

**[2021] PBRA 78****Application for Reconsideration by Henworth****Application**

1. This is an application by Henworth ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 23 April 2021, after an oral hearing on 12 February 2021, issued a decision not to direct his release on licence.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. The following documents have been provided:
  - i) The 443-page dossier provided by the Secretary of State, which includes the panel's decision;
  - ii) Representations submitted on 11 May 2021 by the Applicant's solicitor in support of this application;
  - iii) An e-mail from PPCS dated 25 May 2021 stating that on behalf of the Secretary of State they offer no representations in response to this application;
  - iv) A series of emails provided at my request to establish the sequence of events between 19 and 23 April 2021.

**History of the case**

4. On 21 September 1999, at the age of 45, the Applicant received a sentence of life imprisonment for murder. His minimum term was set at 12 years less the substantial period which he had spent in custody on remand (during which he had been tried no fewer than four times). His minimum term expired on 17 July 2007 and he has remained in custody since then.
5. By February 2021, he was detained at an open prison and at his oral hearing on 12 February 2021 all the professional witnesses supported release on licence. The panel, however, decided that before they could make a decision it was necessary to obtain further information about the proposed risk management plan. Adjournment directions were therefore issued on 15 February 2021 setting out a timetable.
6. A new hearing date was not fixed at that time. Instead, an adjournment review date (23 April 2021) was fixed. Directions were made for further information to be provided by 16 April 2021 and it was directed that any further representations by



3rd Floor, 10 South Colonnade, London E14 4PU

[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)

@Parole\_Board



0203 880 0885

the Applicant's solicitor should be provided by 23 April 2021. It was stated that the panel would then conclude the review 'on the papers' (that is to say, without a further oral hearing).

7. On 25 February 2021 the Applicant was released from the prison on temporary licence so that he could attend work in the community. He failed to return to the prison and was thus an absconder.
8. On the following day (26 February 2021) he was recaptured in a flat not far from the prison and was returned to custody at a closed prison.
9. Also, on 26 February 2021 the panel chair was informed of the abscond and issued further directions. At the time when those directions were issued the Applicant had not yet been recaptured. The directions stated that it was too early to say whether the panel would need to reconvene. Further short reports were directed, and it was stated that:

*"Representations on the need (or otherwise) for a resumed oral hearing would be welcome from [the Applicant's] legal representative at any time. She is invited in any event to submit further representations by 23 April 2021 as set out in the adjournment directions of 15 February 2021. The panel will then decide how to proceed."*

10. On 1 March 2021 the Applicant pleaded guilty to escaping from lawful custody (the abscond) for which he received a 4-month sentence. But for his life sentence he would by now have been released on licence from that new sentence.
11. At some stage (I do not know exactly when) it was decided that a new hearing date should be fixed in case it was needed. I note from the panel's decision letter that that date was Tuesday 27 April 2021.
12. As the adjournment review date approached, the Secretary of State issued a letter to all parties, stating the Secretary of State's provisional view that as an absconder the Applicant would be precluded from returning to an open prison. The Applicant was given until 17 May 2021 to submit representations if he wished to argue that he should remain eligible for an open prison. The Secretary of State's letter was sent by e-mail at 9.05 a.m. on Monday 19 April 2021.
13. At 2.31 p.m. on the same day the Applicant's solicitor sent an e-mail to the Board's case manager. The e-mail stated: "*We have not received a timetable for a hearing on 23 April 2021. We were under the impression that representations were due on Friday 23 April only. Please can you confirm*". The solicitor did not receive a reply to that e-mail. It transpires that that was because the Board's case manager was away on leave at the time and none of his colleagues picked the e-mail up.
14. At 9.47 a.m. on Friday 23 April 2021, the panel chair sent to the case worker by e-mail a decision letter which had clearly been agreed by the panel on the assumption that no representations had been or would be submitted by the solicitor on the Applicant's behalf. The decision letter expressly stated that no such representations had been received.



15. The case manager was still away on leave, and the decision letter was picked up by one of his colleagues who issued it on his behalf at 10.24 a.m. on 23 April 2021.
16. At 10.56 a.m. on 23 April 2021 the solicitor e-mailed the case manager, asking: "Why had a decision been issued? I had until today to get representations in and was in the process of doing so! Please can you query this with the panel chair? Our intention is to apply for a reconvened oral hearing."
17. The case manager's colleague immediately notified the panel chair of this development, and at 11.04 a.m. the panel chair asked him to recall the letter pending receipt of the representations.
18. The case manager's colleague was concerned about whether it was possible to recall the decision letter. The Board's Legal and Practice team were consulted and correctly advised that since the decision had been made and issued, the panel were functus officio and had no power to reconsider it: the only route to having a further oral hearing would be a reconsideration application.

## The Relevant Law

### *The test for re-release on licence*

19. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of their decision.

### *The rules relating to reconsideration of decisions*

20. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
21. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
  - a paper panel (Rule 19(1)(a) or (b)) or
  - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
  - an oral hearing panel which makes the decision on the papers (Rule 21(7)).
22. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.
23. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the ground of procedural unfairness. The decision not to recommend a move to an open prison is not eligible for reconsideration.

### *Procedural unfairness*

24. 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 from the issue of irrationality which focusses on the actual decision.

25. It has been established that the things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

26. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

### **Request for Reconsideration**

27. The Applicant's solicitor's representations are quite lengthy but boil down to the essential complaints that the decision was made too early, without the benefit of representations on the applicant's behalf, and that if the panel had had the benefit of those representations they might well have directed a further hearing instead of making a negative decision on the papers.

28. In support of those representations the solicitor points out that there are clearly disputes of fact about the circumstances of the Applicant's return to closed conditions and about certain new allegations against him which were contained in one of the reports submitted since the oral hearing. She submits that that dispute needed to be explored at an oral hearing.

### **Discussion**

29. I can deal with this application quite briefly. It is a fundamental principle that a prisoner is entitled to have his case presented on his behalf by his legal representative. He is also entitled to challenge allegations made against him in evidence presented on behalf of the Secretary of State.

30. As a result of the failure of communications in this case, the Applicant was inadvertently deprived of those rights. If the panel chair had been aware of the solicitor's e-mail of 19 April 2021, the decision letter would obviously not have been issued when it was, and consideration would have been given to the solicitor's request for a reconvened hearing. It is likely that that request would have been granted.

31. It follows that, although inadvertent and nobody's fault, this clearly amounted to procedural unfairness.

### **Decision**

32. For the reasons set out above I must allow this application and direct that the case should be reconsidered at a fresh hearing. A fresh hearing will have the incidental



advantage that it will be known whether the Applicant is or is not eligible for a return to an open prison.

**Jeremy Roberts**  
**18 June 2021**