

Application for Reconsideration by O'Reilly

Application

1. This is an application by O'Reilly ("the Applicant") for reconsideration of the decision of a panel of the Parole Board ("the panel") not to direct his release on licence. The decision was made on 2 June 2020 after an oral hearing on 29 May 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 initially provided to me were:
 - (i) The dossier considered by the panel, which contains 357 numbered pages;
 - (ii) The panel's decision;
 - (iii) The application for reconsideration, which was made on 23 June 2020 by the Applicant's solicitor on his behalf; and
 - (iv) Representations dated 2 July 2020 on behalf of the Secretary of State.

At my request the Applicant's solicitor provided further information in e-mails dated 10 July 2020 and 13 July 2020.

Background

4. The Applicant is aged 38 and is serving a sentence of imprisonment for public protection which was imposed on 1 July 2009 for causing grievous bodily harm with intent. His tariff was set at 3 years less time served on remand. It expired on 30 September 2011.
5. The victim of the offence was the Applicant's mother, whom he subjected to a violent and sustained attack whilst under the influence of alcohol, threatening repeatedly that he was going to kill her.
6. The Applicant was released on licence on 6 July 2018 but was recalled to custody on 15 August 2019. The ground for his recall was that he had breached a licence condition prohibiting him from contacting his former partner.

7. Prior to his release on licence his stated intention had been to remain single and establish himself independently in the community before proceeding with caution with a new relationship. However, within a couple of weeks of his release he had resumed his relationship with A (his former partner). At her request a licence condition prohibiting him from having contact with her was removed.
8. As a result of three incidents which resulted in the police being called, that condition was reinstated. The Applicant was informed of that fact in July 2019. The most serious of the three incidents was the second which occurred in May 2019 when, according to the complaint made by A to the police, she and the Applicant had both been out drinking at several public houses after which they returned to her address where he assaulted her causing significant injuries which were photographed by the police. A few days after making her statement to the police she retracted it.
9. Despite the reinstatement of the non-contact condition, the Applicant sent a series of messages to A using unpleasant and derogatory language and making threats against her male friends. It was that behaviour which triggered the recall.
10. Following the recall, the Applicant's case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence. On 27 September 2019 a single member of the Board directed an oral hearing, which was conducted by the panel on 29 May 2020.
11. By then all face to face hearings in prisons had been suspended as a result of the COVID-19 restrictions, so the hearing in this case took place by telephone link. The Applicant was represented by his solicitor, and oral evidence was given by the Applicant, the prison offender manager and the community offender manager.

The Relevant Law

The test for release on licence

12. 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.

The rules relating to reconsideration of decisions

13. 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.
14. 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)).



15. 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.
16. It follows from the above that the decision of the panel in this case not to direct re-release on licence is eligible for reconsideration. It is made on both grounds. In addition to the decision not to direct re-release on licence, the panel decided not to recommend a transfer to open conditions, but that decision is not eligible for reconsideration.

Irrationality

17. 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."

This was the test set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. It applies to all applications for judicial review.

18. 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.
19. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and others.

Procedural unfairness

20. 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.
21. The kind of 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.



The overriding objective is to ensure that the case was dealt with fairly.

The request for reconsideration in this case

22. In the application for reconsideration the Applicant's solicitor sets out concisely the grounds on which the application is made.
23. Essentially the complaint of irrationality is based on what are said to be errors of fact in the panel's decision letter, and the complaint of procedural unfairness is based on (a) the fact that the hearing was conducted remotely; (b) the fact that there was no arrangement for private consultation between the Applicant and his solicitor during the hearing; and (c) the fact that certain written evidence seen by the panel was not disclosed to the Applicant himself.

The response on behalf of the Secretary of State

24. The Secretary of State accepts that there was one error of fact, which will be discussed below, in the panel's decision letter. Otherwise the Secretary of State very properly offers no representations in respect of the application.

