

[2021] PBRA 3

Application for Reconsideration by Shannon

Application

1. This is an application by Shannon (the Applicant) for reconsideration of a decision made after an oral hearing and subsequently concluded on the papers. The application was made on behalf of the Applicant by his legal representatives. The decision letter is dated 23 December 2020 (the decision). The outcome of the decision was not to direct release.
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 dossier that was before the panel, the decision, and the application for reconsideration.

Background

4. The Applicant is serving a sentence of life imprisonment for the offence of murder. At the time of the offence he was almost 16 years old. He had initially been convicted for Grievous Bodily Harm (GBH) but was later sentenced for murder, and his tariff took into account time he had spent in prison for the GBH offence. His tariff was set at 5 years 2 months and 6 days and expired in February 2011. He is now 37 years old.

Request for Reconsideration

5. The application for reconsideration is dated 11 January 2021.
6. The grounds for seeking a reconsideration are as follows:

Procedurally Unfair:

- a) The panel failed to properly apply the test for release;
- b) The panel relied on incorrect assumptions; and
- c) The panel relied on information that was not disclosed to the Applicant or his legal representatives (in finalising their decision).

Current parole review

7. The Secretary of State's referral is dated March 2019 and asks the Parole Board to consider the Applicant's release or failing that whether he continued to be suitable for open conditions, and to comment on any continuing areas of risk. The Applicant had been in open conditions at the time of the referral but by February 2020 he had been returned to closed conditions.
8. The two member panel considered a dossier of initially 271 pages, however after the adjournment they considered the further directed reports from the Applicant's Offender Manager (OM), the Offender Supervisor (OS) and a report from the specialist team working with him on substance abuse. The decision letter indicates the dossier came to 289 pages. The panel also appear to have considered further information from the OM which is not in the dossier, this is referred to below. They took oral evidence from the OM, the OS, the Applicant's keyworker and also the psychologist who had prepared a psychological risk assessment for the purposes of the review. It is reasonably assumed, although not indicated, that the panel heard concluding submissions from the Applicant's legal representatives at the end of the hearing.
9. The case was initially listed to be heard on 7 April 2020, however the panel chair decided to adjourn that hearing and hold a case conference instead in order to clarify details of the risk management plan. This included information about Designated Accommodation and any recommended offence focused work. I note that there were other preliminary decisions and applications made in this case however they are not relevant to the issues raised by the reconsideration and not referred to here. The legal representative attended the case conference.
10. Subsequent to the case conference, the panel chair directed that the hearing could now be listed. Further directions were made, and the hearing was listed on 28 July 2020.
11. After the hearing which took oral evidence from all the witnesses and the Applicant, the panel chair adjourned the case to 15 December 2020 in order that more work could be carried out on the release plan. The adjournment notice dated 30 July 2020 indicates that the case will be concluded on the papers.
12. On 23 December 2020 the panel issued its decision letter which indicated that the panel had further considered the additional reports directed by the adjournment notice. Personal representations from the Applicant were also considered.

The Relevant Law

13. The panel correctly sets out in its decision letter the test for release. While the decision letter refers to the requirement to consider recommendation for open conditions, no test for open conditions is provided. While this is an omission it is not in itself a factor that need be taken into account for this reconsideration.

Parole Board Rules 2019



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14. 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)).
15. 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

16. 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."

17. 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.
18. 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

19. 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.
20. 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.



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Other

21. 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 his 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 him. 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/the prisoner

22. The Secretary of State (SoS), by e-mail dated 18 January 2021, indicated that no representations were made in response to the application

Discussion

23. The Application specifically states that the grounds for reconsideration are procedural unfairness, and I have approached this decision without consideration of the ground of irrationality.

24. The central issue on which the Application is made relates to the decision of the panel following the adjournment, which focuses on the proposed release or risk management plan, in particular the release address. It would be fair to say that the panel was focused on this from the start, given that was one of the key areas for the case management conference and again when the hearing was adjourned after the hearing.

25. It will be of some assistance to indicate what the professionals recommended at this point. All professional witnesses recommended that the Applicant be released. One suggestion was that he might be released to his mother's address, this was rejected by the panel and an explanation for that rejection is given in the decision letter. However, it was also suggested that this could be an appropriate move-on address by the professionals, especially the OM. No comment is made by the panel on this suggestion.

26. Another suggestion was that the Applicant might be released to a residential rehabilitation unit. The Applicant indicated that an application for one had been made. Unfortunately, no placement was offered.

