

[2022] PBRA 82

## Application for Reconsideration by Tait

### Application

1. This is an application by Tait (the Applicant) for reconsideration of a decision of an Oral hearing Panel (OHP) dated the 7 June 2022. The decision of the panel was not to direct the release of the Applicant.
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 application form dated 27 June 2022, the dossier consisting of 367 pages and the OHP decision dated 6 June 2022.

### Background

4. The Applicant was sentenced on 5 August 2008 to a sentence of imprisonment for public protection. The minimum term set by the judge was three years. The minimum term expired on 22 October 2010. The Applicant was 25 years old when sentenced. The Applicant is now 39. The Applicant was released on licence on 31 July 2020. His licence was revoked on 2 August 2021.
5. The index offences were wounding contrary to section 20 of the Offences against the Person Act 1861 and causing Grievous Bodily Harm with intent contrary to section 18 also of the Offences against the Person Act 1861. Both offences related to the same victim who was a male family member of the Applicant. The offences occurred on different days. The section 20 matter involved striking the victim with a broken bottle causing injury. The second offence related to stabbing the victim behind the ear with either a knife or a pair of scissors. The incidents caused serious injury to the victim.

### Request for Reconsideration

6. The grounds for seeking a reconsideration are as follows:
  - a) That the panel acted procedurally unfairly in that they failed to take into account the Applicant's evidence that the vehicle where a knife and gas cannister firearm were found had been packed for a camping trip, thereby supporting the contention by the Applicant that there was a reasonable explanation for the presence of a knife in the car.



- b) That the panel acted irrationally in concluding that the items found in the vehicle were owned or possessed by the Applicant.
- c) That the panel misunderstood the account given by the Applicant relating to explanations around the use of the knife by his partners son.
- d) That contrary to the finding of the panel the Applicant believes that his vehicle had MOT cover.

## Current Parole Review

- 7. As noted above the Applicant had been released on licence on 3 July 2020. He had been recalled following a police investigation relating to the finding of a knife and a gas cannister firearm in a car that he was driving. The matter had been sent to the Parole Board to review the Applicant's position and to consider whether he should be rereleased on licence or be subject to a recommendation for a transfer to open conditions.
- 8. The panel hearing took place on 26 May 2022. The panel consisted of an independent chair and an independent member. The panel heard evidence from the applicant's Community Offender Manager (COM) and Prison Offender Manager (POM). The Applicant also gave evidence. The Applicant was legally represented.

## The Relevant Law

- 9. 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*

- 10. 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 when it is made by an oral hearing panel after an oral hearing (Rule 25(1)).
- 11. 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*

- 12. 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."*

- 13. 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.

14. 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*

15. 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.

16. 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.

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

18. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

19. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

### **The reply on behalf of the Secretary of State**

20. The Secretary of State offered no representations.

### **Discussion**

21. The decision of the panel in this case relied substantially upon their view of an incident which led to the Applicant being stopped by the police in a vehicle and the finding of a hunting knife and air canister firearm in the car.

22. The panel set out its conclusions on the basis of the evidence. The panel relied upon the Parole Board Guidance on Allegations published in July 2021.

23. It is helpful to set out some aspects of that guidance. The guidance extract is in italics. The numbering from the guidance is followed.

24. The guidance indicates as follows:

**Overview**

1. *Panels may be presented with allegations that have been made against the prisoner.*
2. *The term 'Allegation' refers to conduct alleged to have occurred which has not been adjudicated upon. Adjudications can include a finding by a criminal or a civil court or a prison adjudication. Allegations which are relevant are those which, if true, could affect the panel's risk analysis. Sometimes these allegations are currently being investigated by the police or others and may be disposed of or adjudicated on in the future.*
3. *Allegations may be of harmful behaviour and/or 'risky' behaviour.*
4. *Once it is established that an allegation has been made, panels will need to consider the allegation when making a parole decision.*
5. *Panel decisions must be made objectively, based on (a) the information and evidence provided to the panel and (b) information and evidence obtained as a result of the panel's inquiries and (c) what can properly be inferred from that information and evidence.*
6. *Panels faced with information regarding an allegation, will have to assess the relevance and weight of the allegation and either:
  - a. Choose to disregard it; or,
  - b. Make a finding of fact; or
  - c. Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review.*
7. *Panels must record in the decision letter their analysis and conclusions regarding allegations, including any impact allegations have on the parole decision."*

25. In this case the evidence indicated in the dossier and received at the oral hearing was that the Applicant had been stopped by the police driving a vehicle. He had no licence or insurance. He was accompanied by his partner. In the glove compartment of the motor vehicle the police recovered a gas canister firearm and a hunting knife. The firearm was a gas canister 'BB' type weapon. The gun was not charged with carbon dioxide gas.

