

[2021] PBRA 43

## Application for Reconsideration by Ford

### Application

1. This is an application by Ford (the Applicant) for reconsideration of a decision taken, following oral hearings, on the papers and dated 16 February 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 dossier amounting to 820 pages, the decision letter and the grounds in support of the application.

### Background

4. On 10 December 2008, the Applicant was sentenced for offences of possessing a firearm with intent to endanger life, to imprisonment for public protection with a minimum period to serve of 7 years (later reduced to 6 years) less time spent on remand. On the same occasion, the Applicant was sentenced to determinate sentences for three offences of making threats to kill, doing an act tending to pervert the course of public justice, possessing a firearm with intent, possessing a firearm and possessing ammunition without a certificate.
5. At the date of the sentence, the Applicant was aged 20. The applicant is now 33 years old.
6. The minimum period expired on 4 September 2012.

### Request for Reconsideration

7. The application for reconsideration is dated 8 February 2020.
8. Essentially, the Applicant complains that, after a number of oral hearings, the panel concluded the case on the papers and suggests that a number of defects flowing from that decision amount to procedural irregularity.
9. The grounds for seeking a reconsideration are as follows: the panel

- 'a) Withdrew a direction for a prison-based psychological report;
- b) Failed to allow the Prison Offender Manager to make a recommendation;
- c) Failed to allow the Community Offender Manager to make a recommendation;
- d) Failed to hear evidence and to undertake a prison- based risk assessment in light of their findings of fact; and
- e) Failed to allow [the psychologist] to complete his independent risk assessment in light of the findings of fact.'

## Current parole review

10. The referral to the Parole Board by the Secretary of State (which may not be the first referral) is dated 27 September 2018. The Secretary of State asked the panel to consider whether it was appropriate to direct the Applicant's release; the panel was not asked to consider recommending a transfer to open conditions.
11. Between April 2019 and December 2020, the panel held five oral hearings. A finding of fact made by the panel that the Applicant had absconded from prison overnight was subsequently quashed by way of Judicial Review, on the ground the panel had not heard from a particular witness who supported his case.
12. On 18 January 2020, the panel conducted the last oral hearing, at which it heard evidence from the Applicant, two Prison Offender Managers two Community Offender Managers two members of the Police Service two members of prison staff and a psychologist instructed by the Applicant.
13. From 2018 at least, and repeatedly thereafter, both the current Prison Offender Manager and the Community Offender Manager recommended and then deferred their ultimate recommendations until the receipt of an independent psychological risk assessment instructed on behalf of the Applicant.
14. This psychological risk assessment was to be conducted by a different psychologist to the psychologist who gave evidence to the panel on 18 January 2021 and had been directed to be filed prior to what had been intended to be the final oral hearing listed to take place in March 2021.
15. On 18 January 2021, following the conclusion of the oral hearing, the Parole Board case manager informed the Applicant's solicitor by email (which I have not seen) that the panel did not need to hear further evidence and proposed concluding the case on the papers.
16. The Panel Chair Directions, dated 18 January 2021, adjourning the hearing, stated,  
  
*"The panel received evidence at oral hearings on 27.10.20, 11.12.20 and 18.1.21. Having received the evidence, the panel came to the view that it was able to make a decision on the referral from the Secretary of State without the need for a psychological risk assessment or a psychiatric assessment to be completed, both of these having been considered. It instead invites [the Applicant's] legal representative and the Secretary of State's representative to make closing submissions in writing and also any representations that they may wish to make in respect of concluding the review at this stage".*



17.The closing submissions were to be filed by 1 February 2021.

18.According to the Applicant’s submissions, the representations were submitted by email and were as follows

19.“We write following the Panel’s notification that they intend to complete [the Applicant] review on the papers and have sought our submissions on this. We have also been invited to comment on the proposed retraction of the direction requiring a prison psychological report. Given that the Panel’s view is that they are now in a position to conclude on the papers, there is nothing to be gained by making any further submissions on [the Applicant’s] behalf”.

## The Relevant Law

20.The panel correctly sets out in its decision letter dated 16 February 2021 the test for release.

### *Parole Board Rules 2019*

21.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)).

### *Procedural unfairness*

22.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. 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; they were not properly informed of the case against them.
- c. they were prevented from putting their case properly; and/or
- d. the panel was not impartial.

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

## The reply on behalf of the Secretary of State

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24. The Secretary of State was represented at the oral hearing on 18 January 2021 and filed written submissions for the panel to consider before it gave his decision on the papers; however, the Secretary of State has not chosen to make any representations in respect of this application.

## Discussion

25. I am extremely grateful to the Applicant's solicitor for the carefully prepared representations and the tabulated chronology; in the circumstances, this decision is shorter than might otherwise have been the case.