27. The suggestion that appeared viable was release to a Designated Accommodation. By the time of the hearing, a Designated Accommodation (DA) placement had been secured for February 2021. Having taken evidence at the hearing about this, the panel decided to adjourn, and specifically indicated as follows:



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- a) That a DA place was not available until February 2021(as indicated by the OM);
 - b) That both the OM and OS indicated preference for release to a DA rather than the Applicant's mother's address; and
 - c) That if a residential rehabilitation centre could be sourced the Applicant was very keen to take that offer.
- 28.The Adjournment notice goes on to indicate that the panel required further development of the risk management plan, including exploring release to the residential rehabilitation centre, and that there was time to do this before the offered DA space in February 2021.
- 29.The adjournment notice directed reports from the OM, the OS and a report about the Applicant's engagement with drug services in the prison. The direction to the OM was fairly general, asking for any further updates on the release plan and options for release to a residential rehabilitation centre.
- 30.There is nothing in that notice that indicated that the panel was concerned about the existing recommendations for release to Designated Accommodation.
- 31.Legal representations were not invited in the Adjournment notice, nor were they invited at any point after that, and the panel concluded the case on the papers. While the Applicant sent in his own representations, they do not appear to be a response to the updated reports.
- 32.The OM, in their post adjournment report, continues to recommend release, and is clear that the recommendation is that the Applicant be released to a DA (as stated earlier), and following that stay, there were proposed enhanced monitoring through the use of electronic tagging. No comment is made about any residential rehabilitation centre, it is reasonable to assume this was not a viable option.
- 33.I am concerned that it appears that there was some further information available to the panel on which they based their decision, this is not in the dossier. The decision letter states that, "*[The Applicant's] OM confirmed on 23 December 2020 that [a DA] space would only be guaranteed for six weeks but was hopeful this may be extended to three months*".
- 34.The decision letter goes on to indicate that in the absence of any residential rehabilitation address, an extended stay at a DA would be 'essential' to monitor the Applicant's risk and as this is not available, the risk cannot be managed. The Adjournment notice had no indication as to what the panel was considering in relation to length of stay at a DA. It only refers to the DA as being a 'minimum

component of the risk management plan'. Since a DA place was available at the time of the adjournment, the Applicant might reasonably expect, if a DA was part of the final release plan, that release was at least a possible outcome.

35. I note that in the Parole Board Guidance on Adjournments and Deferrals, last updated in July 2020, it is stated that where hearings are adjourned on the day (and presumably shortly after the hearing) with an intention to conclude on the papers, this conclusion should follow once outstanding information has been directed and received ... "*(along with any representations)*". While this appears fairly weakly put, my view is that in fact it is procedurally fair that in any such adjournment the panel should welcome further representations and provide a deadline for them, and secondly it is important in the interests of fairness that any further information received and considered by a panel is put before the Applicant and his or her legal representatives before a final decision should be made.

36. To summarise, there are three separate facts that help me in my decision. These are:

- The adjournment notice did not indicate that the length of stay at any DA was an important consideration for the panel;
- It failed to invite representations following the receipt of the new directed material; and
- The panel refers to material received further to the directed reports that was clearly relevant in its decision, and there is no indication that either the Applicant or his legal representatives had seen it. Indeed, there is no indication they saw the further directed material either.

37. The Application indicates that had the legal representatives been aware of the concerns of the panel with respect to length of stay at any DA, submissions for a further hearing rather than conclusion on the papers could have been made to explore the release plan. I consider that reasonable, for example taking into consideration the OM's suggestion in their most recent report that electronic tagging would assist in monitoring the Applicant after he had moved on from a DA. This amongst other matters could have been further explored in another hearing that focused on the release plan.

38. The Application also complains that the panel made an error in that it indicated that should a suitable release address for an extended time be sourced at a future date, an application for Executive Release could be made by the Applicant. They point out, correctly, that as an indeterminate prisoner there is no entitlement to apply for Executive Release. I also notice that there is another error in the decision letter that

indicates that the panel was made up of a Judicial member and a psychologist member, this is not the case.

39. I do not need to make a decision as to whether or not the test for release was correctly applied, because I have decided that there is a procedural irregularity that requires correction. I have come to my decision bearing in mind the principles enunciated in **Osborn** and specifically the need for evidence to be given careful scrutiny where open to explanation, whether that should be done orally or in person and the legitimate interest of a prisoner in being able to participate in that decision.

Decision

40. Accordingly, I do find that there was a procedural irregularity and applying the test as defined by case law, I find the decision to be procedurally unfair. 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.

Directions

41. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was flawed. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

42. The following further directions are now made:

- (a) The re-hearing should be expedited.
- (b) The original decision must be removed from the dossier and must not be seen by the new panel.
- (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
- (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.
- (e) The prison Psychologist is directed to provide an updated view on their recommendation in light of the further information from the OM about the release plan and release address. In order to do this, they need not provide an entire Addendum, a letter/brief report should be sufficient.
- (f) The OS should provide a brief update only if there have been any significant developments in relation to custodial behaviour and engagement.
- (g) The OM is directed to explore whether an extended stay at a DA is possible, given the concerns expressed by the current panel and provide any other alternative suggestions as to release plan/release address.



- (h) This hearing should be by video link. This is because in his personal submissions the Applicant regretted not being able to have sight of the panel or for them to have sight of him.
- (i) This panel should have three members to prevent there being a possibility of a split decision. No specialist is required.
- (j) The time estimate should be for three and a half hours, and this should be the first case on the day in order to ensure that it is heard.

Chitra Karve
27 January 2021