[2021] PBRA 36

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Application for Reconsideration by TERRY

Application

1. This is an application by Terry (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 22 January 2021 not to direct his 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, the dossier and the application for reconsideration. I have also read a number of the emails referred to in the Application, together with the Parole Board Case Management Handbook and the audio recording of the hearing from 15 January 2021.

Background

4. The Applicant received an extended sentence (comprising a custodial period of 18 years with a five-year licence extension period) on 25 October 2011 following his conviction for attempted murder. He was 32 years old at the time of conviction and is now 42.

5. He was automatically released on licence on 17 September 2019. His licence was revoked on 2 November 2019, just under seven weeks later, and he was returned to custody on 7 November 2019.

6. This is the Applicant's first recall on this sentence and the first Parole Board review since recall.

Request for Reconsideration

7. The application for reconsideration is dated 12 February 2021 and has been submitted by solicitors acting for the Applicant.

8. It sets out two primary grounds for reconsideration, labelled 'Ground 1' and 'Ground 2'. Unfortunately, the application confusingly and carelessly sets out 'Ground 1' and 'Ground 2' twice, some pages apart, and the expressions of 'Ground 1' differ. The second articulation of 'Ground 1' in the application makes more points in support of it than the first attempt, so in fairness to the Applicant, I will consider the more comprehensively argued 'Ground 1'.

9. In summary, the grounds for reconsideration are:

   (a) Express procedures laid down by law were not followed in the making of the decision, the Applicant was prevented from putting his case properly, the Applicant was not properly informed of the case against him, and the Applicant was not given a fair hearing; and/or

   (b) The decision was irrational since no reasonable decision-making body could have made it based on the evidence before it.

10. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

11. The Application is heavily reliant on the chronology of events in the course of the parole review. I will therefore have to set this out in considerably more detail than would ordinarily be necessary. This chronology also includes detail of the timing and content of various items of email correspondence raised in the application.

12. Following the Applicant's recall to custody, the Secretary of State referred the Applicant's case to the Parole Board in accordance with section 255C(4) of the Criminal Justice Act 2003.

13. On 23 January 2020, the case was considered on the papers by a Member Case Assessment panel (the 'MCA panel'). The MCA panel directed the case to an oral hearing. In doing so, it set various directions, including a psychological risk assessment (PRA) with a deadline of 17 April 2020, and various updated and historical reports (including the trial judge's sentencing remarks (JSR) and a pre-sentence psychiatric report) to be disclosed no later than four weeks before the oral hearing (the deadline to be set once the date of the hearing has been confirmed). With the benefit of hindsight, once the initial oral hearing date was fixed at 27 October 2020, the deadline for all directed reports (bar the PRA) fell on 29 September 2020.

14. On 30 January 2020:

   (a) The MCA directions were issued;

   (b) Witnesses were requested to provide dates between February and September 2020 on which they would not be available to attend an oral hearing;

   (c) The Offender Management Unit (OMU) at the Applicant's establishment contacted the prison psychologist (PP) with regard to the directed PRA; and

   (d) PP confirmed she would be able to produce the directed PRA.

15. On 31 January 2020, the OMU asked if PP would be assisted in the preparation of the PRA by access to the dossier or any other reports.

16. On 10 February 2020, the PP responded to the request access to the dossier. This was provided the same day.

17. On 14 April 2020:

    (a) PP contacted the Public Protection Casework Section (PPCS) and OMU. She noted that the MCA panel had directed the pre-sentence psychiatric report (to which reference had been made in the Recall Report) and asked if she could see it;

    (b) OMU responded to say that PPCS had not yet requested the historic report from the establishment (via healthcare). They suggested that PP may wish to consider contacting 'them' (presumably PPCS) to see if they had access to it;

    (c) PP completed a Stakeholder Response Form (SHRF) and sent it to OMU for checking saying "*have I done it right and does it read okay?"*;

    (d) OMU offered no view on the correctness of the SHRF and asked PPCS to submit it to the Parole Board;

    (e) PPCS submitted the SHRF to the Parole Board.

