

[2021] PBRA 51

## Application for Reconsideration by Enfield

### Application

1. This is an application by Enfield (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 14 January 2021 not to direct his 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 decision letter, the dossier and the application for reconsideration.

### Background

4. The Applicant received a discretionary life sentence on 31 March 2014 following conviction on three counts of sexual assault on a female by penetration and one count of false imprisonment to all of which he pleaded guilty. A minimum term of six years was imposed. His tariff is reported to have expired on 18 February 2019. The Applicant was 26 years old at the time of sentencing and is now 33 years old.

### Request for Reconsideration

5. The application for reconsideration is dated 31 March 2021 and has been submitted by solicitors acting for the Applicant.
6. It submits that the decision not to release the Applicant was procedurally unfair since he was not properly informed of the case against him.
7. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

### Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2019 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether the Applicant should be transferred to open conditions.



9. This was the Applicant's second parole review. His first review in July 2019 concluded with a negative decision on the papers as the Applicant was about to undertake a training course addressing the use of violence and sex offending.
10. The case proceeded to oral hearing on 14 January 2021. This was held via video link (due to COVID-19 restrictions) before a four-member panel, including two psychologist members and a psychiatrist member.
11. The panel heard oral evidence from the Prison Offender Manager (POM), Community Offender Manager (COM), prison psychologist and the Applicant. An independent psychological report had been provided, together with a joint report from both psychologists.
12. None of the witnesses were supporting release and the Applicant told the panel he was not seeking release. All witnesses supported a recommendation for open conditions.
13. During the hearing, the Applicant's COM referred to Crown Prosecution Service (CPS) papers relating to the Applicant's conviction for the false imprisonment of a prison officer (for which he received a further 12-month determinate sentence, now served).
14. Closing legal submissions on behalf of the Applicant were invited in writing and were provided on 15 January 2021. These reaffirmed that the Applicant was seeking a recommendation for open conditions and not a direction for release.
15. Adjournment directions were issued on 27 January 2021. Having taken full oral evidence from all witnesses, the panel decided to adjourn for the provision of the CPS papers with a view to concluding the review on the papers. The adjournment review date was set to 12 February 2021.
16. Later, on 27 January 2021, the COM sent the CPS papers to the Parole Board Case Manager and those papers were immediately sent on to the panel.
17. The CPS papers were not added to the dossier until 1 March 2021.
18. The panel's decision was issued on 17 March 2021. It made no direction for release and no recommendation for the Applicant's transfer to open conditions.

## **The Relevant Law**

19. The panel correctly sets out the test for release in its decision letter dated 14 January 2021.

### *Parole Board Rules 2019*

20. 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)).

21. 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**.

### *Procedural unfairness*

22. 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.

23. 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.

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

24. The Secretary of State has submitted no representations in response to this application.

### **Discussion**

25. The application seeks reconsideration of the panel's decision not to direct release. It is only that aspect of the panel's decision-making that is open to reconsideration. However, the Applicant was not seeking a direction for release; he sought a recommendation for open conditions which was not made, despite the recommendations of all witnesses. Notwithstanding this, the panel did make a decision – in line with all the witnesses and the Applicant himself – not to direct release, which is a necessary first step according to the terms of the Secretary of State's referral prior to any consideration of suitability or otherwise for open conditions. The decision not to direct release falls within rule 25(1)(b) and, as such, falls subject to reconsideration.

26. The application raises no specific points of procedural unfairness relating to the decision not to release the Applicant but does advance some broader arguments potentially relevant to the overall fairness of proceedings which merit consideration insofar as they relate to general principles of natural justice.

27. It is first argued that further representations should have been sought after the panel had sight of the CPS papers. It is not clear to me when the Applicant's legal representative first saw the CPS papers, but even if they did not do so before they were added to the dossier on 1 March 2021, the decision letter had not been issued at that point.
28. A panel of the Parole Board is not *functus officio* (i.e. reached the point it has no power to make any further substantive decisions in the case) until its decision has been reduced into writing and communicated to the parties: **Dickens [2020] PBRA 106**.
29. As the decision had not been issued, further submissions could proactively have been made on the Applicant's behalf. It is not procedurally unfair for the panel not to have sought further representation, because it was open to the Applicant's legal representative to make such submissions before the decision was issued if they were so minded.
30. Even if such submissions had been received, they would presumably have argued for the Applicant to be moved to open conditions in line with the original application and would therefore not have been material to the panel's decision not to release him. The absence of submissions does not therefore make the decision not to release procedurally unfair.
31. It is also argued that the decision was issued outside the 14-day period provided by rule 25(6). However, rule 29 provided that any error of procedure does not invalidate any step taken in the proceedings, unless I direct otherwise. I do not direct otherwise and find no procedural unfairness in respect of any delay.
32. It is finally argued that the decision did not engage with the submissions put forward on the Applicant's behalf and that the panel paid little attention to the Applicant's representations at the hearing. In support of this, it is noted that the decision cites the legal representative's name incorrectly (and this undermines the panel's attention to their representations).
33. It appears that the legal representative named in the decision was from the same firm as the legal representative at the hearing (and who has submitted the application for reconsideration). Parole Board records show that the legal representative named in the decision was also named on timetables issued during proceedings. This leads me to conclude that the identity of the legal representative changed during the course of the parole review. While it is unfortunate that the incorrect representative is named in the decision, it does not follow that this mistake demonstrates disengagement with the oral representations made at the hearing or afterwards in writing. It is an accidental slip that does not invalidate proceedings or lead me to a finding of procedural unfairness.

## Decision

34. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair and accordingly the application for reconsideration is refused.

**Stefan Fafinski**  
**23 April 2021**

 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)

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 0203 880 0885

