

[2021] PBRA 48

Application for Reconsideration by Wint**Application**

1. This is an application by Wint (the Applicant) for reconsideration of a decision of a panel of the Parole Board at an oral hearing which decided not to direct release. The hearing took place on the 25 of February 2021.
2. I have considered the application on the papers. These consist of a dossier of 513 pages and a document entitled reconsideration representations submitted by the Applicant's solicitor.

Background

3. The Applicant is serving a sentence of imprisonment for public protection. The minimum term set by the sentencing judge was 4 years and 251 days. The Applicant's tariff expired on 16 January 2013.
4. The index offence was a charge of possession of a firearm with intent to endanger life. The facts of the index offence were that in July 2007, the Applicant and co-defendants went to a leisure centre and confronted a person with whom they held a grudge. The Applicant was carrying a cocked firearm. The Applicant used the firearm to assault the victim. The co-defendants also assaulted the victim. The firearm was not discharged.
5. The Applicant was aged 20 at the time of the index offence. The Applicant is now aged 34. The Applicant had been released on licence on 2 March 2018. This was the Applicant's third release on licence. His (2018) licence was subsequently revoked on 6 March 2020. He was unlawfully at large for a period of 3 months and returned to custody on 2 of June 2020.
6. The Applicant has a long history of contact with the criminal justice system beginning at age 11. The dossier notes that the Applicant had connections with gang membership and the drug culture. This connection was the background to the index offence. Prior to the index offence, the Applicant had convictions for affray, assaulting a police constable, and threatening behaviour - all committed as an adult. Subsequent to the index offence the Applicant had a conviction for battery.
7. The Applicant's first recall was in 2015, on this occasion the Applicant assaulted a person in a supermarket by grabbing his collar. This person was a friend of a former boyfriend of the Applicant's partner. The friend was challenged by the Applicant



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about an incident relating to the former partner's son. This incident resulted in the conviction for battery noted above.

8. The Applicant was again recalled in November 2016, following an allegation of being threatening towards a female at a nightclub. The allegation did not result in any conviction in relation to the threats, however there was a conviction recorded at the time for driving while under the influence of drugs.
9. The Applicant was last released from custody in March 2018, and as indicated above, recalled in March 2020.

Request for Reconsideration

10. The application for reconsideration is dated 26 of March 2021.
11. The grounds for seeking a reconsideration are that the panel acted irrationally and in a procedurally unfair manner in concluding that the Applicant should not be released for the following reasons:
 - a) That an indication (at the hearing) by the prison commissioned psychologist of not having a full dossier and of not having considered addendum reports was evidence of unfairness.
 - b) That the failure, by the prison commissioned psychologist, to conduct a disclosure session (after completing the report) with the Applicant was unfair to the Applicant.
 - c) That the reasons provided by the panel for preferring the evidence of the independently commissioned prison psychologist over that of the evidence of the Applicant's independently commissioned psychologist were inadequate.
 - d) That the Applicant had not been given an opportunity by the panel to test evidence relating to the contents of certain police transcripts and thus had not received a fair hearing.

Current parole review

12. On 6 July 2020 the Secretary of State referred the Applicant's case to the Parole Board to consider whether the Applicant should be immediately released, pursuant to section 32(5) of the Crime (sentences) Act 1997. In the event of not directing release, the Parole Board were asked to consider whether to make a recommendation to transfer the Applicant to open conditions.
13. The hearing had been adjourned. It was originally listed for December 2020 but could not proceed because of the absence of a witness.

The Relevant Law

14. 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.



15. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
16. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

Irrationality

17. 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."

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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

Procedural unfairness

18. 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.
19. 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.

Reply by the Secretary of State (the Respondent)

20. The Respondent made representations. The Respondent pointed out that the prison psychologist was able to consider the updates of the POM and COM despite not



having the reports in advance. The psychologist was able to hear the evidence at the oral hearing.

Discussion

21. 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.
22. 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**.
23. 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.
24. Cases in which a party at an oral hearing has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).
25. I have dealt with the representations within the application for reconsideration as set out in paragraph 11 above.
26. **11 (a)** - The Applicant complains that the evidence of the prison commissioned psychologist was inadequate because the psychologist had not read the entire dossier and had therefore not read some recent addendum reports. It is noted in the application that the psychologist did have an opportunity to hear evidence from the witnesses who had provided the addendum reports.
27. This was a case where the Applicant was legally represented. One of the advantages of being legally represented is that the legal representative has an opportunity to test and challenge any evidence which was not accepted or is inadequate. In the application, the Applicant fails to identify exactly what were the inadequacies in the prison psychologist's report or evidence which would have been affected by the addendum reports.
28. It was clear, however, that the position relating to the availability of reports was known by the Applicant and his legal representative at the outset of the hearing. It



is incumbent upon those appearing in hearings (particularly legally represented Applicants) to raise any issue relating to inadequacy in information and to apply for a relevant adjournment or for further time to allow the professional to read the relevant reports. In the absence of any evidence that the psychologist was hampered by the absence of subsequent reports, there appears to be no basis upon which it can be argued that the decision by the panel was irrational or procedurally unfair. The reality in this hearing was that the psychological report focused upon the Applicant's historical conduct and behaviour and in particular upon the behaviour which led to the recall. That evidence was clearly set out and available to the reporting psychologist and was the basis upon which the report was presented. I therefore do not find that the complaint relating to the presence of later addendum reports on the dossier supports the contention that the decision was either irrational or procedurally unfair.