18. The SHRF noted the difficulties that PP had encountered in interviewing the Applicant resulting from the COVID-19 restrictions in place. It primarily noted that PP had been unable to complete a full risk assessment and had added the limitations as a caveat within the PRA. It also noted that PP had not yet seen the pre-sentence psychiatric report and *"would be grateful to receive a copy"*. The SHRF was not marked as urgent.

19. On 20 April 2020, PP submitted her report (report dated 14 April 2020). She said in the accompanying email that the report was submitted *"with all caveats as clear as possible"*.

20. The PRA carefully noted its limitations at paragraph 2.3:

    This report has been written in response to these directions to the best of the report writer's ability. This caveat is added as, at the time of preparation and writing, the prison was in complete lockdown due to a Government measure to prevent the spread of a coronavirus, specifically Covid19, involving social (physical) distancing, and in some cases isolation. [The Applicant's] views – with his consent and full compliance – were elicited in writing, to prompt questions, completed on his own, in cell. As a result of these less-than-desirable measures the full assessment in its usual form did not take place. This compromises and limits a full view of risk; these limitations have been brought to the attention of the PPCS Case Manager via a SHRF, dated 14.4.2020.

21. The PRA also noted the absence of the previous psychiatric report and JSR at paragraph 4.4:

There were documents I was unable to access for the purposes of this report, such as the … the Judge's Sentencing Remarks (JSRs). I have requested access to a previous psychiatric report referred to in the Directions letter … but have yet to receive this.

22. Notwithstanding these limitations, the PRA concluded that the Applicant's risk could be managed in the community "*with key safeguards in place"*.

23. On 23 April 2020 the Parole Board Case Manager replied to point out that the SHRF of 14 April 2020 had been completed incorrectly. A fresh SHRF was submitted by PP that day. The second SHRF was also not marked as urgent.

24. The second SHRF essentially reiterated (in the correct form) the content of the SHRF of 14 April 2020. It concluded by saying it was "*submitted to highlight the issue in advance of the deadline for the report and in the hope of some advice and guidance from the Parole Board about the best way to proceed given the limitations described*". There were no comments from the Applicant's legal representative. It appears there was no response from the Parole Board.

25. On 24 July 2020, the case was listed for an oral hearing to be held on 27 October 2020 and a panel was appointed.

26. On 8 October 2020, the appointed chair issued Panel Chair Directions (PCDs). In them, it was noted that the pre-sentence psychiatric report and JSRs were nine days overdue (having fallen due on 29 September 2020) and re-directed that they be disclosed "*as soon as possible*".

27. On 19 October 2020 (20 days late), PPCS added the pre-sentence psychiatric report (running to 24 pages) to the dossier.

28. On 23 October 2020 (24 days late), PPCS added the JSR (one page) to the dossier.

29. The oral hearing convened on 27 October 2020.

30. In the hearing, the Applicant's Prison Offender Manager (POM) told the panel that the security report (dated 24 September 2020) was missing an entry from 15 September 2020 which had been graded as high reliability and had been omitted "*due to officer error*".

31. In the hearing, PP told the panel she had not seen the JSR or the pre-sentence psychiatric report. PP was allowed time to read the JSR and psychiatric report before giving evidence, although she reported that she was "*at somewhat of a disadvantage*". After PP had been questioned by one panel member, the panel chair asked if she had had enough time to consider the implications of the new (to her) information. She told the panel her opinion and decision would benefit from further time to consider the historic reports and to conduct a follow up interview with the Applicant.

32. The panel asked the Applicant's legal representative for their opinion. The legal representative drew the panel's attention *"to the fact that there were limited grounds for [the Applicant's] recall, that the failure to provide a 10-year-old report to PP was*

unfair to [the Applicant], as was the new information on security, on which [the Applicant's representative] had only a short period to take [the Applicant's] instructions".

33. The Applicant's legal representative also stated there did not appear to be a valid reason to adjourn. Nonetheless, the panel concluded that it would be unfair to the Applicant to conclude the hearing without allowing PP to consolidate her view.