26. Dealing with the possible instances of procedural irregularity set out in paragraph 22 of this decision, the panel was entitled under the rules to conclude the application on the papers – Rule 21 (7). In those circumstances, paragraph 22 (a) of this decision is not engaged.

27. The Applicant was properly informed of the case against him and it is not alleged the panel was partial. The application revolves round the question whether the Applicant was prevented from putting his case properly.

28. The pleaded application does not allege that the panel was not entitled to rely on the information actually before it on 18 January 2021; nor does the application suggest that information could not justify the decision not to direct release. What is submitted is the panel should have waited for the additional information and taken that into account before making its final decision.

29. I have, therefore, asked myself two questions: did the panel have sufficient before it on 18 January 2021 to make the decision it did on 16 February 2021, and, is there a reasonable possibility that the psychiatric risk assessment and the final recommendations could have altered the panel's decision.

30. I am not going to set out in detail the evidence adverse to the Applicant but it included the adjudication in July 2020 of possessing £20,000 worth of tobacco, giving rise to the inference the Applicant was involved in the supply of contraband within the prison.

31. The evidence also included repeated possession of mobile telephones (although the Applicant regularly used the prison telephone to contact his family). The panel was entitled to find the possession of telephones amounted to offence paralleling behaviour. It found that the possession of mobile telephones and other communication devices was linked to his risk of harm as well as evidence of poor compliance.

32. The panel also found the Applicant had made threatening and intimidating contact with three women.

33. It seems to me there was a wealth of evidence to support the panel's decision.

34. The next question is whether there was a reasonable possibility the additional information could, or ought to, have altered the panel's decision. The panel had

before it a number of elderly psychological assessments and had heard from a psychologist. The panel also had a psychologist member.

35. The express purpose of commissioning the further risk assessment was to see if it might shed some light on the Applicant's antisocial behaviour in prison and so help with the management of that behaviour; it was also hoped the assessment would help identify further the risk the Applicant posed in the community and thus, possibly, help in the management of that risk; the assessment might also indicate whether the Applicant needed to do further risk reduction work either in custody or in the community.
36. The panel had, without more, sufficient information that the Applicant's conduct, defective thinking and poor motivation established he was not ready for release and could not be trusted to comply with his licence conditions even if he were released. Looking at the problem as objectively as possible, and on the information the panel had before it, it is difficult to see how the psychological risk assessment could have altered the panel's decision.
37. I emphasise that the panel made the decision to conclude on the papers before the risk assessment had been filed on the information before it. The Panel Chair Directions dated 18 January 2021 gave the Applicant the opportunity to make representations, not only in respect of the panel's decision not to direct release but also its decision to complete the hearing on the papers.
38. The panel therefore complied with Rule 21(1) of the 2019 Rules. Of course, the panel chair had to consider the Applicant's representations and then decide whether to conclude on the papers or continue with an oral hearing.
39. In this case, the Applicant raised no reason why the panel should not conclude the case on the papers. In taking that course, the Applicant deprived the panel of any further information or arguments. In those circumstances it is difficult to understand why the panel should not have proceeded on the way it did.
40. Although it is not pleaded, it may be the Applicant took the view of the panel had reached a concluded view that a further oral hearing was unnecessary and so it was pointless to object. One of the purposes of Rule 21 is to enable an Applicant to demonstrate a further oral hearing is necessary, notwithstanding the panel has come to the opposite conclusion. The panel's acknowledgement of Rule 21 (implicit in the wording of the Panel Chair Directions) means this decision was dependent on any submissions from the Applicant.
41. The Applicant, in his representations, argues that it has never been accepted that the panel's decision was appropriate. However, to make no submissions and, so to speak, standby passively and permit the panel to proceed to a paper hearing and later argue that to do so had been procedurally unfair, whether intentionally or not, is to try to create an ambush for the panel which Rule 21 seeks to prevent.
42. The panel listened to a wide range of evidence; it came to the conclusion that it had a sufficient amount to come to a final decision, subject to written submissions. The panel was not entitled simply to proceed to the final hearing: Rule 21 required it to consider submissions from the Applicant about the proposed course of action; this



was to ensure the Applicant was not prevented from putting forward evidence or testing further the existing evidence. In the event, the Applicant made no representations and the panel proceeded accordingly. The panel had sufficient evidence to decide that, taking it at its highest, the missing psychological assessment could not alter the panel's decision and it had sufficient information to decline to direct release.

43. In the circumstances, the Applicant was not prevented from putting forward his case and there was no procedural irregularity.

## **Decision**

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

**James Orrell**  
**16 April 2021**