2) The panel omitted to take account of evidence of work done with Forward Trust (an organisation offering a range of services and interventions in both communities and prisons aimed at helping people to move forward with their lives), especially between April and August 2022. The panel also omitted to take account of evidence of the completion of COVAID (a cognitive-behavioural programme for men in secure settings who are violent under the influence of alcohol) in 2020, and wrongly stated that he had only done one piece of work with Forward Trust.

(3) The panel misunderstood the evidence he gave about alcohol consumption.

(4) The panel wrongly found that his recall in 2021 was justified; the recall was in breach of the SSJ's policy PSI 30/2014 because his behaviour showed no deterioration or greater risk but rather was consistent with the risk which was anticipated.

### Current parole review

10. As noted above, the Applicant was returned to prison on 27 April 2021. His case was referred to the Parole Board on 24 May 2021 for consideration of release: he was not eligible for transfer to open conditions. Directions were given and his case was listed for oral hearing in March 2022. At that time there was no support for release; his COM considered that he should do work with the substance abuse team and one-to-one work with psychology concerning thinking skills and propensity to violence. He applied for an adjournment and a direction for a psychological risk



assessment which would identify any outstanding treatment needs. The application was granted.

11. A psychological risk assessment was completed in June 2022. It did not recommend release. It recommended the Building Better Relationships Course and one-to-one work.
12. In the meantime, the Applicant had begun to re-engage with Forward Trust on substance abuse work. He undertook this work between April and August 2022. A report on the work as it stood in June 2022 was included within a report by his prison offender manager ('POM') dated 22 June 2022. It stated that the Applicant now recognised the harm caused by his use of alcohol; that a sober lifestyle was the only way to make considered choices; and that *"his confidence has grown and his belief that he can achieve long term abstinence from alcohol has solidified"* (dossier, page 1036).
13. The Applicant was then offered and undertook sessional work with a prison psychologist between 17 October and 22 November 2022. The report noted that he had co-operated fully and that he *"has developed cognitive restructuring techniques, accepts a need for abstinence and has high motivation to succeed in employment and remain out of prison"*. It is also clear that throughout the period of his recall his prison behaviour was of a high standard; there were no concerns about compliance.
14. At the oral hearing on 14 March 2023 the panel consisted of three independent members. The panel heard from the POM, a prison psychologist, the COM, and the Applicant himself. In the discussion below I will set out more fully what transpired as regards recommendations to the panel (see paragraph 9(1) above) and as regards the evidence about alcohol (see paragraph 9(2) above).
15. The panel summarised the evidence which it heard in some detail in section 2 of its decision. It considered the risk management plan and the level of risk in section 3. It turned to its conclusions in section 4. It found that recall was appropriate because the Applicant *"was non-compliant with his licence conditions, given that he left his approved accommodation and his whereabouts were unknown, although there is no evidence of further offending"*. As to release, its key conclusions were as follows:

*"4.3 The evidence heard by the panel and the views of the professional witnesses are summarised at the end of section 2. The main areas of concern link to [the Applicant's] somewhat conflicted views about the role of alcohol in his life and this in turn creates some confusion regarding his ability to stick to his expressed undertaking to abstain. All of the professionals were of the view that he has further work to do, but the COM and POM appeared to be of the view that risk would be manageable, provided that [the Applicant] complies with his risk management plan. Based on custodial behaviour, the POM considered that compliance was now more likely than previously; the COM considered that it would rely on external controls being in place (such as the alcohol tag) and expressed some concern about the effect of this being removed in future. The psychologist did not feel able to express a clear view regarding release.*

*4.4 The panel appreciated the concerns of the professionals and shared them to the extent that they agreed that risk would principally arise if [the Applicant] were to*



return to drinking. However, they did not think that this would happen immediately. He does need to learn to manage his schemas, frustration, and sense of injustice without resort to drinking, to recognise when he needs help and to fully acknowledge the role alcohol plays in the risk he presents. The panel notes that between 2010 and 2017 when [the Applicant] was in the community he resorted to violence in the context of significant alcohol consumption. The recall also occurred in the context of a return to alcohol use, notwithstanding [the Applicant's] awareness that a zero-tolerance approach would be taken. In this respect [the Applicant's] view that alcohol is not an offence-related central problem for him is of concern. The panel took into account that [the Applicant] has completed a course with the Forward Trust but felt that he has further work to do to understand how his alcohol use is closely linked to his risk of resorting to violence. While [the Applicant] is commended for the progress he has made in this respect, the panel must consider risk in the longer term.