34. The hearing was therefore adjourned part-heard and further directions were set for a PRA addendum in the light of the pre-sentence psychiatric report, JSR and updated custodial behaviour reports, together with updated reports from POM and Community Offender Manager (COM) in the light of the PRA addendum. An updated security report was also directed. The deadline for the PRA addendum was set at 5 January 2021 with the POM, COM and security reports due on 15 January 2021.

35. The panel members were available on 22 and 29 January 2021, and so the adjournment directions set the earlier reconvene date of 22 January 2021 dependent on witness availability which "*should be canvassed as soon as possible".*

36. The adjournment directions were issued on 28 October 2020. Witness and prison video availability for 22 and 29 January 2021 were canvassed.

37. On 20 November 2020, the Parole Board Case Manager advised witnesses that the target dates of 22 and 29 January 2021 were no longer possible (there being no availability for a video hearing on those dates) and sought witness availability between February and May 2021.

38. On 2 December 2020, an earlier date having been found, the reconvened hearing was relisted for 15 January 2021.

39. On 3 December 2020:

    (a) witnesses were advised that the reconvened hearing had been confirmed for 15 January 2021;

    (b) the panel chair directed the Parole Board Case Manager (by email) to amend the deadlines for the POM, COM and security reports from 15 January 2021 to 12 January 2021;

    (c) the Parole Board Case Manager updated the Public Protection User Database (PPUD); and

    (d) in doing so, PPUD would have updated the PPCS caseworker of the revised deadline dates immediately.

40. The PRA addendum report was produced on 22 December 2020. It noted that an interview with the Applicant had taken place on 8 December 2020 and that the report was informed by both the JSR and the pre-sentence psychiatric report. The report reaffirmed the conclusion of the first PRA that the Applicant's risk could be managed in the community "*with the appropriate safeguards in place"*. It confirmed that the Applicant had seen (and had the opportunity to comment upon) the report.

41. On 6 January 2021, the Applicant's legal representative contacted the Parole Board Case Manager (copying PPCS and others) to ask if the panel chair had considered amending the deadline dates for the reports (since the original deadline date was now the date on which the hearing would reconvene). They also noted that the PRA addendum report had been provided to the Applicant, but not to the legal representative, and requested a copy.

42. On 7 January 2021, the Applicant's legal representative also asked the Parole Board Case Manager whether the panel chair had been provided with the SHRF completed by PP on 23 April 2020.

43. After some protracted correspondence, the Parole Board Case Manager advised that the deadline dates had been moved to 12 January 2021 and provided a copy of the panel chair's email from 3 December 2020 directing that they should be so moved.

44. The POM report was produced on 12 January 2021. It noted that the Applicant received a proven adjudication on 30 October 2020 along with recent allegations of inappropriate conduct.

45. The security report was produced on 13 January 2021. It contained two items of intelligence, both rated as high reliability.

46. On 14 January 2021, a further lengthy SHRF was submitted by the Applicant's legal representative. The essence of the SHRF was that the Applicant's legal representative had not seen all the directed reports and had not been able to take instructions from the Applicant. A direction was sought for a 1.5-hour legal conference to be facilitated between the legal representative and the Applicant.

47. The panel chair made two responses to this SHRF. The first noted that, although a legal visit could not be directed, the Applicant's establishment was encouraged to facilitate an extended telephone conference prior to the hearing.

48. In the second (later and fuller) response, the panel chair addressed the various points raised by the Applicant's legal representative in their SHRF. He explained that he had provided a detailed response so that the Applicant's legal representative would be properly prepared for the hearing, particularly if they wanted to make any further submissions on the Applicant's behalf.

49. The application for reconsideration makes various arguments in relation to the following passage from the panel chair's second response to the legal representative's various enquiries about the procedural history of the case:

> *The panel chair did not take responsibility for [the Applicant's] review until 01/09/20, completing the PCD on 08/09/20. The SRF dated 14/04/20 and 23/04/20, and email dated 27/04/20 do not form part of the dossier and are not visible on WAM, therefore the panel chair cannot answer why these have not been responded to.*
>
> *The panel chair chased missing documents on 21/10/20 and continued to do so until the hearing. By the day of the hearing, the panel were only aware of the*

caveat to PP's report contained within in it at page 2 Para 2.3. As the panel were unaware of PP's SRF and emails they could not be expected to have anticipated her answers to their questioning. Again, the panel chair cannot answer for the MCA member's timing for reports or PP's enquiries into historic information.