26. The Applicant and his partner were initially charged with possession of the firearm and possession of a pointed article namely the hunting knife.

27. The matter was referred to a court. At court the Crown Prosecution Service had apparently considered the allegations. The outcome was that the Applicant's partner pleaded guilty to possession of the knife and had affirmed that the firearm was hers.

She was sentenced. so far as the Applicant was concerned, the matters relating to the firearm and the knife, were discontinued.

28. The position therefore was that there were no convictions concerning the gun or the knife, in relation to the Applicant. The court and the CPS had accepted a plea from the Applicant's partner that she was in possession of the knife. (The possession of the gas cannister firearm by the Applicant's partner was not an offence).
29. The Applicant had told the panel at the hearing that he was unaware of the presence of the gun and the hunting knife, in the glove compartment of the vehicle. He told the panel that the knife had been used in a previous camping trip for cutting rope. He said he had not seen his partner's son playing with the gun. He had not known that the items were in the glove compartment when he was stopped by the police.
30. The Applicant's COM had told the panel that she was of the opinion that, on the balance of probabilities, the Applicant was aware of the presence of the weapons. She also told the panel that the police had indicated that there were few items, required for camping, in the vehicle, suggesting that it was not packed for a camping trip (as had been indicated by the Applicant and his partner). She considered it implausible that the items were toys for the child. The COM had also taken account of the fact that the weapons were readily accessible to the passenger and driver of the vehicle.
31. The panel, in assessing the evidence, were obliged to apply the Parole Board Guidance, as set out above. The panel came to the conclusion that the gun and the knife were in the possession (and by inference under the control) of the Applicant when he was stopped in the vehicle. They came to this conclusion on the basis that:
  - a. the items were in the glove box;
  - b. the vehicle was owned by him;
  - c. he was the registered keeper;
  - d. he had been doing work on it;
  - e. he was the driver when seen by the police;
  - f. he has a history of possession of weapons especially knives; and
  - g. the police refuted the assertion that the vehicle was packed for a camping holiday.
32. The Panel also adopted the view (of the COM) that the assertion that the items were the toys of a six-year-old, lacked credibility.
33. In reaching a conclusion relating to the possession of the gun and the knife, the panel concluded that the Applicant's partner, in order to shield him from the consequences of being convicted of possession of the items, had admitted possession of them, knowing the impact upon the Applicant had he been convicted.
34. As noted above the Parole Board guidance specifically indicates that the definition of "allegations" are matters upon which a court has not made a finding. In this case a court had made a partial finding, namely that the partner was in possession of the weapon. The court had not proceeded against the Applicant and had allowed the allegations against the Applicant to be withdrawn.

35. The panel were therefore entitled to consider the allegations of possession made against the Applicant, however the panel were obliged to consider the fact that a court and a prosecuting authority had specifically determined not to proceed against the Applicant. A decision not to proceed in relation to a criminal offence does not amount to an acquittal, however, depending on the circumstances, such a decision may be a persuasive factor in considering culpability.
36. As noted, the items had clearly been found in a vehicle which was being driven by the Applicant and in which the partner was the front seat passenger. The items were clearly easily movable items. The panel relied upon the matters listed above to assess whether the items were in fact owned or possessed by the Applicant.
37. The fact that the vehicle was owned by the Applicant, registered to the Applicant, that he had been working on the vehicle and that he was the driver, cannot in my estimation take the question of ownership and/or possession of the items in the glove compartment any further. Both the Applicant and his partner were travelling in the vehicle. The items were apparently not immediately in view, as they were in the glove compartment of the vehicle. The ownership or possession of a movable item, in a vehicle used by both parties cannot, in my estimation be resolved by reference to the ownership of the vehicle or amount to evidence in support of the Applicant's possession or control of the two items.
38. I accept, in general terms, that there could, in the absence of any other explanation for the presence of the items in the glove compartment, be a basis for inferring that items deposited in a vehicle were owned by a vehicle's owner. However, in this case, the partner had asserted that the items were hers, and had been convicted of possession of the knife. Mere suspicion that the partner was assisting the Applicant, by taking responsibility for the items, could not, in my view amount to an evidential basis for a finding, on the balance of probabilities, that the items were in fact possessed or controlled by the Applicant. The Applicant denied responsibility. No further evidence was sought or received from the partner. There was insufficient evidence, even on a lower standard of proof, to support the contention that the items were owned or possessed by the Applicant.
39. The panel also relied upon "*a history of possession of weapons especially knives*". However, as indicated in the decision letter, the Applicant's index offences involved two incidents - on both occasions the victim was the same family member. On the first occasion the victim had been struck with a bottle, on the second he had been injured with the use of a sharp implement, the sentencing judge indicated that it could have been a knife or scissors. The index offences had occurred in 2006 and 2007. No other convictions for carrying or using a knife were recorded on the Applicant's record. The reliance by the panel upon a history of possession of weapons (especially knives) was therefore not supported by the evidence in the dossier.
40. The panel also relied upon the evidence from the COM that the police had refuted the assertion that the vehicle was to be used for a camping trip, therefore explaining the presence of the knife. By relying upon this evidence, the panel were accepting that the police officer's view of the incident, was correct, and had been correctly reported by the COM. The panel would have had the opportunity to secure a written police report, and/or request that an officer (concerned with the stopping of the