4.5 The panel attached weight to the fact that in custody there has been no violence during the recall, coupled with evidence of him managing violence when sober in his role as a mentor. There is also evidence that he can continue to learn new skills. The panel concluded, however, that [the Applicant] should undertake further work in custody to enable him to recognise his potential for serious violence after drinking, and fully embed appropriate strategies to mitigate this risk. For the reasons outlined, the panel concludes that it is necessary for the protection of the public that [the Applicant] remains confined. Accordingly, it makes no direction for release."

## The Relevant Law

16. The panel correctly set out the test for release in its decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
17. The panel's decision as to release is eligible for reconsideration since the Applicant is serving a life sentence and the decision was taken under rule 25(1) of the Parole Board Rules: see rule 28(1) and 28(2)(a) of the Rules.
18. It is not necessary to set out an exhaustive statement of the circumstances in which a decision will be unlawful. Broadly, a decision will be unlawful if it is taken in contravention of some legal principle or duty applicable to the case; or if it leaves out of account a factor which the law requires to be taken into account; or if it places weight on a factor which is irrelevant in law; or if the reasons fall short of the standard which the law requires for the decision.
19. The concept of irrationality is derived from public law. The test is whether the 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." See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
20. The concept of procedural fairness is rooted in the common law. A decision will be



procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality. On a reconsideration, the member must apply independent judgment as to whether the hearing was fair; the member's task is not merely to review the reasonableness of the decision maker's judgment of what fairness required: see **Osborn v Parole Board** [2014] AC 1115 at paragraph 65.

### The reply on behalf of the Secretary of State (the Respondent)

21. The Respondent has lodged submissions limited to the ground which I have summarised in paragraph 9(1) above. I will set out these submissions verbatim:

- *"All report writers would have fully carried out their responsibilities in enabling the Parole Board panel to fulfil its statutory function in determining if the statutory release test is met.*
- *The changes regarding recommendations did not alter report writer's views providing all necessary information and risk analysis and assessments as has always been supplied to the Board.*
- *Recommendations, or lack of them, should not affect a panel's ability to assess risk and determine whether a prisoner is safe to be released. To suggest otherwise would be to assume that the Parole Board had previously fettered its discretion."*

### Discussion

#### Ground 1 – Recommendations

22. The Applicant's submissions are as follows:

*"Procedurally unfair and unlawful. All three witnesses POM, COM and psychologist stated that my risk could be managed in the community. However when asked if they would recommend 'release' the COM and psychologist refused to answer under instruction from Dominic Raab. Stating that they had not yet received the memo giving directions to change their stance due it being unlawful. However, the POM did give a recommendation for 'release'."*

23. In **Bailey** instructions given by the (former) SSJ to professional witnesses in July and October 2022 not to give recommendations to the Parole Board were held to be unlawful. It is not necessary in this decision to set out the reasoning in detail: it is sufficient to say that it was held that if professional witnesses were asked by the Parole Board for their opinion on the question of release, and if they felt able to give such an opinion, they were under a duty to do so: see paragraphs 99-104 of the judgment.