I will return to analyse this passage in the light of points raised within the application in the **Discussion** section below.

50. The panel chair's response closes by saying, "*should [the Applicant's legal representative] consider [the Applicant's] position to have been disadvantaged by the late submission of reports, [they] can address the panel on this on 15/01/21*".

51. The hearing reconvened on 15 January 2021. The recording of the hearing indicates that the Applicant's legal representative confirmed that they had seen the panel chair's response and there were no matters arising. It is unclear whether the Applicant's legal representative had an opportunity to take instructions from the Applicant prior to the hearing, but the recording indicates that they did ask for time to speak to the Applicant. Following introductions, the panel chair offered "*as much time as you need"* for them to talk. At this point the recording was paused, so it is impossible to say how long they were in conference, but when the hearing was resumed the Applicant's legal representative did not raise any issue about needing more time, and there were no preliminary matters arising from their conversation with the Applicant.

52. The hearing proceeded and the panel heard oral evidence from PP, the Applicant and the Applicant's POM and COM. The panel did not direct the Applicant's release.

The Relevant Law

53. The panel correctly sets out the test for release in its decision letter dated 16 December 2020.

Parole Board Rules 2019

54. 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)). This is an eligible decision.

55. 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

56. 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."

57. 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.

58. 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

59. 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.

60. 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.

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

The reply on behalf of the Secretary of State

61. The Secretary of State has submitted no representations in response to this application.

Discussion

62. I shall deal with the two grounds advanced in the application separately.

Procedural unfairness

63. There are two main areas of potential procedural unfairness raised in the application. The first ground is that express procedures laid down by law were not followed, the Applicant was prevented from putting his case properly, the Applicant was not given a fair hearing, and the Applicant was not properly informed of the case against him. The areas in which it is said that these aspects of procedural unfairness arose relate

to the evidence given by PP at the first hearing, the process around the adjournment and the procedural arrangements for the reconvened hearing.

PP's evidence

64. It is argued that it was unfair to put PP under pressure in the October 2020 hearing. It is said that she was "*put on the spot*" having been given some 30 minutes to consider the pre-sentence psychiatric report and JSRs. It is submitted that any comments PP made after reading the reports were unreliable (as she had not had time to consider the new evidence fully and she had not had the opportunity to discuss them with the Applicant).

65. It is clear that the panel shared the legal representative's concerns about PP's ability to give fully informed oral evidence on the day. PP herself acknowledged that she was *"at somewhat of a disadvantage"* but indicated that, on the basis of her knowledge at that time, and without having had the benefit of a further interview with the Applicant, she would have difficulty in recommending the Applicant's release. After one panel member had asked questions, the panel chair asked if she was in a position to proceed and she said she would benefit from further reflection and a further interview.

66. At that point, it was entirely reasonable for the panel to propose an adjournment. As PP's recommendation for release was less firm on the basis of what she had read on the day, the situation at that time was less favourable to the Applicant. A proposal that PP should be afforded the time to reflect on her position, speak further to the Applicant in the light of what she had just read, and then decide if her recommendation had, in fact, wavered to the detriment of the Applicant, could not be more fair.

67. In the circumstances that existed at that point in the proceedings, it seems to be absolutely unfathomable that the Applicant's legal representative argued that the hearing should continue (a point that was not raised in the application). To have done so would have run the risk of proceeding with PP not recommending the Applicant's release. It is to the panel's credit that it chose to adjourn.

68. It is particularly worth noting that, having interviewed the Applicant and having had the time to reflect, PP's recommendation at the second hearing had veered back to release. Therefore, the adjournment also turned out to be in the best interests of the Applicant.

69. There is no basis on which the adjournment could be said to have been procedurally unfair. Indeed, on the contrary, it was scrupulously fair.

