

[2021] PBRA 168

Application for Reconsideration by Taylor**Application**

1. This is an application by Taylor (the Applicant) for reconsideration of a decision, dated 7 September 2021, by a Parole Board Panel refusing to direct his release but to recommend his transfer to open conditions.
2. The review was by way of oral hearings on 7 April 2021 ("Hearing 1") and 2 September 2021 ("Hearing 2"), at which detailed evidence was given by the Applicant, two Prison Offender Supervisors, (POMs), his Community Offender Manager (COM) and an Independent Psychologist commissioned by the Applicant's Legal Representatives. The oral hearings were considered remotely by telephone link due to restrictions imposed as a result of the COVID-19 pandemic.
3. Between the two hearings there was a significant change of personnel and the review further complicated by other issues.

At Hearing 1:

The Applicant was represented by Mi.
POM was C.

At Hearing 2:

The Applicant was represented by Md.
POM was B.

4. The COM who gave evidence at both hearings (G) had been in post since 17 March 2021, only 3 weeks before Hearing 1, had had only a brief video link meeting with the Applicant and had not prepared a written report. Mi was granted an adjournment to allow G to meet the Applicant and prepare a report.
5. C had been in post fewer than 10 weeks at the time of Hearing 1 since 27 January 2021.
6. B had been in post only for 5 weeks at the time of Hearing 2 since 28 July 2021.
7. Md had been unaware of earlier representation by Mi and had been under the

impression that the Applicant had been represented at Hearing 1 by another, experienced, Legal Representative. He informed the Panel that he had not received hand-over notes from Mi.

8. I have considered this application and the relevant papers comprising the dossier which contains 392 pages, the decision of the Panel, dated 7 September 2021, and the application for reconsideration, dated 16 September 2021, consisting of, a little over, 8 pages of closely argued submissions. In addition, the Panel was provided with relevant extracts from the official note of record of the hearings consisting of: Hearing 1 (which had not been recorded) the Chair's notes and, Hearing 2 a transcript of recorded evidence.

Background

9. On 22 June 2012, the Applicant, having, variously, been convicted by a Jury, or pleaded guilty to, two charges of rape, one of assault by penetration and, separately, to two charges of assault by beating and two of robbery, was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum term of 5 years and 286 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 4 April 2018. All the offences were committed on 2 October 2011. The Applicant was 22 years old at the time of sentence and is now 31, and the tariff term was said by the Sentencing Judge to reflect guilty pleas to the 2 assaults and one robbery.
10. The Applicant had a poor criminal record since the age of 17 primarily for dishonesty but including one offence for violence and had served a number of periods in Young Offenders' Institutions. He had no previous convictions for sexual offences.
11. The index offences began after, in drink, the Applicant chased two young men and a young woman, first reaching the young woman whom, in a prolonged attack, he raped. When the two youths attempted to intervene, he subjected them to a drawn-out attack and robbed one of cash and a mobile phone.
12. His "Not Guilty" pleas to the sexual charges, rejected by the Jury, were on the basis of consent.
13. A Parole Board Panel, after a hearing in March 2020, directed the Applicant's release which took place on 8 June 2020, but he was recalled on 29 July 2020 following concerns about alcohol and substance misuse and breaches of licence and curfew conditions.

Request for Reconsideration

14. The function of the Reconsideration Assessment Panel (RAP) is limited to the statutory limbs of challenge of irrationality of the decision and of procedural unfairness, both of which are raised in the lengthy application for reconsideration, prepared by the Applicant's Legal Representatives. It is not necessary to reproduce

the application in full, but all sections have been considered and the aspects relevant to the statutory limbs are set out below.

