

[2021] PBRA 185

## Application for Reconsideration by Spear

### Application

1. This is an application by Spear (the Applicant) for reconsideration of a decision of an oral hearing dated 4 October 2021. The outcome of the letter was not to direct release and to 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 reconsideration application (the application), the decision of 4 October 2021 (the decision) and the dossier considered by the panel of the oral hearing.

### Background

4. The Applicant is serving an indeterminate sentence for public protection (IPP) for the offences of rape, assault by penetration and false imprisonment. His tariff was set for 4 years and 176 days. This expired in February 2016. He was released on licence following a decision of the Parole Board in July 2019 and recalled in March 2021. This was his second recall on this sentence.

### Request for Reconsideration

5. The application for reconsideration is dated 29 November 2021.
6. The grounds for seeking a reconsideration are as follows:
  - (a) Procedurally unfair - The panel misunderstood the Applicant's explanation for phone calls made from prison and predicated their decision on a false premise that the Applicant is not honest or transparent.

### Current parole review

7. The Secretary of State's referral to the Parole Board is dated 26 April 2021.
8. On 13 October 2021 a panel of two independent members and a psychologist member considered the Applicant's case over a video link. They considered a dossier of 330 pages, all of which was disclosable to the Applicant except for the Victim Personal Statement which was not disclosed. However, a gist of the statement was included in the dossier and therefore disclosed to the Applicant. Oral evidence was



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taken from the Applicant, his Community Offender Manager (COM) and Prison Offender Managers (POM).

9. Following the hearing, in response to written submissions made by the Applicant's legal representatives, the panel adjourned the case for a short period. It directed the list of contacts on the Applicant's PIN from the time of return to custody after recall to present. Because of the content of the Application, it is important that I give a brief explanation of the PIN system. The PIN, as explained on the government website, is a Personal Identification Number. This is held by the Prisoner and all telephone numbers that a prisoner is allowed to call (or receive calls from) are on a list attached to this PIN. So, for example, the telephone number of a prisoner's legal representative and COM will often be found on a prisoner's PIN so that they can contact them by phone. I understand that if a number is not on the PIN, a prisoner must go through other steps in order to get permission to make a telephone call. It is possible therefore for a panel of the Parole Board to call for a list of all calls made by a Prisoner. This call log provides the number called, date, time and length of time of each call (or if the call was not taken or refused), and also indicates if attempts have been made to call numbers not on the allowed list.
10. Having considered the log as directed, the panel concluded the hearing on the papers.

### The Relevant Law

11. The panel correctly sets out in its decision letter dated 14 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*

12. 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)).
13. 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**.

### *Procedural unfairness*

14. 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.
15. 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.

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

17. 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.*"

18. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

19. On 8 December 2021, the Secretary of State indicated that they would be making no submissions in relation to the Application.

### Discussion

20. The application is on what I consider to be a fairly narrow issue and I will therefore restrict myself to consideration of this issue alone.

21. The panel took evidence at the oral hearing (and from the dossier prior to the hearing) about contact that the Applicant had made with his former (or current, it is not entirely clear) partner after recall. It should be made clear here that the index offence(s) were in relation to a previous partner at the time and relationships were assessed as a key risk factor for the Applicant. The new partner will be known as P in this reconsideration.

22. The concerns about the contacts made after the recall were because the reasons for recall centred around allegations that P had made about abusive behaviour by the Applicant towards her. Police were involved however they did not pursue the allegations. The decision letter notes that the police decided not to prosecute for lack of evidence. The panel took evidence from the Applicant and the other

witnesses in relation to these allegations and the Applicant's relationship with P in general and made no findings in relation to the allegations. Nevertheless, they expressed concern about some similarities of the allegations to the circumstances surrounding the index offence as well as the first recall.

23. The decision letter gives a narrative in its conclusion where it provides reasons for its decision not to release. In a long paragraph, a number of matters are cited. However, I would agree with the thrust of the application that the issue about contact with P after recall (and the concerns of openness and honesty attached to any actions to call her) stand out as a key issue of concern for the panel.
24. The application states that on receipt of the further directed information, and on considering the legal representative's submissions that led to the adjournment in the first place, the panel has misunderstood what the Applicant stated, or tried to state. The application also points out an error made by the panel in relation to one of the numbers.
25. It is not my role to consider the relevant material and decide whether or not there was a problem in interpreting the material and indeed the oral evidence and legal submissions in relation to it. However, I accept two things:
- a) It is *possible* that there could have been a misunderstanding and some errors made in interpreting the evidence which is not straightforward; and
  - b) It is the case that this evidence and the findings of the panel in relation to it was significant in its decision not to release.
26. I re-iterate that this 'contact evidence' was not the only evidence relied upon by the panel, and the other aspects of the decision are not in dispute.
27. I have considered carefully the test for procedural unfairness. The application indicates (albeit very briefly) that a further hearing to test the 'new' evidence would have been the fair way forward.
28. On balance, and because of the emphasis placed by the panel on this matter in making its decision, I agree that a further exploration of this evidence at another hearing would have allowed the Applicant to make his representations and offer any corrections for the panel to consider.
29. I will state here that any further evidence may not have changed the panel's final decision, however there is a sufficient question about this issue that leads me to my decision.

## Decision

30. Accordingly, I do consider, applying the test as defined in case law, that the decision meets the test for being 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 the original panel by way of an oral hearing. It should be noted that this Application has been granted on a narrow point.

**Chitra Karve**  
**21 December 2021**