70. It is also argued that PP's comments at the first hearing had not been taken in context and so it was wholly unfair for the panel to rely upon them as part of its overall assessment of the Applicant's risk.

71. The decision meticulously sets out an account of the difficulties faced by PP at the first hearing and there is nothing in that account that suggests PP's reservations about recommending release at that time have not been taken in context. In fact, the decision makes the context for PP's potential change in recommendation very

clear and there is no reason for that account of her oral evidence not to have been recorded in the decision. Moreover, there is nothing in the decision that suggests that the panel gave particular weight to that evidence.

72. The decision also sets out PP's oral evidence at the January 2021 hearing in considerable detail and carefully notes her recommendation for release. All evidence has been carefully weighed by the panel in reaching its decision. It was only at the January hearing that PP was fully questioned; questioning having stopped after one panellist in October 2020.

73. It is further argued that, as all comments (made at the first hearing) by PP after having read the report had not been previously disclosed to the Applicant or his legal representative, he had therefore not been properly informed of the case against him and was prevented from putting his case properly. The hearing was adjourned part-heard and, by the time the second hearing began, the Applicant and his legal representative were properly informed of the case against him. Even though some written evidence was disclosed on the day of the hearing, the Applicant's legal representative confirmed they had sufficient time to prepare and take instructions. This argument must therefore fail.

74. In any event, if I were to accept the proposition that any evidence a prisoner had not heard before was unfair, then all oral hearings would become unfair. One of the essential functions of an oral hearing is to test the content of written reports and find those points that may have gone unsaid, but which are nonetheless crucial to the panel's assessment of a prisoner's risk. It is therefore self-evident that new evidence will come to light in a hearing. This is why prisoners seek legal representation: so that new evidence can be challenged (where appropriate) and the prisoner is thereby assisted to put their case properly.

75. In summary, I can find no procedural unfairness insofar as PP's evidence was concerned.

Case management – adjournment

76. I have been directed to the Lord Chief Justice's comments in **R (Vowles) v Parole Board [2015] 1 WLR 5131 (CA).** It is submitted that this case is authority for the proposition that the Parole Board has an obligation to manage its cases effectively (and that the Parole Board failed to discharge this obligation in the Applicant's case).

77. At para. 41, the Lord Chief Justice says:

> *"The determination by the Parole Board is a judicial process. It is self-evident that the obligation to make a speedy determination under Article 5(4) cannot be realised without active case management by the Parole Board."*

78. In doing so, the Lord Chief Justice acknowledges that the Parole Board should manage cases effectively in order to meet its Convention obligation speedily to review the lawfulness of a prisoner's detention.

79. At para. 42, he goes on to say:

"There is [an] aspect in which the Parole Board is…disabled from complying with its obligations to make a speedy determination, as it has no specific statutory powers to enforce its case management directions. It is difficult to see how it can properly and actively manage cases without such a power…It is plainly essential that the Parole Board be given such a power."

80. Therefore, the Lord Chief Justice also realistically and correctly concedes that the Parole Board is entirely toothless when it comes to enforcing compliance with directions that are outside its span of control. This will include directions which require action by outside agencies, including PPCS. Put simply, the Parole Board can make directions, and use escalation processes if they are not met, but is wholly reliant on the actions of external agencies as to whether or not they are, in fact, met.

81. It is argued that the panel chair's response to the SHRF of 14 January 2021 (which is set out in full at para. 49 above) accepts that the Parole Board, as a whole, missed opportunities to manage the case actively, which, in turn, could have avoided the first hearing being adjourned. The passage relied upon contains five statements from the panel chair's response. I will consider each of these five statements in turn with a view to determining whether they did, in fact, admit a failure on behalf of the Parole Board.

82. The first statement from the panel chair is "*The panel chair did not take responsibility for the Applicant's review until 01/09/20, completing the PCD on 08/09/20*."

83. While the panel chair has mis-stated dates (the case being listed on 24 July 2020 and PCDs being issued on 8 October 2020), it is correct to say they were not responsible for matters prior to their appointment. Neither is there any procedural unfairness stemming from the timeliness in which those PCDs were issued.