15. In general terms, the Application submits:

a) Irrationality

- i. Factual issues relating to an incident in September 2021.
- ii. That "all professional oral witnesses" supported release and that the Panel's conclusion and reasoning "is inadequate".
- iii. That the Panel's recommendation for transfer to open conditions "inferred" that it did not see a requirement for any further core risk reduction work.

b) Procedural Unfairness

- i. That the Panel incorrectly stated that, at Hearing 1, C had not changed her recommendation from supporting open conditions to supporting release. This is described as "*simply untrue*" on the basis of evidence given by B, at Hearing 2, as to her subsequent conversations with C, and on the basis of correspondence conducted, after the Panel's decision, by the Legal Representatives with C. On that basis, the decision, taking into account all the circumstances of the case, was "*possibly procedurally unfair*".

16. The Applicant did not dispute his recall "per se" but challenged factual points and emphasised that he did not reoffend during this period.

Response on behalf of the Secretary of State

17. The Secretary of State (SoS), by letter dated 24 September 2021, submitted:

"We have reviewed the attached application for reconsideration submitted to the independent Parole Board by The Applicant's legal representative on behalf of The Applicant and we wish to provide representations regarding the following claims discussed in the application:

- i. The Parole Board decision letter states '[C] (previous COM) had conceded in her report and in her evidence to the panel that a robust release and risk management plan had been prepared, but she did "not consider that release was suitable." She was of the view that more evidence was needed to indicate that [the Applicant] could manage [his] anger and for [him] to "build an honest relationship with professionals". She preferred the "stepping stone" approach that a transfer to open conditions would provide. It was suggested that she would support [the Applicant's] release. However, she was not available to give evidence to explain why she had changed her recommendation from the earlier hearing.



ii. In regard to this matter, the Public Protection Casework Section (PPCS), on behalf of the Secretary of State, contacted C, previous Community Offender Manager (COM) who confirmed that although not initially supporting release, *"believed that since the hearing in April he [The Applicant] was able to demonstrate positive, pro-social and stable behaviour and that the conditions proposed for his release were appropriate to manage his risk."* C stated *"I did not communicate this change to the panel in writing myself, as prior to handing the case over to [B], I did not believe that a further report was required. Instead, I shared this information with [G], who noted it in his [probation officer's report] dated 18/06/2021".* PPCS can confirm the *[probation officer's report] is in the dossier at page 367.'*

iii. The Applicant also sustained an injury. Incidentally the Independent Psychologist disputes saying, *'she had seen photos of the injury [the Applicant] sustained and it was her view that reflected contact with a sharp object such as a table edge.'* The independent psychologist stated in a recent email *'I also do not have any memory of giving a view about the cause of injuries as is mentioned?'* Acting on The Applicant's behalf I believe this was said by B (COM).

18. In regard to this matter, PPCS contacted B (COM) who confirmed *"I did say something along the lines of "I am not a medical professional, however from viewing the images I do not feel that these could be sustained through head butting, but that they look more like injuries caused by his head hitting against something sharp/a sharp edge." I cannot recall the exact statement made."*

19. *"PPCS make no further representations in response to [The Applicant]'s reconsideration application".*

Current parole review

20. The case had been referred to the Parole Board on 12 August 2020, the Board being asked to consider whether to direct the Applicant's release or, in the alternative, to consider whether to recommend that the Applicant be transferred to open conditions.

21. The Panel considered the dossier, then of 357 pages. The dossier included a Risk Management Plan (RMP) for implementation in the event of release being directed, a psychological assessment dated 8 March 2021 from an Independent Consultant Clinical Psychologist in which she provisionally remained supportive of re-release and up-dated reports from C, for Hearing 1 in which she recommended a transfer to open conditions and did not believe that release was suitable at that stage, from B and G (for Hearing 2) in which re-release was recommended. The recommendations for release were repeated in evidence by the Independent Psychologist, by B and by G but the evidence of C is in dispute.



