[2020] PBRA 42

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**Application for reconsideration by Hardisty**

## Application

1. This is an application by Hardisty (the Applicant) for reconsideration of a decision of an oral hearing panel dated 3 February 2020 not to direct his release from open conditions.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have also listened to the audio recording of the hearing in its entirety. This represents the official record of the hearing.

## Background

4. The Applicant was sentenced on 22 October 2007 to imprisonment for public protection following conviction for three counts of rape to which he pleaded guilty. A minimum term of three years and six months (less time spent on remand) was imposed. He was 17 years old at the time of the offence.

5. His tariff expired on 18 January 2011. This is his fifth parole review.

## Request for Reconsideration

6. The application for reconsideration is dated 26 February 2020 and has been submitted by solicitors acting for the Applicant.

7. The grounds for seeking a reconsideration are as follows:

   i. the Applicant disagrees with a statement in the decision letter and refusing release on the basis of an incorrect statement is irrational;

   ii. the panel's reliance on minor breaches of prison discipline as evidence of poor likelihood of compliance with licence conditions is irrational;

   iii. a panel member applied significant pressure to the Applicant to answer a question, a break was refused, an allegation of possible witness coaching was

raised, and that reliance on the Applicant's speculative response to that question as a ground not to grant release was procedurally unfair; and

iv. failure to consider an adjournment for the Applicant to undertake additional releases on temporary release was procedurally unfair.

8. The grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

**Current Parole Review**

9. The Applicant's case was referred to the Parole Board by the Secretary of State in October 2018 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he continued to be suitable open conditions.

10. The case proceeded to an oral hearing on 29 January 2020. A panel of the Parole Board comprising two independent members heard the case. It took oral evidence from the Applicant, his Offender Supervisor and his Offender Manager.

11. The Offender Supervisor's most recent written report (10 January 2020) recommended release. She noted that the Applicant had completed multiple Resettlement Overnight Releases (RORs) with no immediate concerns. There were reported issues concerning his perceived attitude towards his Offender Manager, although his Offender Supervisor considered this could be 'managed and improved'. It was noted that he would be likely to be allocated a new Offender Manager. His Offender Supervisor supported release at the oral hearing.

12. A written update (27 January 2020) was provided by his new Offender Manager who had been allocated the Applicant's case on 20 November 2019. It did not provide a recommendation but noted concerns that after completing extensive work there was not yet a full understanding of his sexual thoughts, feelings and wishes. In the hearing, the Applicant's Offender Manager did not support release. The decision notes her view that the Applicant needed to complete further RORs to build a good working relationship with them. They were also concerned about the Applicant's attitude towards his licence conditions and that there was still a lack of understanding of his sexual thinking.

13. The panel found that the Applicant continued to present a high risk of serious harm. It was particularly concerned about the Applicant's inability to form trusting working relationships with those responsible for his supervision in the community and noted a need to demonstrate improved custodial behaviour as an indicator of compliance and evidence of consequential thinking skills. It therefore made no direction for release.

14. The decision letter did not respond specifically to the referral regarding the Applicant's continued suitability for open conditions, although its view that he was so suitable was implicit in its statement that future panels would be assisted by *inter alia* an exploration of sexual thinking in the community (giving rise to a presumption of future releases on temporary licence).

**The Relevant Law**

15. The panel correctly sets out the test for release in its decision letter dated 17 February 2020.

*Parole Board Rules 2019*

16. Under 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)).

*Irrationality*

17. 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.*

18. 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.

19. 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*

20. 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.

21. 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.

22. The overriding objective is to ensure that an applicant's case was dealt with justly.

23. Justice must not only be done but be seen to be done. Procedural fairness demands that the decision-maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties. The test of bias was set out by Lord Hope in **Porter v Magill [2001] UKHL 67** to be whether '*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias'*.

**The Reply on behalf of the Secretary of State**

24. The Secretary of State has submitted no representations in response to this application.

**Discussion**

25. I will deal with each ground in the application separately:

*Ground i: Refusing release on the basis of a disputed statement*

26. It is first submitted that a statement in the decision letter that the Applicant responded negatively when questioned about his sexual thinking or risk management is incorrect, and therefore, the panel's reliance upon it is irrational. In furtherance of this it is submitted that the panel irrationally relied upon the Offender Manager's evidence rather than the Offender Supervisor's evidence.

27. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

28. The decision letter is more nuanced than the bare statement advanced in the submissions. It goes on to recognise the difficulties the Applicant may have had in expressing himself and the number of changes of Offender Manager, but the panel noted (as it was entitled to do) that there was a consistent pattern of difficulty in establishing open relationships with Offender Managers. The working relationship is one in which sexual and risk related matters would be discussed.

29. While the Applicant may disagree with the panel's assessment, I do not find its reasoning to be irrational. Accordingly, this ground fails.

*Ground ii: Reliance on minor breaches to evidence poor likelihood of future compliance*

30. It is further submitted that reliance on the Applicant's history of breaches of prison discipline as evidence of poor likelihood of compliance with licence conditions is irrational, particularly as these breaches were not 'risk paralleling'.

31. The Applicant has broken prison rules (including having been adjudicated twice since his transfer to open conditions) and the panel has considered this to be evidence of his potential to break rules in the future. While I agree that the Applicant's infringements are in no way related to sexual risks, and he has completed temporary releases without breach, I do not find the panel's conclusion on this point to be irrational. This ground also fails.

*Ground iii: Pressure when questioning; refusal of break in proceedings; allegations of witness coaching; negative reliance on speculative answer*

32. It is also submitted that a panel member applied significant pressure to the Applicant such that he felt compelled to answer their question. His legal representative intervened to ask for a break. This was opposed by the panel member but granted by the panel chair. An accusation was made by the panel member that the Applicant could be coached by his legal representative during the break. His legal representative has submitted (following the Applicant's waiver of privilege) that the consultation was to remind the Applicant that he if did not know the answer to the question then he should simply say so.