84. The second statement from the panel chair is *"The SHRF dated 14/04/20 and 23/04/20 and the email dated 27/04/20 do not form part of the dossier, therefore the panel chair cannot answer why these have not been responded to."*

85. The SHRF of 14 April 2020 would not have been added to the dossier as it was returned as incorrect and would therefore never have been considered for a response.

86. I must also consider whether the Parole Board should have acted any differently in respect of the rejected SHRF of 14 April 2020. At the time of submission to OMU, PP had foreseen the possibility of the form having been completed incorrectly. OMU either did not check it, or also erroneously thought it was correct before sending it to PPCS. PPCS ditto before sending it to the Parole Board. Two opportunities were missed to correct the SHRF on the day of submission, neither of which were the responsibility of the Parole Board.

87. The SHRF of 23 April 2020 received no response. The PRA to which it referred had already been submitted three days previously. The caveats raised in the SHRF had, by then, been disclosed within the PRA and so no response was necessary. The point requesting access to the pre-sentence psychiatric report was, by then, also irrelevant. The PRA had been submitted without the historic report having been

consulted and its later disclosure was swept up by the deadline set by the MCA panel. There was nothing to suggest that the pre-sentence psychiatric report was an essential prerequisite to the PRA: if it had been, then presumably PP would not have submitted her report without it. Moreover, the thrust of the SHRF concerns the methodological validity of the PRA and not the crucial absence of an historic report.

88. Aside from these specific points and looking more generally at the effective management of cases, it must be noted that the Parole Board has a comprehensive Case Management Handbook for the benefit of its Case Managers, running to some 462 pages (October 2020, version 3.8). I have reviewed carefully the guidance relating to the processing of SHRFs.

89. When a SHRF is received from PPCS, comments from the other party (i.e. the prisoner or their legal representative) are to be sent within five working days. After this, the SHRF is sent to a Duty Member if the panel has not been allocated, or the panel chair if it is within eight weeks of the oral hearing. The member considering the SHRF should return the completed SHRF within seven days to the Parole Board case manager. The Parole Board case manager would then issue the same to all parties.

90. So, even if the SHRF of 14 April 2020 had been correct, the legal representative would have had until 21 April 2020 to respond, and a Duty Member (the panel chair having not been appointed at this point) until 28 April 2020 to make a determination. This again would have fallen after the PRA had been submitted. The SHRF was not marked as urgent and so there was nothing to suggest to the Parole Board Case Manager that it would have warranted a response outside standard operating procedure. I can see neither a failure of process, nor any procedural unfairness flowing from this point.

91. The third statement from the panel chair is "*The panel chair chased missing documents on 21/10/20 and continued to do so until the hearing*". This is indicative of active case management from the panel chair. I am reminded here of the Lord Chief Justice's observation in **Vowles** that the timely fulfilment of directions ultimately rests on the actions of parties which the Parole Board is unable to compel to act. The Parole Board can chase those responsible for the disclosure of documents, but it cannot enforce action. The panel chair did all he could.

92. The fourth statement from the panel chair is "*By the day of the hearing, the panel were only aware of the caveat to [the PRA] contained within it. As the panel were unaware of PP's SRF and emails, they could not be expected to have anticipated her answers to their questioning".* This is a bare statement of fact.

93. The fifth (and final) statement from the panel chair is "*The panel chair cannot answer for the MCA member's timing for reports, or PP's enquiries into historic information".* Neither should he. The MCA member has made an independent judicial decision and PP's enquiries are a matter for her.

94. Having carefully analysed the panel chair's response, I find the argument that he has accepted that the Parole Board, as a whole, missed opportunities to manage the case actively to be unfounded at best, and contrived and misleading at worst.

95. The application goes on to say that the adjournment "*put significant mental stress on [the Applicant] causing him to self-harm and becoming involved in an altercation with another prisoner that led to him being adjudicated – one that was given significant importance in the decision.*"

96. There is intelligence to suggest that the Applicant made cuts to his arm on 1 November 2020, some nine days after the adjourned hearing. I have no evidence to support the assertion that this episode was caused by the decision to adjourn; neither is it relevant to any discussion of procedural unfairness. Neither it is established that the adjournment inexorably led to the Applicant getting into a fight.