24. It does not follow that, because professionals considered themselves subject to the SSJ's unlawful instructions during an oral hearing, the hearing was necessarily unfair. I have found considerable assistance from the reconsideration decision of Sir



John Saunders in **Rehman** [2023] PBRA 67. He said:

*"20.The decision on the 'ultimate issue' is for the panel and not the witnesses. The panel would not and should not simply accept the recommendation, if made, without consideration of the reasons for it. It is only if the panel agrees with the reasons for the recommendation that it would adopt it in its decision.*

*21.The making of a recommendation by professional witnesses, which is what has happened for a long time, provides a useful framework for the consideration of the witness' evidence. A witness will be asked what their recommendation is and then asked the reasons for it. They will often then be asked about other matters which may tend to suggest that the recommendation is not well founded. The panel having considered the reasons for the recommendation will then decide whether they agree with it or not. A panel will not simply count up those who are recommending release as against those who are recommending no release. It is the reasons for the recommendation rather than the recommendation itself which are of the most significance to the panel.*

*22.In my judgment it will not be automatic that when a panel has not been able to obtain recommendations because of the effect of rule 2(22) that there will have to be a reconsideration. It will depend on the facts of the individual case....*

*24.In the situation that faced this panel, what was required was a detailed examination of the evidence of the three witnesses about all matters which could have contributed to a recommendation if they had made one."*

25.I gratefully adopt this reasoning, subject to the following point. It was not the effect of rule 2(22) that prevented panels from obtaining recommendations. Rule 2(22) did not have that effect, except as regards initial reports placed in the dossier: see **Bailey** at paragraph 105. It was the unlawful guidance of the then SSJ to professional witnesses which had this effect: see **Bailey** at paragraphs 140-149. It is an unattractive feature of the state of affairs which existed from July 2022 until shortly after **Bailey** that panels were prevented from obtaining recommendations in directed reports and at oral hearings by the unlawful interference of one of the parties to the case. For the reasons given by Sir John Saunders, I do not think that decisions are automatically rendered unfair in these circumstances; but their fairness should receive anxious scrutiny.

26.I would add one consideration to what Sir John Saunders has said. The long-standing practice of the Parole Board to ask for recommendations in my view contributes to good decision-making. Professionals, in preparing their reports and evidence, know that they will not only be asked about risk and protective factors, but also how they weigh those factors in assessing whether a prisoner can safely be released subject to a risk management plan. They will have thought this issue through; the POM and COM will have discussed it; and they will come to the hearing prepared to deal with it. Especially in difficult cases, this can be of real assistance to the process of decision-making.

27.I have not found any assistance in the submissions made on behalf of the SSJ which I have quoted above; and it is disappointing that those submissions make no reference to and are inconsistent with **Bailey** and **Rehman**. I will briefly address the three points made.



- a. If report writers are directed by the Parole Board to provide recommendations either orally or in writing, they are not fully carrying out their responsibilities unless they provide their honest and candid opinion on that subject to the extent that they feel able to do so: see **Bailey**, especially at paragraphs 101-103.
- b. The refusal of report writers to provide their opinion and reasons on the question whether the prisoner could safely be released was a failure to provide a key form of assessment which had hitherto always been provided to the Parole Board: see **Bailey** at paragraphs 147-149 and **Rehman** at paragraph 17.
- c. It is absurd to suggest that a panel will fetter its discretion if it seeks and considers recommendations from professionals. It is plain that a panel is free to assess the reasons given for recommendations and to adopt or reject them: see **Bailey** at paragraph 103 and **Rehman** at paragraph 21. For reasons which I have explained above, the giving of recommendations with reasons is a valuable aid to good decision making.

28. I now turn to the facts of this case. I have listened with care to the recording of the oral hearing for two reasons. Firstly, the submissions of the Applicant set out above are not entirely consistent with the panel's reasons. As will appear in a moment, the submissions are not an entirely accurate account of what transpired at the hearing: the position is more complex and nuanced.

29. Secondly, in the panel's reasons the following sentence appears (paragraph 2.34):

*"The present uncertainty for professionals regarding their ability to make clear recommendations has complicated an already complicated situation."*

30. I have not found any real explanation in the decision as to why the panel thought this was the case; and I have therefore listened with special care to the passages where the question of recommendations arose.