Discussion

The complaints of procedural unfairness

25. I cannot accept that the fact that the hearing was conducted remotely amounted, 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. This procedure is clearly entirely appropriate to meet the interests of justice and to be fair to everyone.
26. In this case the panel chair was satisfied that the case was suitable for a remote hearing. He therefore directed one. I can see no grounds for saying that the panel chair's decision was unjustified or unfair, and no such grounds have been advanced on behalf of the Applicant.
27. It is, I think, unfortunate that no arrangements were made for a private consultation between the Applicant and his solicitor during the hearing, and in particular before the solicitor made his closing submissions to the panel. In my experience such arrangements are very often made. In this case no request for a private consultation was apparently made, but I am prepared to accept that the absence of the opportunity for such a consultation might be regarded as a procedural irregularity.
28. However, a procedural irregularity is not the same thing as procedural unfairness. Procedural irregularities do occur from time to time, but such an irregularity only



amounts to procedural unfairness if it can be said to have compromised the overall fairness of the proceedings.

29. In this case I have made a careful examination of all the available material, and my conclusion is that the absence of a private consultation cannot have affected the panel's decision and did not compromise the overall fairness of the proceedings. The panel's decision was arrived at on a meticulously fair and thorough analysis of all the available evidence, applying the correct test for release on licence, and I do not think there is any realistic possibility that anything which might have submitted by the solicitor as a result of a private consultation with the Applicant could have resulted in any different decision.
30. The final point on procedural unfairness concerns the fact that it appears that the Applicant himself did not see all the material seen by panel.
31. It is clear that the dossier seen by the panel contained 357 pages. The panel's decision states in terms that the panel "considered the contents of the dossier comprising 357 pages", and that dossier was clearly the same 357-page dossier as was provided to me.
32. It is stated in the solicitor's representations that the Applicant says that the dossier provided to him by the prison contained only 280 pages. I have no reason to doubt that that was the case.
33. The solicitor has helpfully informed me, in response to my request for further information, that the dossier which he himself had at the hearing contained 297 numbered pages plus five unpaginated pages comprising a Stakeholder Response form (SHRF) and a police report. I of course accept that unreservedly. The five unpaginated pages which the solicitor had appear at pages 298-301 and 360 in the dossier seen by the panel and myself.
34. Pages 302-359 in the dossier seen by the panel and myself but not by the solicitor (and I assume not by the Applicant) comprise an updated version of the detailed risk assessment document compiled by probation (known as probation assessment report). A previous version of the probation service assessment report (updated on 30 August 2019) appears at pages 77-133 of the dossier and must have been seen by the Applicant and his solicitor. The version at pages 302-359 was updated on 22 May 2020 (7 days before the hearing). The vast majority of its contents is identical to the previous version
35. It is most unfortunate that the solicitor does not appear to have been provided with the updated probation service assessment report and that the Applicant himself does not appear to have seen everything provided to his solicitor. Page 280 in the dossier which I have (and the panel had) comes part way through a document. It seems unlikely that the Applicant would have been provided with a dossier which stopped in the middle of a document. The solicitor therefore suggests, and I agree, that the dossier provided by the prison to the Applicant may well have been differently paginated from the one provided to the solicitor and the panel. Unhappily that is something which happens all too often.