vehicle) attend the hearing. Neither the panel nor the Applicant had an opportunity to assess or test the credibility of the police view and the Applicant had no opportunity to challenge any view. Whilst the investigation of allegations should not become a forum for collateral hearings, the credibility of the police view, relating to the camping trip, and the knife, was a fundamental issue in this case. The panel relied on relatively limited, secondary hearsay information to reach their conclusion.

41. The panel assert that they had concluded that the Applicant's partner "*had admitted possession knowing the impact upon the Applicant had he been convicted*". Whilst the scepticism of the panel is understandable, the panel appear to have reached this conclusion on the basis of suspicion alone. The evidence considered by the panel was of a criminal conviction and a decision by the court and CPS not to proceed against the Applicant. There appeared to be no evidence, beyond suspicion, that the partner had admitted possessing the item to assist the Applicant.
42. The panel also relied upon driving convictions in reaching a conclusion as to risk. The panel asserted that "*[The Applicant] is assessed as a high risk of serious harm towards the public. Whilst it is said that his risk of serious harm would not be imminent, the panel do not agree. He was driving a vehicle that had no MOT certificate to show it met minimum standards of safety and road-worthiness, he was uninsured and unqualified. Further, his driving with the diagnosed medical condition had not been sanctioned by the DVLA. Harm to the public from his driving could be great and immediate. It is also significant that he only came to the notice of the police by mounting or at least clipping the kerb*".
43. The panel determined that driving a motor vehicle without an MOT posed a high risk of serious harm to the public. This was said to be because the vehicles minimum standards of road worthiness had not been met. However, the Applicant was not found to be driving a vehicle in a dangerous condition (an offence which would have implied a risk to the public). The Applicant was also not charged with any form of dangerous or careless driving. The Applicant had stopped when required to do so by the police. No charges emanated from driving with a medical condition. The Applicant had no previously recorded convictions relating to dangerous or careless driving. The absence of insurance was clearly a matter of concern, particularly if an accident had occurred. However, in itself, the absence of insurance would be unlikely to be an issue which could be said to pose a risk of serious harm to the public. The panel's conclusion that a risk of serious harm arose from his offences relating to driving were not, in my view, supported or supportable by the evidence.
44. As indicated above, fundamental to the panel's decision in this case, was the fact that the Applicant's risk had been elevated by the fact that he was stopped in a vehicle with a knife which the panel found was owned or possessed by him. The panel also found that the risk was elevated by the fact that the vehicle was not properly insured or maintained.
45. As set out above, I determine that the panel did not appropriately apply the guidance set out by the Parole Board. The panel were obliged to apply the appropriate standard of proof, namely the balance of probabilities. This is a lower standard of proof than is required in criminal proceedings, however it remains a standard which must be applied. The panel were also obliged to apply the standard to credible evidence. Reliance upon suspicion and speculation is insufficient to base

a conclusion. Accordingly, I find that the hearing was procedurally irregular, in that the panel failed to appropriately apply the Parole Board Guidance relating to allegations.

## Decision

46. Accordingly, I do not find the decision to have been irrational, however applying the test as defined in case law I do find that the decision suffered a procedural irregularity as set out above. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**HH S Dawson**  
**13 July 2022**