31. The decision in **Bailey** had not been handed down at the time of the panel hearing, but there had been concessions shortly before and during argument on 1-2 March – see paragraph 83-85 of the judgment. Parole Board members had been informed that this was the case. Unfortunately, no fresh guidance had been given by SSJ to professionals correcting his unlawful advice. At an early stage, the panel chair informed professionals of the advice she had received and that the panel would ask for the recommendations of witnesses (recording, minutes 11-12). The COM responded that probation services had not been given any fresh guidance; her understanding was that they were still prohibited on giving any recommendation relating to release (recording, minute 14). The panel chair said the matter would be addressed further during the evidence.

32. The POM had prepared a report in June 2022 prior to the SSJ's unlawful instructions. He had not made any recommendation in that report; I do not find this surprising, since the general practice by that time was for any recommendation in a report to come from the COM after consultation with the POM. He gave evidence to the panel;



he was not expressly asked either by the panel or by the Applicant's representative whether he had a recommendation and if so, what it was. The legal representative did, however, ask whether there was any further work for the Applicant to undertake in custody prior to release; the POM replied that he did not see any further work that could be done (recording, minutes 43-44). While he was not asked specifically for a recommendation, the tenor of his evidence as recorded by the panel and as it sounds on the recording is favourable to the Applicant. The panel said that the POM appeared to be of the view that risk was manageable, provided that the Applicant complied with his risk management plan.

33. As noted above, the psychologist had prepared a report which did not recommend release until further work had been done; further work had been done by the time of the hearing. He was asked at the hearing whether anything had changed his mind about not recommending release. His reply is found in the recording at minutes 2:51 and following. He said he found the question *"really tricky."* After saying that there was evidence of progress, and that some of the work he had recommended had been completed, he said he found it difficult to know if other matters had been addressed. He concluded by saying that the latest guidance he had was that they should not be commenting [sc. on release] so that put him in a *"tricky position"* but *"I don't feel I would be able to give one [sc. a recommendation] even I feel I could."*
34. In 2022 the COM, who had substantial experience of working with the Applicant, had also recommended that the Applicant do further work before being released. Some work had now been done with a psychologist. In evidence she said, in answer to questions from the first co-panellist, that if he complied with licence conditions the Applicant would be manageable in the community; she was not directly asked for a recommendation by him or by the other co-panellist. She was, however, directly asked by the chair whether her view had changed. She said that she struggled to answer; she asked whether he had developed enough skills to manage alcohol in the community without controls; she said that her answer to the co-panellist was a qualified one, depending on controls remaining in place (the particular control which was in mind was an alcohol tag, which generally lasts for a year). In answer to the Applicant's representative she repeated similar points, finishing by saying (in apparent reference to the Secretary of State's guidance) *"I cannot comment on whether he should or should not be released"*. The passages are found in the recording at about minutes 4:13 to 4:15 and at about 4:17 to 4:19.
35. In summary therefore, it is not correct to say that all three professionals stated that the Applicant's risk could be managed in the community: the COM and POM came closest to this, but the COM in particular was guarded in what she said.
36. Why did the panel say that the uncertainty for professionals regarding their ability to make recommendations had complicated an already complicated situation, and was the panel correct?
37. By the date of the oral hearing there was no longer any real issue about whether the Parole Board was entitled to ask professionals for recommendations, and whether the professionals were to answer to the best of their ability. Except as regards initial reports, the old position was restored. The Parole Board was entitled to expect that witnesses would come along prepared to answer questions about their recommendations and the reasons for them. The panel made that expectation





clear to the witnesses in this case.

38. The SSJ, however, had not communicated the correct legal position to the professionals even though he had done so to the Administrative Court more than 2 weeks before. It is plain, listening to the professionals, that they were still strongly influenced by the unlawful advice given. Listening to the recording, it is apparent that the psychologist and COM had not come prepared to give a reasoned recommendation or a reasoned view as to whether risk was manageable in the community; their answers are not in a form calculated to assist the panel taking a difficult decision. In my view the panel was fully entitled to say that the uncertainty, particularly of the psychologist and COM, about their ability to make recommendations had complicated an already complicated situation.
39. I agree with Sir John Saunders that the fairness of a hearing affected by the SSJ's unlawful guidance will depend on the facts of the case. The state of affairs in which the panel found itself was quite unnecessary, given that the SSJ had conceded the relevant points in **Bailey** but failed to inform professional witnesses. The panel did not find the case an easy or straightforward one, and both the panel and the Applicant were entitled to expect that professional witnesses would approach their task in accordance with the law. As I have noted above, to do so would have made an important contribution to good decision making at the oral hearing. Instead, an already difficult case was further complicated for the panel, as it made clear in its reasons. I find it impossible to say, in the circumstances of this case, that the hearing was fair. I will therefore allow the reconsideration on this ground.

