

[2020] PBRA 142

## Application for Reconsideration by Flowerday

### Application

1. This is an application by Flowerday ("the Applicant") for reconsideration of a decision of a panel of the Parole Board ("the panel") not to direct his release on licence. The decision was made on 2 September 2020 after an oral hearing on 19 August 2020.
2. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
3. The documents provided to me were:
  - (i) The dossier (version 4) considered by the panel, which contains 178 numbered pages;
  - (ii) Copies of two handwritten letters now paginated at pp.179-185;
  - (iii) The panel's decision;
  - (iv) The application for reconsideration, dated 10th September 2020, from the Applicant in handwritten form with 9 additional pages titled "Evidence List"; and
  - (v) Representations dated 23 September 2020 on behalf of the Secretary of State.
4. At my request I was provided on 24 September 2020 with the contents sheet for v.3 of the dossier.

### Background

5. The Applicant is now 29 years of age. He is serving an extended determinate sentence of 78 months imposed on 7 March 2017 for a number of sexual offences involving anal and oral sexual activity and an element of grooming against a 15-year old boy. The sentence consists of a custodial element of 52 months and an extended licence period of 26 months ("the index offences"). These offences were committed in breach of the terms of the licence on which he had been released from a previous sentence of 30 months imprisonment imposed, together with an



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

indefinite Sexual Harm Prevention Order, in June 2015 for similar offences against another, under-age victim. The Applicant was aged 25 or 26 at the time of the index offences.

6. The Sentence Expiry Date for the index offences is 6 September 2023. The Parole Eligibility Date was reported as 26 January 2020 and the Conditional Release Date as 6 July 2021.
7. On 28 October 2019 an MCA member of the Board directed the case to an oral hearing, suggesting that a face-to-face hearing would be appropriate. However, by the time of the scheduled hearing, all face-to-face hearings in prisons had been suspended as a result of the COVID-19 restrictions. The hearing therefore took place remotely and the Panel used Skype. The Applicant's solicitor and witnesses joined by telephone.
8. However, on the day of the hearing the Applicant indicated through his solicitor that he no longer wished to have a hearing and asked for the case to be concluded on the material contained in the dossier. He took no part in the hearing, having returned to his cell before it started.

### **Request for Reconsideration**

9. The application for reconsideration is dated 10 September 2020.
10. The grounds for seeking a reconsideration are as follows:

The Applicant makes a number of complaints of procedural unfairness which I will address in due course but which are in essence:

- (a) the fact that the hearing was conducted remotely;
- (b) the fact that certain written evidence seen by the panel was either not seen by the Applicant or seen late;
- (c) evidential disputes; and
- (d) that he did not have the opportunity to put certain documentation before the panel.

### **Current parole review**

11. The case was referred to the Parole Board in February 2019 when the Applicant was 27 years of age for it to consider whether it was appropriate to direct the Applicant's release. It was his first review.

12. A Panel of the Parole Board consisting of two independent members and a psychologist member of the Board met to consider the case at an oral hearing on 19 August 2020.
13. The Panel considered a dossier containing 178 pages (v. 4). It did not include the MCA directions or subsequent representations from a previous solicitor. They were, however, available on the IT system to which the Panel and the current solicitor had access. On the day before the hearing, the Panel and the solicitor were also supplied with copies of two letters the Applicant had written to the first victim (L) from prison.
14. The solicitor who represented the Applicant at the hearing confirmed that he had received the same dossier, documents and copy letters as the Panel. The Panel did not receive any reports that were not disclosed to the Applicant.
15. The following witnesses attended to give evidence: the Offender Supervisor (OS); a Forensic Psychologist; and the Offender Manager (OM).
16. At the start of the hearing the solicitor told the Panel that the Applicant would not attend the hearing and had returned to his wing. He had spoken to him prior to the scheduled start and the Applicant said that he did not want a hearing. The Applicant had been animated and upset because the letters referred to in section 5 of the decision letter had not been disclosed to him until the morning of the hearing. The OS said she had seen the Applicant the previous week to discuss the letters but had been told to go through the solicitor. She had not left the letters with him because the content was inappropriate for him to have on the wing.
17. The forensic psychologist pointed out that she had arranged a meeting with the Applicant earlier in the week to discuss her report but he had not wanted to discuss it and said he did not have any questions. She had also taken an envelope for him containing his written work from a training course addressing the use of violence and sex offending ("the relevant programme"). She told him what it contained, but he had been frustrated because the label said it should not be opened for 72 hours.
18. The solicitor said that the Applicant had wanted to challenge the psychological assessment, particularly how a comment about the age at which he had said he was ready for sex had been misconstrued by the forensic psychologist. However, the Applicant did not seek an adjournment for an independent assessment, would refuse to answer questions about the letters and would not undertake the 1:1 work recommended by the witnesses.
19. Through his solicitor, the Applicant requested that the review be concluded on the papers and accepted that it would be a negative decision. The Panel therefore agreed to conclude the review on the basis of the reports in the dossier.