33. I have listened to the audio recording of the hearing, and the account given in the application is accurate. There are, however, some further points to make.

34. At the start of the hearing, the panel chair (C) had set out the procedure for breaks, informing the Applicant that a break would be possible on request at any time, including for him to have a discussion with his legal representative.

35. The line of questioning by the co-panellist (P) concerned an allegation made by the victim at the time of the offence. The Applicant speculated on the victim's reasons for doing so but otherwise did not know/could not say. P asked three follow up questions on the same point. Each time the Applicant reiterated that he did not have an answer.

36. The Applicant's legal representative was concerned about the pressure being put on the Applicant to give an answer and requested a break. This request was refused by P three times before C intervened and offered a break. After the break was offered, P commented that it was not appropriate for the Applicant to discuss his evidence with his legal representative. The Applicant's legal representative strongly rebutted any insinuation that they would be discussing evidence or coaching him and reminded the panel of their professional responsibilities to their regulatory body.

37. Before the break, C reminded the Applicant that he was perfectly entitled not to answer any of the panel's questions but reminded him that if he refused or was evasive then the Panel would take that into account in its assessment.

38. This situation gives rise to two points to consider: the questioning of the Applicant by P, and the concerns raised about witness coaching.

39. With regard to the questions asked by P, rule 24(2)(b) sets out that the panel may ask any question to satisfy itself of the level of risk of the prisoner. The Oral Hearing Guide notes that witnesses should feel comfortable enough to give evidence and that the Chair should not allow a representative of either party to badger a witness. By extension, the Chair should also not allow any member of a panel to badger a witness.

40. That said, in **Green [2019] PBRA 4** it was noted that that questions in an oral hearing are often challenging; they may – and frequently must - explore sensitive areas relevant to risk that a prisoner finds uncomfortable to revisit and would prefer to leave alone. The fairness of proceedings is viewed in the round, having regard to the interests both of the prisoner and the general public.

41. P had embarked on a line of questioning involving a sensitive issue; one in which the Applicant was asked to comment on why the victim may have made a particular statement. The Applicant made it clear on multiple occasions that he did not know and was only speculating on one possible answer. He was clearly finding it uncomfortable to the point that his legal representative felt moved to intervene. Although P's questioning was verging on badgering, I do not, on balance, consider it to be so extreme as to constitute procedural unfairness.

42. With regard to breaks in hearings, there no guidance provided in the Oral Hearing Guide although it is, in my experience, standard practice to offer and permit breaks on request from anyone present. Moreover, C's introductory remarks would have left the Applicant (and his legal representative) with an expectation that a break, if requested, would have been granted without the need for a protracted argument with P over its timing or merits.

43. Once C had granted the break, this should have been the end of the matter. However, P intervened again to say that they did not consider it appropriate for the Applicant to have a break and thereby the opportunity to discuss his evidence with his legal representative. Not only was it not P's place to do so (the conduct of proceedings resting solely with the panel chair), but their comment carried with it an insinuation of witness coaching so obvious that it was immediately noticed and vehemently rebutted by the legal representative.

44. In connection with this, C also warned the Applicant that any refusal to answer a question or evasiveness would form part of the panel's assessment and that it would come to its conclusion based on how the Applicant answered questions. This could be reasonably taken to imply that any such assessment would not be in the Applicant's favour. Indeed, in its decision, the panel noted that it was sufficiently concerned by the Applicant's response to P's line of questioning on this point for it to be one of the factors relied upon to deny his release.

45. In my view, if a fair-minded and informed observer were to reflect on the comments made in the hearing (around witness coaching and the ramifications of not answering a question straightforwardly) they would conclude that there was a real possibility of bias and therefore I find procedural unfairness on this ground.

46. Having established this, I shall dispense with the remaining submission briefly.

*Ground iv: Failure to consider an adjournment*

47. Finally, it is submitted that the Applicant (through his legal representative) requested the panel to consider a brief adjournment for further temporary releases to take place such that the Applicant could build rapport with his new Offender Manager. It is further submitted that the Applicant's Offender Manager suggested two further temporary releases would suffice.

48. The Applicant's legal representative asked the panel, in their closing submissions, to consider a deferral (in their words) to enable the Applicant to take additional RORs, if this would alter the panel's decision *'in any significant way'*.

49. The proposed adjournment (and the reasons for discounting it) were not explicitly addressed in the decision and so there is no evidence on which the Applicant can fairly be satisfied that the panel did consider this requested adjournment (even though it is almost certain that it would have done as a matter of course). I also find this to be procedurally unfair. If an adjournment is requested, the panel has a duty to consider it, and, if it decides not to grant it (which it is perfectly entitled to do), it must document its reasoning so that the prisoner can be clear that the panel has, in fact, given it due consideration and understand the basis on which it has not been granted.

**Decision**

50. Accordingly, applying the tests as defined in case law, I consider the decision not to release the Applicant to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

51. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

52. The question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was made unfairly. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

53. <u>The following further directions are now made</u>:

(a) The re-hearing should be expedited.
(b) The original decision must be removed from the dossier and must not be seen by the new panel.
(c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.

(d) The new panel should also be advised of the fact that this is a reconsideration and should not in any way affect its decision. It is a complete re-hearing.

(e) Updated reports from Offender Manager and Offender Supervisor should be provided four weeks prior to the re-hearing. These reports must not provide any detail regarding or comment upon the last hearing.

**Stefan Fafinski**
**20 March 2020**