### **Ground 2 – Alleged omissions**

40. The Applicant's second ground may be summarised as follows. The panel omitted to take into account important evidence – namely work done with Forward Trust, especially between April and August 2022 after his case was adjourned. The panel wrongly stated that he had completed only one piece of work with Forward Trust which was prior to that adjournment. The panel also omitted to consider a COVAID course completed on the links between alcohol and violence in 2020 – since which there has been no violence and his behaviour has been of enhanced quality.
41. In my view it is plain that the panel was aware of the Forward Trust course which the Applicant undertook between April and August 2022 and took account of it. The course is specifically described in paragraph 2.9 of its reasons and mentioned again in paragraphs 2.11, 2.15 and 4.4. The panel was also aware of and took into account the COVAID course: see paragraph 2.4 of its reasons. I do not think the panel can be said to have been irrational in the way it took these courses into account. It is true that the Applicant did not commit any act of violence in the period after completion of the COVAID course; but he had not kept to his resolve to be abstinent, and the panel was entitled to question whether he truly recognised the link between his drinking and serious violence.

### **Ground 3 – Applicant's evidence about drinking**

42. The Applicant's third ground is that the panel misunderstood his evidence. He submits that he was not minimising the link between alcohol consumption and his risk of serious harm; he was merely stating that alcohol was not considered a risk



factor in his case until 2017 and trying to convey to the panel the difficulty in making the lifestyle change to abstinence.

43. I have listened to the passages in the Applicant's evidence relating to this issue. Questioned by the first co-panellist, there are answers which appear to minimise both his drinking and the link between drinking and violence – to the extent that he found himself saying that "*drink has never really been an issue for me*" – recording at minute 1:07 in a passage which begins at 1:04. In this passage he was not asked specifically whether he intended to be abstinent. Questioned quite extensively by the second co-panellist, the chair, and his own representative he accepted that he had been drinking on the occasion of violence in 2017 and said that he fully intended to be abstinent, while saying this would be hardest in relation to social drinking because this had never been a problem. The passages in their questioning are between 1:58 and 2:25.
44. The panel summarised the Applicant's evidence in respect of alcohol in its reasons at paragraphs 2.15 to 2.16. I can see no error of law, unfairness, or irrationality in the way it summarised his evidence. It may well be that the Applicant initially gave an impression he did not intend to give about his attitude to drinking; he did not actually say that he was not committed to abstinence, and later clarified that he intended to be abstinent. But the initial answers, especially saying that "*drink has never been an issue for me,*" were ones which the panel was entitled to bring into account as it did.

#### Ground 4 – Recall

45. The Applicant's final ground challenges his recall. He argues that his recall was not justified because his behaviour on recall had shown no greater risk than anticipated when he was released and was consistent with the risk anticipated at that time.
46. This ground of appeal is without substance. The Applicant had resumed drinking when he said he would be abstinent and had then absconded from approved premises and been at large for several weeks. It is true that he did not commit any further offences; but given that he was on life licence for murder and had committed a serious offence during a previous release on licence, recall was inevitable and fully justified. In truth the recall was not seriously in issue at the oral hearing. The real question, as the panel fully recognised, was whether the Applicant's good behaviour subsequently coupled with his work with Forward Trust and the psychologist indicated that his risk was such that he could be safely released on licence.

#### Decision

47. For these reasons I grant the application for reconsideration on the first ground. I would not have granted it on any other ground.

**David Richardson**  
22 May 2023