36. The solicitor very frankly and fairly (and quite understandably) says that he cannot remember whether at the outset of the hearing there was a discussion of the kind which often takes place to establish whether everyone has the same documentation. If it had been necessary for the purposes of this decision to make enquiries of the panel members about that, I would have done so. However, in the result it is not necessary.
37. I am certainly prepared to proceed on the basis that there was a procedural irregularity, no doubt due to the difficult circumstances in which everyone was operating, which resulted in the solicitor not seeing everything which the panel saw and the Applicant not seeing everything which the solicitor saw.
38. But did that irregularity compromise the fairness of the proceedings? Whether or not it did so depends on a careful analysis of what happened and what effect (if any) it might have had on the panel's decision.
39. I have carefully examined the dossier and the panel's decision letter to see if the panel's decision might have been any different if the solicitor and the Applicant had both had the full dossier, and I have come to the clear conclusion that there is no reasonable possibility that it would have done.
40. The document which neither the solicitor nor the Applicant saw was the version of the probation service assessment report which had been updated a week before the hearing. However, they will both have seen the previous version which had been updated on 30 August 2019. Comparison of the two versions reveals that there is nothing in the later version which (a) was not in the earlier version and (b) could possibly have assisted the Applicant's case or been used to undermine the panel's conclusions if it had been available to everyone.
41. In particular, probation's assessment of the Applicant's risks of serious harm to various categories of people in the community were precisely the same in both versions of the probation service assessment report. The statistical predictions of the likelihood of his re-offending (both in a violent and in a non-violent way) were marginally higher in the later version than in the earlier one: the panel's decision quotes the marginally higher figures (though with an obvious typo in relation to one of them) but the difference was minimal and cannot conceivably have affected the decision.
42. As indicated above, the unpaginated documents which the solicitor saw but the Applicant did not were the SHRF form and a police report.
43. The SHRF was a request by the Secretary of State (agreed to by the Applicant's solicitor) to revoke a direction for the production of a report which, it had turned out, did not exist.
44. The police report was an e-mailed confirmation relating to two police files, one of which related to the first of the three incidents which led to the reinstatement of the non-contact condition. In relation to that incident, the e-mail confirmed that the police had decided that no offence had been committed. The panel was fully aware of that fact, which was faithfully recorded and taken into account in its



decision. The other file related to a much earlier incident which does not seem to have featured in the case at all and which again did not result in any further action by the police.

45. It is clear, therefore, that the non-disclosure to the Applicant of either of these unpaginated documents, whilst regrettable, could not possibly have prejudiced his case in any way or affected the fairness of the proceedings.
46. That leaves the other documents which it seems were not disclosed to the Applicant. The fact that the dossier provided to him appears to have had different pagination from the one seen by the panel and the solicitor, makes it difficult to see which documents he had and which he did not. I have therefore read through the whole dossier to see whether there is anything in it which is not referred to in the panel's decision letter and which might have made any significant difference to its reasoning and decision if it had been drawn to its attention.
47. At the end of the day I have been unable to find any. It follows that, while there were procedural irregularities and I have every sympathy with the Applicant's position and that of the solicitor, I cannot find that there was any procedural unfairness - within the meaning explained above - such as to affect the overall fairness of the proceedings and require reconsideration of the panel's decision.

Complaints of irrationality

48. The complaints of irrationality are all based on what are said to be errors of fact in the panel's decision letter. It is inevitable that there will sometimes be errors when a panel is setting out the facts of the case in its decision. Sometimes the errors will be relatively insignificant and cannot have affected the panel's decision: in other cases, the mistake may be more significant and might have affected the decision. It is only where the latter is the case that the mistake will afford a ground for reconsideration.
49. That principle is consistent with the approach of the courts in judicial review cases such as **E v Secretary of State for the Home Department [2004] QB 1044** in which it was stated that before a mistake of fact can be treated as a ground for interfering with a tribunal's decision
- (1) there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;*
 - (2) the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable;*
 - (3) the appellant (or his advisors) must not have been responsible for the mistake; and*
 - (4) the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*
50. The mistake in this case which the Secretary of State agrees was made by the panel was in the section of the decision letter dealing out the facts of the offence for which the Applicant received his current sentence ("the index offence"). The panel adopted the account of that offence which had been contained in the



decision of the panel which had previously directed the Applicant's release on licence.

51. That account was in the following terms:

"The index offences were assault of your ex-partner, and causing grievous bodily harm with intent to your mother. The circumstances were that, whilst under the influence of alcohol, you confronted your ex-partner who was in a park with your child. After an altercation, you poured a can of lager over her head and ran off. Later that day, after you had continued drinking, you went home, and when you arrived, your mother was talking on the phone. You repeatedly punched her grabbed her by the throat, and dragged her by the hair. You hit her about the head with the handle of a large kitchen knife and threatened to kill her. You bit her ear causing an injury which required extensive stitching. The trial judge described you punching her as if you were in a boxing ring, and undertaking a violent and sustained attack."

