

[2021] PBRA 147

**Application for Reconsideration by the Secretary of State  
in the case of Urwin****Application**

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 7 September 2021 following an oral hearing heard that day. The hearing was conducted remotely via video-link, due to current Covid-19 restrictions on face-to-face hearings.
2. The Panel directed the release of Urwin (the Respondent).
3. 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.
4. I have considered the application on the papers. These are the dossier of 330 pages (that includes the decision letter), the application for reconsideration and the submissions in response.
5. There was in this case an application for non-disclosure of certain material (that was summarised in the dossier). I was not invited by either party to consider that material and have made the decision based on the above documentation.

**Background**

6. The Respondent was aged 31 at the time of sentence and is now aged 40 years old. He was sentenced to imprisonment for public protection on 18 November 2011 for two offences of rape (committed against different victims). The tariff was set at 5 years (with allowance for time on remand) and expired on 7 June 2016.
7. The Respondent was released in 2016 and recalled after approximately 20 months after he was arrested for further sexual offences.
8. He was released again on 5 March 2019 and recalled in March 2020 after it was alleged that he had committed offences of a violent nature against his partner.
9. The case was deferred by a Parole Board Member in September 2020 due to the police investigation into the recall allegation. This was discontinued after the Respondent's partner declined to co-operate with the investigation.

**Request for Reconsideration**

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10. The application for reconsideration is dated 29 September 2021.
11. The initial grounds for seeking a reconsideration is that the decision was an irrational one.
12. The basis for this can be broken down as follows:
  - a) All witnesses were recommending a move to open conditions (and therefore not release);
  - b) The Panel's approach to the Respondent's ability to undertake 'BBR' (a specified rehabilitation course addressing relationships and the handling of emotions;
  - c) The Panel failed to place any (or any sufficient) weight on a security entry in the dossier; and
  - d) The decision to direct release when the release plan was not complete was irrational.
13. Following a direction dated 10 October 2021 a further ground of reconsideration was added:
  - e) The Panel failed to apply the Parole Board 'Guidance on Allegations' to the matters that led to recall.

### **Current parole review**

14. The Respondent's case was referred to the Parole Board in April 2020. An oral hearing was directed in January 2021.
15. As part of the case management directions, a report was directed from the Chief Constable of the local Police Force. This was to include all the evidence gathered.
16. The oral hearing was conducted remotely on 8 June 2021 and adjourned. It was concluded on 7 September 2021. The Panel heard evidence from the Respondent, as well as from the prison probation officer, the community probation officers and (it seems) from a prison psychologist.
17. It is important to note that at all stages of the proceedings (including the two oral hearings) the Applicant had the option of making representations in writing and/or attending the hearing and making representations. However, he chose not to do so. That does not preclude him from making arguments at this stage, but it does mean that he is not entitled to simply argue a case now which could have been done at the hearing.

### **The Relevant Law**

18. The panel correctly sets out in its decision letter dated 7 September 2021 the test for release.

### *Parole Board Rules 2019*

19. 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)).
20. 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**.

#### *Irrationality*

21. 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."*

22. 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.
23. 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*

24. 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.
25. 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.

26. The overriding objective is to ensure that the case was dealt with justly.
27. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontroversial and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.
28. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

### The reply on behalf of the Respondent

29. The Respondent has submitted representations in response (dated 4 October and 15 October 2021). These respond to the grounds raised in the application. I shall set them out below where necessary.

### Discussion

30. I shall consider the separate grounds individually before considering whether the decision as a whole was flawed.

### Ground (a) – Recommendations of the professionals

31. At the hearing all the professionals were recommending a move to open (and, therefore by implication, not recommending release).
32. That is something that the Panel was bound to take account of. However, as is trite law, the Panel is not bound by the recommendations, provided sufficient reasons are given.
33. In this case, the Panel sets out reasons for the conclusion that the Respondent's risk is manageable in the community, contrary to the recommendations of the Panel.
34. The application sets out a careful analysis of why, in essence, the recommendations are correct.

35. I consider that this amounts to, in effect, a disagreement with the Panel's decision rather than reasons why the decision is irrational. These are arguments that could have been made to the Panel at the time, but the Applicant chose not to. It is not open to him to make them now.

#### **Ground (b) – The analysis of programme work**

36. The application is based around the premise that the Panel directed release so that the Respondent could access the healthy sexual relationships course more quickly.

37. If that were the case, then that would have been an error. However, it does not seem to me that the Panel went that far. The Panel's reasoning on para 8 of the decision letter does not identify the course as being 'core work' that it was necessary for the Respondent to complete before he could be safely released.

38. The essential reasoning of the Panel is that the proposed release plan was sufficient to manage his risk. In those circumstances, then, whilst it may have been preferable for the Panel to set out whether, in its view, there was core work outstanding, I do not consider that this makes the decision irrational.

#### **Ground (c) – Failure to place sufficient weight on parts of the evidence**

39. The grounds refer to a security entry (from 1 August 2020) that the Panel has not referred to.

40. Although I can see why this entry could be seen of significance, it was one specific entry from a lengthy dossier. A Panel cannot be expected to refer to every piece of evidence. Had the Applicant been particularly concerned about this entry, the time to raise it was before (or at the latest at) the hearing.

#### **Ground (d) – The incompleteness of the risk management plan**

41. It is said that there were gaps in the release plan and that the Panel fell into error in directing release.

42. The Panel set out in the decision letter reasons why it considered that the proposed release plan could manage the Respondent's risk.

