

[2021] PBRA 49

## Application for Reconsideration by Macleod

### Application

1. This is an application by Macleod (the Applicant) for reconsideration of a decision of an oral hearing dated the 2 March 2021 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 application for reconsideration dated 19 March 2021 which also appended an undated note to the parole board from a Police Sergeant, and an exchange of emails dated 10 February 2021 and 17 February 2021 concerning police witness attendance at the oral hearing; the decision letter dated 19 March 2021; and the parole board dossier of 371 pages.

### Background

4. The Applicant was sentenced on 2 December 2013 to a 10 year extended sentence comprising 7 years in custody and a 3 year extended licence period. The index offence took place in November 2012 when the Applicant attacked two victims in the outside courtyard of a public house whilst he was heavily intoxicated causing serious injuries. The Applicant was convicted of section 18 wounding with intent to do grievous bodily harm. He also received a concurrent 4 year sentence for the assault occasioning actual bodily harm of the second victim.
5. The Applicant was released from custody on 13 September 2018, but his licence was revoked on 25 February 2020 and he was returned to prison on 3 March 2020.
6. The incident immediately before the Applicant's recall took place on 23 February 2021 when the Applicant was found by police under the influence of alcohol or drugs near a stolen motor vehicle. He was subsequently arrested for theft of a motor vehicle and driving whilst being unfit to do so.
7. At the time of recall, it was also known to probation that the Applicant was under police investigation for an incident which took place on 8 February 2020 whereby he was stopped in a vehicle and small bags consistent with dealing drugs were found in the



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vehicle. On the same occasion, the Applicant had subsequently tested positive for cocaine. There is some dispute as to whether the police were searching for a stolen weapon when they stopped the vehicle on this occasion or whether they were investigating an offence of violence.

## **Request for Reconsideration**

8. The application for reconsideration is dated 19 March 2021.

9. The grounds for seeking reconsideration are as follows:

### Irrationality

- a) That the information held by the police should have been disclosed in full—a direction to provide further and better particulars by way of a report had been revoked; and
- b) That the panel chair in the decision accepts the Applicant's name as 'cloudy' which was not established at the hearing.

### Procedurally unfair

- a) That the panel failed to follow the Parole Board's guidance on Allegations regarding the allegation that the Applicant had committed an offence of GBH with intent on 28 November 2019; and
- b) That the panel, took into account factually incorrect information in their assessment of risk.

## **Current parole review**

10. The matter was originally listed for oral hearing on 3 December 2020. The oral hearing started on that day and took place remotely due to the Covid-19 restrictions. The single member panel chair took evidence from the Applicant's Community Offender Manager and Prison Offender Manager. The case was, however, adjourned before the Applicant gave evidence.

11. The day before the hearing on 2 December 2020, the panel chair had received evidence from the police that the Applicant had previously been questioned in respect of a serious assault (which was separate to the two incidents which had given rise to the concerns leading to the Applicant's recall). Intelligence indicated that the Applicant was linked to the attack of a male who had been seriously injured on 28 November 2019.

12. The Panel Chair adjourned the oral hearing on the basis that more information was required about the intelligence linking the Applicant to this attack in order to adequately assess the Applicant's risk of serious harm.

13. On 4 February 2021 a report was provided detailing the 7 pieces of intelligence dated between 29 November 2020 to 9 December 2020 assessed by the police to link the Applicant to the attack.
14. The hearing resumed on 2 March 2021. The Officer in the case did not attend the oral hearing but instead another Detective Inspector from the relevant police intelligence unit attended the hearing and gave evidence.
15. In the decision of 3 March 2021, the Panel Chair found that on the balance of probabilities, the Applicant was responsible for the attack on 28 November 2021 and that his continued confinement remained necessary for the protection of the public.

## The Relevant Law

16. The panel correctly sets out in its decision letter dated 3 March 2021 the test for re-release.

### *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."*

18. 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.
19. 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*

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 to the issue of irrationality which focusses on the actual decision.
21. 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

22. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

23. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"


24. In **R (Morris) v The Parole Board and the Secretary of State for Justice [2020] EWHC 711** the Court found the Parole Board 'Guidance on Allegations' as published on 11 April 2019 to be lawful and also examined in more detail the circumstances in which consideration of allegations not resulting in a conviction could be said to be procedurally unfair in the context of parole board hearings. Irwin LJ in that case made clear that the Parole Board is entitled to consider such allegations in the absence of a criminal verdict of civil judgment '*The Board is an expert body, charged with acting fairly. It is clear they will reject mere allegations unsupported by any material or evidence. Beyond that, they will be careful to consider matters said to be relevant to risk fairly, and above all in the context and in the light of facts established in the individual case*'.