52. The Applicant correctly points out that there was only one index offence, causing grievous bodily harm to his mother with intent. However, although there was no conviction for assaulting his ex-partner, evidence of that assault was given at the Applicant's trial as part of the background to the much more serious offence against his mother. The judge in his sentencing remarks, having heard all the evidence at the trial, stated:

"The facts of the matter were that on the afternoon ... there was a potentially violent incident, a slightly violent incident, with your ex-partner, the mother of your son, in the afternoon, when you met her in the park. You were drunk, abusive, confrontational and you ended up pouring a can of lager over her head and then throwing the can at her, and then you ran off threatening to burn down her house. Then you turned your attention later in the evening to your mother"

53. Although therefore it was an error to state that the assault on A was one of two offences for which the Applicant was serving his sentence, there was no mistake about the facts of that assault. The fact that the Applicant was not convicted of the assault does not mean that it did not happen. On the contrary the judge was clearly satisfied that it did, and where there has been a contested trial, panels of the Board are normally expected to proceed on the basis of the judge's findings as set out in his or her sentencing remarks.

54. In any event the assault on the Applicant's former partner was a relatively minor one. The panel was concerned with risk of serious harm. The grievous bodily harm offence was clearly relevant to that risk, whereas the assault on the A was relatively insignificant.

55. In these circumstances it is inconceivable that the panel's decision would have been any different if it had not made the error in question.



56. The remaining suggestions of errors in the decision letter all proceed on the basis that the panel should have accepted the Applicant's accounts of various matters as opposed to the other evidence on those matters. The panel was, however, perfectly entitled to make the findings which it did. The factual issues were very carefully identified and analysed, and where there was a dispute the panel correctly applied the standard of proof which is applicable in parole proceedings (proof on balance of probabilities).
57. It is unnecessary to go through all the disputed points. It is sufficient to mention just two.
58. In relation to the index offence the solicitor's representations state: "[The Applicant] refers to the Index offence and has always stated the account in the dossier is not how it happened, and he has always given a different account, this account is not recorded." The difficulty with this is that the Applicant's account was clearly not accepted by the jury at his trial and the judge passed sentence on the basis of the jury's verdict, setting out in his sentencing remarks the facts as they had been established at the trial. The Board has neither the power nor the resources to reinvestigate criminal cases: it is required to proceed on the basis of the jury's verdict and (normally, as in this case) the judge's sentencing remarks.
59. In relation to the incident of May 2019 the solicitor's representations state: "[The Applicant] states that the reference to stopping several times at public houses is factually incorrect, he stated during evidence that they stopped twice. The use of the term several makes the consumption of alcohol far more than it actually was." The difficulty with this is that the account given by the Applicant's former partner to the police was that she and the Applicant had had four cans of lager before driving home in his car. They then walked into the nearby town centre and after visiting some pubs there they ended up in a particular pub where they had a few drinks before A wanted to go home after an argument.
60. Although this account was retracted by A and was disputed by the Applicant, the panel was entitled to attach weight to it, as it did. Panels of the Board are entitled to rely on hearsay evidence provided that they can be satisfied that it is fair to do so. The panel carefully weighed up the Applicant's evidence and A's account to the police and made findings on balance of probabilities which were clearly supported by the evidence.
61. In the result I cannot find that any of the matters complained of, taken separately or together, passed the high threshold for a finding of irrationality.

Decision

62. For the reasons set out above I cannot find that this decision was irrational or procedurally unfair, and accordingly I must refuse this application. I am grateful to the solicitor and the Secretary of State for their assistance.

Jeremy Roberts



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

21 July 2020

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

 www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 [@Parole_Board](https://twitter.com/Parole_Board)

 0203 880 0885