43. If the Applicant had concerns about the release plan, then this should have been addressed at the hearing, especially as the case was adjourned part-heard to investigate the release plan.

44. I consider that this ground is a disagreement by the Applicant with the Panel's decision and it cannot be said that this is irrational.

#### **Ground (e) – The Parole Board policy on allegations**

45. The recall was triggered because of an allegation by the Respondent's partner that he had strangled her.

46. When faced with this unproven allegation, the Panel was obliged to follow the approach as set out in the Parole Board document 'Guidance for Parole Board members on the consideration of allegations which have been made against a prisoner' (issued in March 2019, and amended in July 2021).
47. This has been considered, and upheld, twice by the Administrative Court last year in **R (Morris) v Parole Board [2020] EWHC 711 (Admin)** and again in **R (Pearce) v Parole Board [2020] EWHC 3347 (Admin)**.
48. The recent amendments to the policy were made to clarify parts of the policy to better reflect the Court's analysis in the above cases. Although the amendments straddled the first and second hearing of this case, it does not seem to me that that makes a difference to the analysis.
49. The policy sets out a structured approach to follow when a Panel is faced with an allegation that is not accepted by a prisoner and has not been adjudicated on.
50. In brief, the Panel should first consider whether the allegation is (if true) relevant to risk. If it is (as this allegation undoubtedly was) then they must consider whether there is sufficient evidence to make a finding of fact, and whether it is fair to do so.
51. If so, then the Panel must make a finding of fact as to what happened on the balance of probabilities. If not, then the Panel must make an assessment of the level of concern, following the process set out at paras 18-24.
52. The decision letter should then set out the factual conclusions arrived at and how this impacts on the decision-making process.
53. The reasons do not need to be lengthy, but need to be sufficient to explain to a reader what conclusions the Panel drew from the evidence and why.
54. In this case the Panel noted that the allegation was made and that no further action was taken by the police.
55. However, the decision letter makes no reference to what the Panel made of the allegation in accordance with the procedure as set out above.
56. The Applicant and Respondent were both entitled to know what findings (if any) had been made, or the assessment of concern, and brief reasons as to why this was the case.
57. Further, the fact that the Panel made no reference to the 'Guidance on Allegations' document means that a fair and independent observer could not conclude that the correct process was followed.
58. The Respondent submits that it is clear that the Panel took the allegation into account in its decision. The difficulty with that submission is that reading the letter it is not possible to say that this is the case, or what the Panel's assessment was.
59. It is often the case that there will be a number of matters raised at a hearing that the prisoner disputes. A Panel does not have to make findings of fact on everything



that is in dispute. Even when a Panel does so, it will often be possible to set out the Panel's conclusions in a sentence.

60. However, given the seriousness of the allegation and the fact that this was the reason for the recall, it is clear that this matter was one that had to be considered.

61. As was said by Bourne J (at para 85 of **Pearce**, albeit in a slightly different context) "Where allegations are fundamental to a parole review, it is the Board's duty to carry out a sufficient investigation of them", and by Irwin LJ in **Morris** "The Board is an expert body, charged with acting fairly. It is clear they will reject mere allegations unsupported by any material or evidence. Beyond that, they will be careful to consider matters said to be relevant to risk fairly, and above all in the context and in the light of facts established in the individual case".

62. To that it can be added that it is axiomatic that when a Panel carries out that exercise, reasons must be given.

63. I accept that the Panel has set out reasons as to why the Respondent's risk is manageable in the community. However, I do not consider that I could conclude that that aspect is severable given the centrality of this matter to the Panel's task in assessing risk.

64. The further representations from the Respondent state that the recall allegation was fully considered at the hearing. There is no evidence of this put forward, but I have no reason to doubt it.

65. However, the decision letter is entirely silent on the question of how the Panel approached this allegation and what weight, if any, was placed on it. In any event, the fact that there was extensive exploration of the allegation at the hearing makes it all the more important that the Panel's conclusions were set out.

66. Lastly, it is said that para 25 of the Guidance says that the decision letter 'should', rather than 'must' include the above, and therefore the decision is still sound.

67. I shall set out para 25 in full:

*"The parole decision letter should include reference to an allegation made, explain whether the allegation has been disregarded or taken account of, and if taken account of an outline of the panel's analysis and how the allegation has impacted on decision-making. If the allegation has been disregarded the decision letter should explain why it has been disregarded. The decision letter should also set out, in respect of any findings of fact, how and why they were made (namely, upon the balance of probabilities and in order to assist the panel considering risk)".*

68. It is clear to me that, reading the whole paragraph, 'should' in this context means 'must', rather than 'may' as contended for by the Respondent.

69. In those circumstances I am driven to the conclusion that this ground is made out, although it is one that falls under the heading of procedural impropriety rather than irrationality.

## Conclusion

70. The Respondent was recalled following an allegation of serious offending.

71. For the reasons set out above, I do not consider any of the grounds (a)-(d) are made out.

72. However, for the reasons set out above, I consider that the lack of reference to the Parole Board policy, or to what conclusions the Panel drew in relation to the allegation, the fair minded observer cannot be satisfied that the correct procedure in relation to unproven allegations was followed, and clear findings (with reasons) made.

## Decision

73. For the reasons I have given, I conclude that the application for reconsideration should be granted.

**Daniel Bunting**  
**19 October 2021**