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

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25. PPCS on behalf of the Secretary of State confirmed by email on 29 March 2021 that the Secretary of State would not be offering any representations in respect of this application.

## Discussion

26. The Applicant asks me to find that the Panel Chair followed the incorrect process when he made the finding that on the balance of probabilities the Applicant committed an offence of grievous bodily harm with intent on 28 November 2019. He states that the Guidance on Allegations issued to Parole Board Member in March 2019 was not followed.

27. The Guidance on Allegations requires the Parole Board to consider each allegation and either a) choose to disregard it 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. The panel chair chose to make a finding of fact based on the information available to him. To make this choice is one of the options available to him and is not in itself contrary to the guidance.

28. The Applicant states that the information or evidence in this case provided no evidential basis upon which to make a finding of fact and should have been disregarded. The Applicant asks me to find that making a finding of fact in the circumstances that the Applicant had committed a serious assault with a machete was also irrational. The guidance itself makes clear that the information the Parole Board will have before it when making a finding of fact will not necessarily equate to that which would be admissible in criminal or disciplinary proceedings. Such decisions will be made instead on the basis of information and evidence and what can properly be inferred from that information and evidence. At para. 10 of the guidance Parole Board members are told that it will normally be appropriate to make findings of fact in respect of allegations which they consider to be relevant (rather than simply disregard information about them).


29. Para. 11 of the guidance provides more on making findings of fact. This is pertinent to this case. It states that Panels may need to make a finding of fact regarding the allegation when: *'a) It is capable of being relevant to the parole review; and b) the panel is in a position to make a finding of fact. Panels will only be in a position to make a finding of fact when it has a reasonably sufficient body of evidence on which it can properly make a finding of fact on the balance of probabilities; and c) The prisoner's case can be fairly considered. The prisoner must have a fair opportunity to contest the allegations'*.

30. In this case, the allegation that the Applicant had committed a further serious violent assault with a weapon was clearly highly relevant to his risk of serious harm. The Panel Chair had 7 pieces of intelligence before him and an experienced police officer who gave evidence about the credibility of the source of that intelligence. The Panel Chair

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was also able to infer other matters from the evidence of the other professional witnesses (for example, that the Applicant's demeanour had changed in November 2019 which coincided with the date of the assault). The Panel Chair clearly took the view that this was a '*reasonably sufficient body of evidence on which to make a finding of fact*'. This was not an unreasonable conclusion for him to reach and it was certainly not an irrational one which should lead me to interfere with his finding.

31. The information before the Panel did not come from a single source. It was not in my view a '*mere allegation*' (i.e. one which has no evidential basis whatsoever) as referred to in **Morris**. The Panel was not taking in to account the mere fact that an allegation had been made but rather took the opportunity to take evidence about it and conduct its own investigation into the credibility and circumstances of the allegation. This then enabled the Panel to make its own findings of fact about the allegation and in my view provided it with enough information to do so.

32. I have given very careful consideration to whether the Applicant was, in the circumstances, given a fair opportunity to contest the allegations. I have concluded that he was. He was given full disclosure of the pieces of intelligence before the Panel and so understood exactly what the allegation was against him. He had also been given a summary of the allegation when he was interviewed by the police about it. He was also represented at the hearing and the Applicant's legal representative had a full opportunity to cross examine the police officer about the source and credibility of the intelligence. I do not accept the Applicant's assertion that not knowing the name of the informant made this exercise unfair. The nature of the allegation, the credibility of the source and the nature of the source's access to the information were all disclosed both to the Applicant and to the Panel. (Whilst the Applicant complains that a non-disclosure application should have been made, a successful application here could well have resulted in far less information of relevance to risk being before the Panel and the Applicant. In fact, the relevant intelligence (and relevant factors about its source) were disclosed in full, allowing the Applicant to appropriately challenge it, whilst the (irrelevant) detail which could lead to the source being identified was withheld.

