

[2021] PBRA 115

## Application for Reconsideration by Laidley

### Application

1. This is an application by Laidley (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board (the Panel) dated 5 July 2021 not to direct release. The Panel also did not recommend transfer to 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 dossier now at 349 pages (including the decision letter), the post hearing written closing submissions dated 23 June 2021 and the application. In addition, due to the grounds advanced by the Applicant, I requested and was provided with the recording of the oral hearing.

### Background

4. The Applicant is aged 49. On 9 February 2010, when he was 39, he was sentenced to imprisonment for public protection for causing grievous bodily harm with intent. The victim was his then partner. He was jealous and had been drinking alcohol and he attacked her with a baseball bat causing significant injuries. The Applicant had previous convictions which included violence and arson and involved his ex-partners.
5. The minimum term was set at 3 years less time served on remand and expired on 24 August 2012. This was the fifth review of his case by the Parole Board.

### Request for Reconsideration

6. The application for reconsideration is dated 23 July 2021 and was submitted by the Applicant's legal representative.
7. The grounds for seeking a reconsideration are as follows:

Ground 1: That the decision was procedurally unfair because the Applicant was denied the opportunity to give his best evidence by way of a face to face hearing.

Ground 2: That the decision was procedurally unfair because the decision taken by the Panel to release the Prison Psychologist prior to evidence being taken by the COM was wrong.



Ground 3: That the decision was irrational as the Panel placed undue weight on the evidence from the Community Offender Manager who was the only witness not to support a move to open conditions and was a witness who did not know the Applicant well.

### **Current parole review**

8. The Secretary of State referred the case to the Parole board in July 2020 for it to consider whether it was appropriate to direct the Applicant's release or, if not, to consider whether a recommendation should be made for his transfer to open conditions.
9. The matter came before an experienced member of the Board for Member Case Assessment (MCA) on 14 December 2020 and was directed to an oral hearing.
10. The oral hearing was convened by way of video link on 21 June 2021 before a Panel of three members of the Parole Board (including a Psychologist and a Judicial member). On that date the panel heard evidence from the Applicant, his Prison Offender Manager (POM), a Psychologist employed by the Prison Service and his Community Offender Manager (COM). The Applicant was legally represented and made an application for a recommendation for transfer to open conditions.
11. At the close of the oral hearing, it was agreed that written submissions would be sent to the Panel by the legal representative. Those were sent in and are dated 23 June 2021.

### **The Relevant Law**

12. The panel correctly sets out in its decision letter dated 5 July 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

#### *Parole Board Rules 2019*

13. 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. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.
14. This is significant in this case, as the Applicant accepted he was not suitable for release and did not make an application for release.

#### *Irrationality*

15. 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,



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*"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 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. 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*

17. 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.

18. 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.

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

### **The reply on behalf of the Secretary of State**

20. The Secretary of State did not make any representations in this case.

### **Discussion**

#### Ground 1

21. The Applicant submits that the decision was procedurally unfair because the Applicant was denied the opportunity to give his best evidence by way of a face to face hearing. The Applicant expanded on this within his application to say that, *"it is not apparent from the decision letter that manner of questioning of [the Applicant] by the judicial member may well be interpreted as having been overbearing"*. The application further states that the Applicant *"may be forgiven for having formed the view the Panel were intent on provoking him"*.



22. The Applicant was legally represented throughout the review including at the MCA stage. The MCA member directed the case to a remote hearing by way of telephone or video. Since March 2020 the Parole Board have undertaken the majority of its reviews remotely initially in response to the Covid-19 pandemic. However, some face to face hearings have been convened where it is deemed necessary. For this case, the MCA did not deem it necessary but said that was subject to any representations from the Applicant. The Applicant did not submit any representations objecting to a remote hearing.
23. The Panel Chair completed his directions on 10 June 2021 and confirmed that in his view the case could be heard via video link. Again, the Applicant who remained represented by the same legal team, did not object.
24. At the start of the oral hearing, the Applicant's legal representative did not object to the case proceeding via video link, despite an opportunity to make any submissions or applications following invitation from the Panel Chair. No objection was raised during the evidence or at the end of the hearing.
25. In the written closing submissions following the hearing the legal representative raised the issue that the Applicant may not have "*presented his best evidence*" over the video link and asked the Panel to take that into account. The submissions did not request a further hearing or fresh hearing to be held face to face. The Panel addressed the points raised in submissions at length within its decision letter in section 8. The Panel expressly stated that it took into account the fact that oral hearings are stressful. However, the Panel rejected that the Applicant was adversely affected by the format of the hearing. The Panel considered him to be defensive, angry and confrontational at times during his evidence. However, in the Panel's view the manner of the Applicant's response "*appeared to be related to the question asked*" rather than his general ability to deal with questions.
26. I have listened to the recording and the evidence of the Applicant. The Applicant submits that the focus was on his previous convictions. It is correct to say that questions were asked about some of his past convictions, specifically those which related to his intimate relationships, which would be expected given his index offence, it was his first substantive parole hearing, and the Panel would want to consider the impact of the offending behaviour work he had undertaken and whether it has improved his insight and skills to deal differently with relationships in the future. The forensic approach of a parole panel will be unique to its own constitution. Each member of the Board has his or her personal style, developed with experience and training towards achieving an effective technique. Questions must be appropriate for the individual witness and relevant to the issues. In this forum such questions are likely to be challenging and will explore sensitive and difficult areas which a prisoner may find uncomfortable to revisit and explore. Robust questioning must not be mistaken for overbearing questioning.
27. In this case, all questions were entirely relevant. The Applicant was given opportunity to respond to each one and was clearly listened to as follow up questions were asked in response to his answers. It is the Applicant himself who often interrupted or responded to a question with his own question. The Panel Chair specifically asked the Applicant about his level of emotional arousal during the hearing and indicated that