## **The Relevant Law**

20. The test for release on licence is whether the prisoner's continued confinement in prison is necessary for the protection of the public. This test was correctly set out in the introductory section of the panel's decision letter.

### *Parole Board Rules 2019*



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



INVESTORS  
IN PEOPLE | Bronze

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)).
22. 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.

### *Irrationality*

23. 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."*

24. 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.
25. 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*

26. 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.
27. 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.

### Other

28. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put their case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for them. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

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

29. The Secretary of State in their representations dated 23 September 2020 said: "We have reviewed the attached request for reconsideration submitted to the Board by [the Applicant] and we wish to respond to the following points raised as follows:

***The Panel considered a dossier containing 278 pages (version 4). I was not issued with (version 4) I was only issued dossier (version 3) by [a prison officer] on the week commencing 10/08/2020.***

*I can confirm that the Offender Supervisor (OS) has confirmed that version 3 of the dossier along with all addendum reports were delivered to [the Applicant], therefore updating his dossier to match version 4. The OS has confirmed that [the Applicant] received the full dossier which was submitted to the Parole Board.*

*We offer no further representations on this matter."*

30. Although this reply suggests that the Applicant refers to "278" pages, an examination of the Application confirms that he did in fact write the correct number "178".

### Discussion

#### ***The complaints of procedural unfairness***

31. The Applicant states he only received version 3 of the dossier. The panel had v.4 containing 178 pages. I have considered the contents page for v.3 and this also runs to 178 pages, the last document (as in v.4) being the 6 page report of the OS ending on p.178. The Applicant's solicitor confirmed that he had received the same dossier, documents and copy letters as the Panel on the basis of which he had, it appears, the opportunity of discussions with the Applicant and of receiving clear instructions.
32. The Applicant complains that he was brought copies of the two letters said to have been written by him to L on the day of the hearing by an officer not wearing gloves or PPE. How the officer was equipped is not a matter for me.
33. The Applicant now seems to suggest that he had not written "sexually graphic" letters to L. However, it is unclear whether he denies authorship of the two letters seen by the panel (which are signed "[Applicant's first name]") or that, although written by him, they are not "sexually graphic".
34. The Applicant was clearly aware of the contents of the letters and, if he wished to dispute authorship/the nature of their contents, it was open to him to challenge this evidence at a hearing and give his own account if he chose.
35. It was not suggested on the Applicant's behalf that he had not written the letters and in the Psychologist's handwritten notes attached to the Application he is recorded as accepting that L had been writing to him and that he had written back.
36. The Panel found that the Applicant had written these letters to L and, accordingly, he must be held to have been aware of their contents.
37. The Applicant complains at the manner in which he was provided with copies of his written work on the relevant programme. It is not clear that the Panel actually viewed this work but there is no indication that they were asked not to do so. Equally, if the Applicant had wished to ensure it was seen in order that he might explain its content, he had the opportunity to take part in the hearing.
38. The Applicant complains that he did not receive copies of the Psychologist's Notes until close to the hearing date. However, he obviously had the opportunity to consider them in sufficient detail and in good time to instruct his solicitor that he challenged the assessment and one comment in particular. In any event, he instructed his solicitor that he did not seek an adjournment for the preparation of an independent report and chose not to participate in the hearing, confirming instead that he wished the panel to conclude the review on the papers.
39. The Applicant now suggests that he would have preferred a face-to-face hearing.

40. The fact that the hearing was conducted remotely does not in my judgment amount, in itself, to procedural unfairness. The Board has been confronted with an unprecedented situation in which oral hearings have had either to be adjourned indefinitely or conducted remotely. A blanket decision to defer all hearings indefinitely would clearly have been unfair to most prisoners. The procedure which the Board has adopted in this situation is for the panel chair in each case to decide whether a remote hearing would be fair to both parties (the prisoner and the Secretary of State) and, if so, to direct such a hearing, having invited comments from the prisoner or his solicitor. This procedure is appropriate to meet the interests of justice and to be fair to everyone.

41. In this case the Panel Chair's directions of 19 August 2020 invite comment on the merits of a remote hearing and, if it is considered appropriate, whether it should be via video or telephone.

42. It does not appear that any comments were received, nor any application made for an oral hearing either prior to, or on, 19 August 2020.

43. The Applicant complains that he was not able to present his work portfolio or business plan to the Panel. Had he taken part in the hearing, he could have done so or he could have instructed his solicitor to invite the panel to consider these documents. No such application appears to have been made.

### ***Irrationality***

44. No formal complaint is made of irrationality but, as the Application is made apparently without the benefit of legal advice or assistance, I can confirm that I can discern no grounds for finding that the Panel's decision in this case was irrational.

### **Decision**

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

**PETER H.F. JONES**

**1 OCTOBER 2020**