22. In its decision and its analysis of the Applicant's offending, the Panel considered not only the circumstances of the index offence and the offences committed while on release licence, but specifically recorded that before the Panel directing release, the evidence then, of both the same Independent Psychologist and a Prison Psychologist was that all core risk offending work had been done and that he could be safely released.
23. In his own evidence before the Panel, the Applicant had said that on licence he had "*pushed luck a little bit*" and that he had been drinking and used a Class A drug on, he said, one occasion.
24. The Panel reported that, at Hearing 1, C, who had been his POM for only 3 months, during which, due to Covid restrictions, she had met him only once, advised that she did not feel that release "*was suitable*" and preferred the "*stepping stone*" approach through open conditions.
25. It was with this background that the Panel came to its decision not to direct release, emphasising that it had no direct evidence of C's purported support for release. It suggested that the Applicant was ill-prepared for release in 2020, had quickly lapsed into past thinking and behaviours including substance misuse and aggression. There was, it found, despite the release views of witnesses, "*little evidence*" to suggest that he was any better prepared for release at that stage. It concluded that "*on balance*" it was still necessary for the protection of the public that he remain confined but that there were clear benefits to be gained from a transfer to Category D.

The Relevant Law

26. The Panel correctly sets out in its decision letter the test for release.
27. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.
28. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. For the avoidance of doubt, however, it is noted that this issue, also, was separately considered by the RAP.
29. In **R (on the application of 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"*.
30. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

31. 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.*"

32. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

33. 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 focusses on the actual decision.

Discussion

Irrationality

34. In my judgment, the decision to refuse release cannot be said, in any way, to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier and the oral evidence, gave a clear and reasoned decision. The incident in September 2020 was considered in detail and the Applicant was given credit for there being no other evidence of violent behaviour.

Procedural Unfairness

35. The thrust of this limb of the Application centres around evidence sought by the Legal Representative and the Secretary of State as to a change of recommendation by C from that recorded as her evidence to the Panel at Hearing 1. This raised issues both as to the accuracy of the Decision and a subsequent change of view by



C at her recommendation. This had involved direct contact with C by the Legal Representative, after promulgation of the Panel decision, and by the Secretary of State after lodging of the Reconsideration application.

36. None of this direct contact took place before the conclusion of the review or with the knowledge of the Panel. The information suggested to have been placed before the Panel came in the form of evidence of conversation between B and C between hearings and the briefest of references in a report from B, dated 18 June 2021 when it is stated (Dossier P 369-370), "*Having discussed this case at some depth with the POM, we are of the view that The Applicant could be suitable for re-release as his risk could be managed in the community provided a robust RMP is in place*". In so far as any change in C's views came before the Hearing 2, it was linked to a suggestion that that change had been made in evidence at Hearing 1 and the issue was dealt with by the Chair who referred to his own notes of the evidence then taken. No direct further information came from C who was, therefore, at Hearing 2 unquestioned before the Panel.

37. The Applicant was represented, at Hearing 2 by Md, the author of the Reconsideration Application, who did not seek leave to call C.

38. The Panel considered in detail the various issues raised in the Application and referred also to the suggestion that there had been a change in recommendation. It analysed the evidence and recommendations of all witnesses and commented that C had not appeared to give evidence at Hearing 2 and that it had received no direct evidence as to the suggested change.

39. In issues of reconsideration, the RAP is concerned as to the evidence then properly before the Panel prior to the promulgation of the decision and not as to any subsequent and unchallenged information.

40. The RAP has, itself, considered the official records of the hearings, the Chair's notes for Hearing 1 and the transcript of the evidence of B at Hearing 2 and is satisfied that they are correctly reflected in the Panel decision. At Hearing 2, the evidence of B as to what she believed had been said by C, at the previous hearing, was robustly challenged by all Panel members. It is satisfied that procedurally, also, the decision was fair.

Decision

41. The RAP prefaces its decision by expressing sympathy with all concerned in the case, particularly with the Panel and the Applicant. It is clearly highly unsatisfactory



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for a decision relating to the potentially conflicting issues of protection of the public and liberty of the subject to be decided following widespread and recent changes of those responsible for him. It is also unfortunate that an aspect of the Panel's decision was described in the Application as "*simply untrue.*"

42. For the reasons I have given, I do not find that the Panel's decision was irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

Edward Slinger
29 November 2021