he perceived the Applicant to be angry and frustrated at times which the Applicant denied. The Applicant's legal representative had the opportunity to intervene if a question was considered to be unfair, irrelevant or difficult to understand. No such intervention occurred. The legal representative did not ask for a break either. The legal representative was given the opportunity from the Panel Chair to ask any questions of his own to the client and he took that opportunity. Within the legal representative's questions, the issue of his emotional arousal and his presentation was again covered, and the Applicant was given time to explain how he felt and why he may have been perceived as angry.

28. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel. It was plainly a matter for the Panel to determine what it did or did not accept from the Applicant's evidence including his reasons for his presentation and the content of his answers. The Panel carefully set out its findings in relation to the Applicant within its decision. The Panel also directly addressed the points raised in closing submissions regarding the hearing and the questioning in its decision letter. Having considered the material and the recording of the hearing, I find no reason to interfere. The hearing was conducted fairly, and the Applicant was given a full opportunity over a number of hours to put his version of events to witnesses and directly to the Panel. Accordingly, this ground fails.

### Ground 2

29. The Applicant submits that the decision was procedurally unfair because the decision taken by the Panel to release the Prison Psychologist prior to evidence being taken by the COM was wrong. It is not entirely clear from the application what impact the Applicant submits this had other than to say the Prison Psychologist did not have the opportunity to hear a different opinion to his own, although it must be highlighted that the Psychologist did not recommend release. In the closing submissions it is suggested that the Psychologist might have been able to be in a position to answer further questions.

30. The Applicant's legal representative accepts that he did not object to the Psychologist being released. Having listened to the recording the Panel Chair asked the legal representative directly whether he was content to release the Psychologist and he said he was "*absolutely content*". After hearing the COM's evidence, he passed comment that his agreement to releasing the Psychologist "*may have been premature*" but he then moved to his questions and did not ask the Panel to consider recalling the Psychologist. In the closing submissions the legal representative did not ask for the hearing to be reconvened or for a further report from the Psychologist answering any questions but simply raised the issue that it "*might be considered procedurally unfair*". The Panel addressed this point in its decision letter indicating that it was not clear what further evidence could have been given by the Psychologist "*that would have affected the panel's independent judgment*".

31. It is right to say that the COM was not the author of the report in the dossier and was relatively new to the case. She said in evidence that it was the content of the Applicant's own evidence in particular which had impacted on her recommendation



which was now for him to remain in closed conditions. The panel members themselves put aspects of the Psychologist's evidence to her for comment as well as many other questions to understand her analysis of the case, her risk assessment and her recommendation. The Applicant's legal representative then took the opportunity of asking questions where he tested the basis for the recommendation. He was not interrupted or curtailed in this.

32. The Panel set out in its decision the reasons why it took a different view to the POM and Prison Psychologist. It is a matter for the Panel to determine which opinion it preferred and whether it agrees with recommendations given. A parole panel is perfectly entitled to reject any or all of the opinions given. An oral hearing is not an opportunity for professional witnesses to question each other, to argue with each other, to find an agreed way forward or to have the last word.

33. It is submitted that the decision to release a witness led to a procedural unfairness, depriving the Psychologist of an opportunity to hear the COM's evidence and perhaps to be asked further questions (although those questions are not set out and it is not clear what they might be). I cannot see how this decision impacted on the fairness of the proceedings. The Applicant was properly informed of the case against him including the COM setting her opinion out in evidence and he was given a full opportunity to put his side forward, to question the witnesses and to offer alternative opinions for comment. The decision letter sets out the detailed reasons and it appears the Panel placed particular emphasis on the Applicant's evidence when coming to its decision. The Panel specifically addressed whether further evidence from the Psychologist would assist and concluded it would not. The application does not help me as to what might have been asked to affect the evidence heard by the Panel. Accordingly, this ground fails.

### Ground 3

34. The Applicant submits that the decision was irrational as the Panel placed undue weight on the evidence from the COM who was the only witness not to support a move to open conditions and was a witness who did not know the Applicant well. As stated above, it is accepted that the COM was relatively new to the case but had considered the evidence including the oral evidence given by the Applicant and witnesses in the hearing.

35. Crucially, none of the witnesses recommended release and the Applicant himself did not consider he was ready for release. Within his closing submissions the Applicant specifically accepted that the statutory test for release was not met. Within his application, he again submits that it is the decision "*to remain in closed conditions*" which is irrational. As set out in paragraph 13 above, 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. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. It is therefore not within my remit to consider the decision of the Panel in not recommending a transfer to open conditions.

36. In any event, as with Ground 2, 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. The decision



letter in this case provides detailed reasons for the decision, carefully linking the evidence it heard and read. It would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. There are no such reasons here and accordingly, the ground fails.

## **Decision**

37. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Cassie Williams**  
**6 August 2021**