97. It is not my role to go behind the panel's assessment of risk, nor the weight given to any particular evidence, unless the weight given is irrational in the legal sense. In the abstract, it is not irrational for a panel to give weight to a piece of evidence that proves a prisoner chose pre-emptively to use violence (even if destabilised by stressful or upsetting circumstances) within the restricted environment of a custodial setting; even more so if this took place within their parole window and potentially jeopardised their review.

98. I therefore find no procedural unfairness in respect of the case management arrangements for the first hearing.

Case management – reconvened hearing

99. It is further argued that the arrangements for the reconvened hearing were procedurally unfair.

100. The application draws reference to rule 22 of the Parole Board Rules 2019, which provides as follows:

> *(1) Before fixing the date of the oral hearing the Board must consult the parties.*
> *(2) Within 1 week of a case being listed, the Board must notify the parties of the date of the oral hearing.*
> *(3) The Board must give the parties reasonable notice of the date, time and place of the hearing.*
> *(4) Where notification is less than 12 weeks then the Board must review any other affected timescale.*
> *(5) Notification of less than 3 weeks must be agreed with both parties.*

101. In addition to rule 22, it is also necessary to set out two other rules which are relevant.

102. Rule 6 (insofar as it is relevant) provides that:

> *(11) The panel chair…may adjourn…the proceedings to obtain further information or for such other purpose as they consider appropriate*
> *(12) Where the panel chair…adjourns…proceedings under paragraph (11) without a further hearing date being fixed, they must give the parties at least 3 weeks' notice of the date, time and place of the reconvened hearing (unless the parties agree to shorter notice).*

103. Rule 29 provides that:

> *Where there has been an error of procedure…by the Board, including a failure to comply with a rule –*
> *(a) the error does not invalidate any step taken in the proceedings unless [directed] otherwise*

104. It is first argued that it was unfair that neither the Applicant nor his legal representative were consulted when listing the reconvened hearing.

105. The reconvened hearing came into existence when the panel chair validly adjourned the proceedings under rule 6(11). A target date of 22 or 29 January 2021 was set (13 or 14 weeks respectively from the first hearing) which, at that time, fulfilled the notice period required by rule 6(12).

106. Although it initially appeared that the reconvened hearing could potentially have been heard as late as May 2021, it transpired that it was possible to hold it a week earlier than planned on 15 January 2021. It was relisted on 2 December 2020 and this was communicated to the parties on 3 December 2020, six weeks and one day in advance, in compliance with rule 22(2) and rule 22(3). Since notification was within 12 weeks, the Parole Board had to review any other affected timescale, which it did, in compliance with rule 22(4). The notification of the hearing was more than three weeks in advance, so rule 22(5) was not engaged.

107. The only question remaining on this point is whether there was a breach of rule 22(1): *Before fixing the date of the oral hearing the Board must consult the parties*. This turns on the meaning of both 'consult' and 'fixing'.

108. In my view, there are two ways in which a consultation can take place. The first is active consultation in which a prospective date would be put forward, the views of both parties sought, and any change (or not) to the proposed dates considered in the light of those views. The second would be a more passive consultation, in which a case is listed and in the absence of objection, matters take their natural course. This passive approach is what happened in this case and is the standard way in which the Parole Board lists oral hearings.

109. At what point does the date of a hearing become 'fixed'? Without wishing to become bogged down in semantic quicksand, it is certainly not fixed at the point that it is listed. If I were to conclude that it was, then this would prevent either party from varying it. A hearing becomes fixed at the point that both parties acquiesce to its date and remains fixed until the hearing, unless an application is made by either party to vary the date and any such application is granted by the Parole Board. Applications to vary a listed date are commonplace.