29. **11. (b)** - the Applicant complains that a failure to conduct a disclosure meeting subsequent to the drafting of the report, was procedurally unfair. As noted above the Applicant was legally represented. The report had been in the hands of the Applicant and his legal representatives for some time. It was open to the Applicant or his legal representatives to raise any issues which were in dispute or needed further clarification by way of a written submission and a request to the panel for a response to any written submission. It is accepted that in the current difficult climate of the pandemic, opportunities for prisoners to engage with professionals are limited. The Applicant had a full opportunity to challenge any issues within the report within the oral hearing process itself or, as I have noted, in advance by way of a formal submission. I do not therefore find that there was any procedural unfairness relating to this complaint in this respect.

30. **11.(c) and (d)** – These complaints are linked. The fundamental consideration in this case was the issue of the Applicant's behaviour relating to his former partner. It was this behaviour which led to a decision to recall the Applicant. The behaviour was also highly relevant to the issue of the Applicant's ongoing risk. There were instances in the dossier of conduct which was associated with potential violence towards partners or those associated with partners. The Applicant had been convicted of the offence of battery after an incident involving violence towards a person associated with a partner and in relation to domestic issues.

31. The Applicant was recalled on this occasion, as a result of a highly concerning incident relating to following a former partner's vehicle causing her enough distress to contact the police while she was driving. This was an incident which clearly concerned the oral hearing panel who recorded as follows:

"Having read the complete transcript of the 999 call, panel members decided that you were minimising both your response to [the new partner] and the impact of your behaviour [on your former partner] during the car chase and when you barged into her home."

32. The panel had clearly reached a conclusion about a transcript of a police report contained in the dossier. It was clear that that conclusion had underpinned the decision by the panel that the Applicant's risk could not be managed in the community. However, within the decision letter itself, there is no indication as to



whether the contents of the police report were put to the prisoner within the hearing, there is no indication as to what exactly the Applicant's position was relating to the transcript and thus how the panel reached a conclusion that the Applicant was minimising the impact of his behaviour.

33. The Parole Board in 2019 issued Guidance to members on the subject of allegations. The Guidance indicates that a Parole Board panel, when considering allegations, should make an objective decision based upon:
 - (a) the information and evidence provided to the panel; and
 - (b) the information and evidence obtained as a result of the panel's enquiries; and
 - (c) what can properly be inferred from that information and evidence.
34. Having conducted an exercise of securing the evidence, the panel must reach a decision as to whether to (a) disregard it or (b) make a finding of fact or (c) make an assessment of the allegation and decide whether and how to take it into account as part of the parole review.
35. The guidance further indicates that panels must record in the decision letter, the analysis and conclusions regarding allegations, including any impact the allegations have had upon the parole decision.
36. In this case the panel perfectly properly took account of the police report. That report had, on the face of it, substantial evidential value. The report had been recorded contemporaneously and therefore was a record of the actual words spoken by the witness. It was a report which was focused in terms of time and date. It was also a report which was spontaneous and unprompted. However, there had apparently been a retraction by the Applicant's former partner and the Applicant himself had a view about the incident. All these matters required objective analysis, once the analysis was complete the panel had a duty to record the basis upon which it had reached its conclusion. In this case the Applicant would have insufficient information to know what conclusion had been reached by the panel in relation to the three alternatives set out above.
37. As a result, I find that the panel failed to adequately record its analysis and conclusions relating to this evidence. Those conclusions clearly had a fundamental effect upon the decision relating to risk. The panel were under a duty to ensure that the Applicant understood its conclusions and thus understood the basis of the decision.
38. Although not specifically raised as a complaint by the Applicant I have considered the panel's conclusions relating to the difference of view of the two psychologists. The panel appropriately tackled the fact that there was a difference in view between psychologists. The panel noted that it preferred the evidence of the prison psychologist because that psychologist had based the conclusion on an objective analysis of the evidence of the Applicant's behaviour on licence - rather than relying upon the Applicant's personal account.



39. The panel gave examples of areas where the psychologist had found that the Applicant's evidence lacked credibility. In particular, in relation to managing finances and what is termed a "Damascene moment".
40. Whilst it was helpful, and a requirement, for the panel to set out the reasons for adopting the findings of one of the psychologists over another, the panel had again adopted an evidential conclusion by the psychologist (about managing finances), rather than reached a conclusion themselves on this evidence.
41. This was again an issue which required an independent and objective view from the panel and a conclusion from the panel. It would be perfectly proper for the panel to reach a determination and on the basis of that determination to adopt the conclusion reached by the psychologist. However, the panel had the duty to raise the issue of a contested factual allegation, to allow the Applicant to deal with it, and then to reach a conclusion upon it in accordance with the Guidance set out above.
42. I therefore find that by failing to follow the Board's Guidance in relation to allegations, the decision was procedurally flawed.

Decision

43. For the reasons I have given above, and applying the relevant decisions set out above, I consider that the decision was procedurally unfair and accordingly the application for reconsideration is granted and the case should be reviewed.

HH S Dawson
15 April 2021

