

[2021] PBRA 187**Application for Reconsideration by Pedder****Application**

1. This is an application by Pedder (the Applicant) for reconsideration of a decision of an oral hearing panel dated 18 November 2021 not to direct release.
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 dated 18 November 2021;
 - The Application for Reconsideration dated 8 December 2021; and
 - The Dossier, numbered to page 990, of which the last document is the Decision Letter.

Background

4. The Applicant is now 51 years old. In February 2008, when he was 37, he received a sentence of imprisonment for public protection, with a tariff expiry date of 14 February 2014, for an offence of attempting to murder his partner. He admitted stabbing her, but denied the intent to kill.

Request for Reconsideration

5. The application for reconsideration is dated 8 December 2021.
6. The grounds for seeking a reconsideration are helpfully set out on the pro forma provided, and are as follows:
 - (1) Procedural unfairness: the panel proceeded with the hearing in the absence of a witness (a psychiatrist, Dr O), whose report remained in the dossier. Dr O was therefore not available to be cross-examined on the Applicant's behalf.
 - (2) Irrationality: the panel did not recommend a transfer to open conditions.
7. A decision not to recommend transfer to open conditions is not susceptible to the reconsideration procedure: see below. I will therefore say no more of Ground (2).

Current parole review

8. This was the Applicant's fourth Parole Review. The Secretary of State referred his case to the Parole Board on 7 May 2019 for consideration of release or, in the alternative, a recommendation for a transfer to open conditions.
9. The oral hearing took place remotely during the Covid pandemic on 4 November 2021. It had been subject to many deferrals and adjournments. In particular, a previously listed oral hearing in June 2021 was deferred because Dr O was unable to attend. He was not informed of the 4 November hearing as he should have been, and the panel was again informed he was unable to attend. On 2 November 2021 the panel chair discussed the position with the Applicant's legal representative. On 3 November 2021 the legal representative, having no doubt taken instructions, asked for a further deferral.
10. The panel chair refused this request, and the decision letter contains the following explanation for that:

*"[T]he panel did not consider that evidence from Dr O was required in order for it to make a fair assessment of risk. His report was completed over a year ago and the panel has no specific questions arising from it. The report from Dr A ([a psychiatrist] commissioned by [the Applicant's] solicitor) was more recent and comprehensive and the panel was content that it would be satisfied by hearing Dr A's evidence.
[The Applicant] and his legal representative ... accepted the panel's decision and agreed to proceed with the oral hearing. They also raised the fact that [the Applicant's] Community Offender Manager [COM] ... was not in attendance and was being represented by [a stand-in COM] who had no previous involvement in the case.
[The Applicant] has consistently refused to work with [his local] Probation Service and had not agreed to attend interviews with his COM ..., who therefore has never met him. [The stand-in COM] confirmed that she had read the dossier thoroughly and spoken with [the COM] and felt confident that she would be able to assist the panel in its assessment of risk. All parties agreed to proceed with the 'stand-in' COM.
A further issue arose on the day in that the independent psychologist ... had laryngitis."*
11. The only live issue that can be the subject of reconsideration pursued in this application is the absence of Dr O from the hearing while his report remained in the dossier.
12. The panel, consisting of an independent chair, a psychiatrist and a psychologist, heard evidence from the Prison Offender Manager (POM), the stand-in COM, Dr A (the psychiatrist instructed by the Applicant's legal representatives), the prison psychologist and an independent psychologist, as well as the Applicant. The Applicant was represented throughout the proceedings.

The Relevant Law

13. The panel correctly sets out in its decision letter 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

14. 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)).
15. 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

16. 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.
17. 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.
18. The overriding objective is to ensure that the Applicant's case was dealt with justly.
19. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
- (a) the progress of the prisoner in addressing and reducing their risk;
 - (b) the likeliness of the prisoner to comply with conditions of temporary release;
 - (c) the likeliness of the prisoner absconding; and
 - (d) the benefit the prisoner is likely to derive from open conditions.

The reply on behalf of the Secretary of State

20. The Secretary of State has indicated by email that he does not wish to make any representations about this application.

Discussion

21. Although the decision letter records that the Applicant and his legal representative accepted the panel's decision to proceed in the absence of Dr O but with his report in the dossier, I am prepared to look at the case to see if there is any basis for a complaint about procedural unfairness.
22. There are only two mentions of Dr O in the body of the decision letter. I would like to set out the whole of the relevant passages, so that there can be no misunderstanding about context. However, this decision will be a publicly available document, and it is not appropriate to give details of the Applicant's diagnosis in such a document.
23. The first passage starts with "*Over the course of his sentence,*" and concludes with "*recommended by a psychiatrist.*" The difference in diagnosis between Dr O and Dr A is minimal, and the panel, very properly, did not concern itself with such minutiae.
24. I think I can properly reproduce the second passage:
- "[The independent psychologist] agreed with [the POM, the prison psychologist] and Dr O that [whilst the work necessary to make her confident that the Applicant's risk could be safely managed could in theory be carried out in open conditions] it would be more likely to be achieved in closed conditions, although even this could not be guaranteed."*
25. Dr A prepared a report at the request of the panel which outlined the differences between him and Dr O. These again appear to be minimal, and the panel does not seem to have thought them at all significant. Dr O was offered the opportunity to contribute to this document, but did not respond. Dr O thought the Applicant would benefit from time in a psychologically informed custodial environment. Dr A did not. In any event, the Applicant told the panel he would not willingly go to such a unit. Dr A was a live witness available to set out the issues and to be cross-examined on behalf of the Applicant. His evidence would, and from the decision letter did, carry far more weight than that of the absent Dr O.
26. The Application does not specify what difference the attendance of Dr O for cross-examination could have made to the outcome of the hearing. This is unsurprising, because the answer is that it would have made no difference. What really troubled the panel is that the Applicant believes that the probation officer from his local area who prepared the initial Pre-Sentence Report on him had a personal animus against him which has infected the whole of the probation service for that area. He has accordingly refused to engage with that probation area, even to the extent of not co-operating in getting his case transferred to another probation area. Any evidence from Dr O could not have affected this primary concern, which makes his management in the community and, indeed, in open conditions, extremely problematic.
27. I cannot see any basis for suggesting that the Applicant was disadvantaged by the panel's decision to proceed without Dr O. Nothing is raised that would fall under any of the heads set out at Paragraph 17 above, nor that could be said to fall under any broader definition of unfairness.



28. Another way of approaching this Application is to point out that none of the professional report writers or witnesses, including those instructed on his behalf, supported his release. Only Dr A supported a move to open conditions.
29. It therefore follows that in reality the issue in the Applicant's case was not whether or not he passed the test for release, but whether it was appropriate to recommend his transfer to open conditions. The reconsideration process cannot deal with that issue.

Decision

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

Patrick Thomas QC
23 December 2021