110. The Applicant and his legal representative were aware of the proposed date over six weeks in advance and made no objection. If they had concerns about the hearing going ahead on the day, or had insufficient opportunity to consider any short-notice written evidence and give/receive instructions, it was open to them to seek a further adjournment. They did not do so. It is tenuous in the extreme to say now that there

was procedural unfairness as they were not consulted in relation to the date of the hearing, having raised no such objections at any point previously.

111. Moreover, against a backdrop of submissions arguing that the Parole Board failed in active case management (which I have already found it did not), it is self-contradictory to argue in parallel that actively managing a case to avoid a potential delay of several months and meet the Board's obligations under Article 5(4) was unfair.

112. Even if I had found (which I do not) that there had been a breach of rule 21(1), rule 29(1) would allow me to find that it did not invalidate proceedings unless I directed otherwise. I would not have done so.

113. I therefore find no breach of rule 22.

114. It is also argued that bringing the deadline for the reports forward put undue pressure on the POM and COM to produce their reports. The POM report was disclosed on time, and the security report two days before the hearing. The COM report was made available on the day of the reconvened hearing and it is clear that the Applicant's legal representative had sufficient opportunity to read it and take instructions upon it on the day and raised no objections in relation to the late disclosure of reports on the day. I find no procedural unfairness in relation to the panel's handling of the reports or the reconvened hearing.

115. It is also argued that the decision does not fully refer to evidence given by the Applicant at the first hearing. The decision letter is not the vehicle by which every piece of oral evidence is recited. With a 335-page dossier considered over the course of two hearings, it would become unwieldy and unnecessarily lengthy if it was. The decision sets out a comprehensive summary of the evidence that it found important to weigh having had the benefit of hearing from the Applicant.

116. Overall, I find no procedural unfairness. There was no breach of any express procedures laid down by law, the Applicant was given a fair hearing, he was properly informed of the case against him, and he was not prevented from putting his case properly.

Irrationality

117. It is submitted that the decision was irrational. Four arguments are advanced in support of this.

118. First, it is argued that the panel did not question the Applicant in relation to historic convictions and that it was irrational to put weight on those as indicative of violence in its decision not to release the Applicant.

119. The weight given to any piece of evidence is a matter for the panel. Disagreeing with it does not automatically make the panel's weighting decision irrational. There is nothing to suggest that the panel gave the matters undue weight. Indeed, the decision tempers its analysis by noting gaps in the Applicant's previous convictions for violence. The panel is also entitled to ask any questions it wishes to complete its risk assessment; however, if the panel is satisfied that an area documented in a

report does not require further amplifying oral evidence it does not have to ask for it. To suggest otherwise would require a panel to question every line of every report, which would be both impractical and unnecessary.

120. Second, it is argued that it was irrational for the panel to note that the Applicant's convictions for failure to comply with bail conditions gave concern about his likely compliance on licence, without questioning his COM or the Applicant himself about them.

121. It is difficult to see how failure to surrender with bail is indicative of anything other than non-compliance and certainly not irrational for the panel to have done so.

122. In passing, the application notes that the panel erroneously stated that the Applicant had been convicted for breaches of court orders. In ascribing no weight to this argument, I note (in addition to the bail-related matters) the Applicant's 19 convictions for driving whilst disqualified.

123. Third, it is argued that it was irrational for the panel not to direct release against the recommendation of professional witnesses to the contrary.

124. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

125. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board [2019] EWHC 2710**.

126. 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.

127. In this instance, the overall decision of the panel was clearly based on a number of factors that are clearly explained in the decision letter. The panel was correctly focused on risk throughout. It was reasonably entitled to reach its own view on the evidence before it and its conclusion cannot be said to be outrageously defiant of logic or accepted moral standards.

128. Finally, it is argued that it was irrational for the panel not to direct the Applicant's release on the basis that designated accommodation may not be available.

129. It is clear from the decision that the availability of accommodation was one of a number of secondary concerns stated by the panel. It cannot be said that this was a

determinative factor in the panel's decision not to release the Applicant and certainly not an irrational concern for the panel to have.

130. The legal test of irrationality is a very strict one. This case does not meet it on any of the arguments advanced. Accordingly, this ground also fails.

Decision

131. 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.

Stefan Fafinski
19 March 2021