33. The Applicant asks me to find the Panel Chair was wrong to find that his nickname is 'Cloudy' based on intelligence from a reliable human intelligence source who had not witnessed the attack directly. The police had provided the reliability coding but also made clear that the source of information was involved in criminal activity and did not witness the attack directly. The Applicant was in my view fully entitled to rely on the police's reliability rating. Source reporting of this nature must be treated cautiously, and appropriate weight given to the fact that it is hearsay and not an eye-witness account to an evidential standard. A reliability assessment from an experiencing police officer specialising in intelligence is not, however, something to be disregarded entirely simply because a human source is involved in criminal activity or didn't see the activity in question first-hand. Taking into account the reliability assessment when deciding to make a finding of fact in relation to the allegation is not in itself procedurally unfair or irrational. In this case two sources had reported the same information and I do not find

it to be an irrational conclusion to find that these sources should act as corroboration for each other.

34. The Panel Chair states that the Applicant destroyed his mobile phone at the time of his arrest which is something he denies. The Applicant was represented at the hearing and it was open to challenge any aspect of the evidence in the dossier as well as that given in oral evidence. It is not clear whether or not the Applicant used the opportunity of the hearing to challenge this evidence but whether or not he did, the Chair was entitled to rely on that evidence. It is the role of the panel to decide what evidence to accept and what not to accept from all the evidence (written and oral) before it. The decision to do so here is not so obviously wrong as for me to find it irrational.
35. The Applicant further states that the panel was wrong to put weight on the Applicant's failure to answer questions in interview. It does not appear to me that the panel did in fact put any weight on this. This part of the decision states '*[The Applicant] stated that [he] did not know the victim of the assault personally but did know about him, and that when [he was] arrested, following legal advice, [the Applicant] provided a no comment interview*'. If, however, the Panel Chair had put weight on these matters he would be fully entitled to do so. In my view the Chair had followed a fair process in allowing himself to take account of these matters and was therefore entitled to determine what, if any weight to put on it (not being bound by the rules of criminal procedure as to how and when to draw adverse inferences from a refusal to answer questions in interview).
36. Some panel chairs would undoubtedly have found that they did not have sufficient information to make a finding of fact on the basis of the evidential material before them. It was, of course, open to the Panel in those circumstances to take into account the information and to decide what weight to give it within the risk assessment as a whole. The result may not in that case have been any different for the Applicant given the information was highly relevant and clearly concerning for the Panel. Given the Panel did decide in this case that it had enough information to make a finding of fact (as opposed to merely giving some weight to the allegation) it may have been better for the Chair to provide more detail as exactly what factors he took into account when reaching that finding and what his assessment of credibility was in relation to each of the pieces of information. This would also have had the advantage for future panels (who may well not have the benefit of the same professional witnesses) to understand how and why the panel has reached its conclusion. Nevertheless, I do not find that the manner in which the Panel reached its conclusion or has expressed its reasons for it, amounts to either procedural unfairness or an irrational decision.
37. Finally, the Applicant also asks me to find that the decision is procedurally unfair because the panel took account of factually incorrect information (namely that '*drugs were found on the side of the car where your passenger was sitting*'), during the 8 February 2020 incident and that the police were called to an incident of violence that day rather than looking for an offensive weapon. The information available in the

dossier on what led to the stop on 8 February 2020 appears to be contradictory. The information in the Offender Manager's report states that '*dealers bags*' were found in the car but does not specifically state that drugs were found. This is in fact the version of events recited by the Panel Chair in his adjournment notice '*On 8 February 2020 police were called to an incident in York where they stopped [the Applicant] in a motor vehicle and a search revealed a number of small plastic bags consistent with the supply of drugs*'. There is certainly some ambiguity in the information before me about the reason the car was being searched that day. It may of course be that the police were involved in both searching for an offensive weapon and investigating an incident of violence (the two not being mutually exclusive). However, if I take the Applicant's case at its highest and find that the Panel Chair has considered factually inaccurate incorrect information and that the reason the car was searched was for an offensive weapon, and that bags for drugs instead of drugs were found during the search, I do not find that this was sufficient to render the process unfair or the decision irrational. The Panel Chair made absolutely clear that the '*pivotal issue*' leading to his conclusion that the Applicant should remain in prison was the finding of fact that the Applicant had committed a further serious assault in November 2009.

## Decision

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

**Kay Taylor**  
**27 April 2021**