

[2021] PBRA 55

## Application for Reconsideration by Ahmady

### Application

1. This is an application by Ahmady (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 12 March 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. I have also viewed the two pieces of video evidence referred to in the dossier.

### Background

4. The Applicant received a sentence of imprisonment for life on 7 September 2007 following conviction after trial for attempted murder. A minimum term of eight years and eight months was imposed. His tariff is reported to have expired on 7 May 2016.
5. He was released on licence on 10 November 2017 following an oral hearing. He was convicted of criminal damage on 24 August 2019 and received a community order, but he was not recalled to custody.
6. However, he was recalled on 7 October 2019 after being arrested and charged with assault by beating his partner (A), his three-month-old child, and an emergency worker. He was also charged with resisting arrest. He was returned to custody the following day.
7. The Applicant is a foreign national and is being considered for deportation. The charges were later dropped on the request of the Home Office to permit the Applicant's deportation (therefore a prosecution was not needed in the public interest). The planned deportation on 3 November 2019 was unable to proceed as the Applicant was in custody on recall pending Parole Board review.
8. The Applicant was 18 years old at the time of sentencing and is now 32 years old.

### Request for Reconsideration



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



0203 880 0885

9. The application for reconsideration is dated 1 April 2021 and has been submitted by solicitors acting for the Applicant.
10. It submits that the decision not to release the applicant was procedurally unfair since the panel did not allow A to attend the hearing to give evidence and consequently failed to follow Parole Board guidance on allegations. It raises no matters of irrationality.
11. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

## Current Parole Review

12. The Applicant's case was referred to the Parole Board by the Secretary of State in November 2019 to consider whether to direct his immediate release.
13. This was the Applicant's second parole review (having been released following the first review) but his first review since recall.
14. The case was deferred on 3 December 2019 for various update reports, including further information relating to the allegations that led to the Applicant's recall.
15. On 23 December 2019, the Applicant's legal representative objected to the deferral *inter alia* on the basis that the court had confirmed the discontinuation of proceedings. This application was considered by a Duty Member and was not granted.
16. On 26 February 2020, further legal representations were submitted seeking release on the papers or, in the alternative, an oral hearing. Within these, the Applicant strongly denied the commission of any violent offences while on licence.
17. On 16 March 2020, the case was directed to oral hearing by a single-member Member Case Assessment (MCA) panel. In doing so, it noted that the allegations had not been tested in court and that the Applicant's risks should be assessed in an oral hearing. On 11 June 2020, Panel Chair Directions (PCDs) were issued, directing the case to a remote hearing (due to COVID-19 restrictions) to be held on 31 July 2020.
18. On 23 July 2020, further legal representations were submitted. These reaffirmed the Applicant's dispute of the allegations. They submitted that, if the panel considered either making a finding of fact or attaching weight to the allegations, then the evidence disclosed to date would be insufficient for the panel to do so. It was submitted that, if the panel wished to explore the allegations further, it should direct disclosure of witness statements and body-worn camera footage. It was emphasised that the panel would be unable to make a finding of fact without this additional evidence. On 30 July 2020, the panel chair noted these submissions, but directed the case should proceed to oral hearing as listed the next day.
19. On 31 July 2020, the panel convened. The Applicant's legal representative submitted that as almost all the recall allegations were disputed (save the Applicant's return to

alcohol use) and the report writers had made their recommendations based on those allegations being fact, then body-worn camera evidence, witness statements and additional witnesses were necessary.

20. The hearing was adjourned on the day, with a plan to reconvene on 19 November 2020. Witness statements and video evidence were directed to be disclosed by 12 September 2020. A number of possible additional witnesses were named: 12 police officers and Adjournment PCDs noted that the need for the additional witnesses would be determined by the content of the statements and the video evidence and that representations would be sought before any final decision was made about the attendance of witnesses.
21. Between 29 September 2020 and 2 November 2020 three sets of PCDs were issued, noting that deadlines for the witness statements and video evidence had passed and setting new deadlines accordingly. With the planned hearing date approaching on 19 November 2020, the final set of PCDs sought representations regarding the possibility of another adjournment.
22. On 13 November 2020, legal representations were submitted. These noted that a number of witness statements had been disclosed on 10 November 2020 (from 11 police statements, A and a neighbour). Having considered those witness statements, the Applicant's legal representative sought the attendance of the two attending police officers and A to give oral evidence at the hearing. In doing so, they noted that the Applicant disputed the accounts of the police officers and A and, as the panel would be likely to treat the allegation as relevant to risk, then the Applicant should be given the opportunity to challenge the accounts of the witnesses. They also asked that further attempts were made to make the video evidence available prior to the hearing.
23. On 16 November 2020, further PCDs were issued, adjourning the hearing for a second time. The Applicant's Prison Offender Manager (POM) was unavailable for the hearing (due to COVID-19) and, although a stand-in was available, they would have had no substantive knowledge of the Applicant's case. It was also noted that the video evidence had ostensibly been made available, but not in a format that could be viewed by the panel or the Applicant's legal representative. The panel considered the video evidence to be necessary for its assessment of risk. Disclosure of viewable video evidence was directed by 23 November 2020.
24. The panel also confirmed the additional witnesses for the next hearing to be the two attending police officers. A was stood down as a witness. In doing so, the panel considered that her witness statement (the **first statement**) provided sufficient evidence. This five-page statement was signed by A and alleged physical violence by the Applicant, including five punches to her head and face.
25. The panel also noted concerns that Parole Board hearings may offer insufficient safeguards for complainants as witnesses, particularly when there are allegations of domestic abuse. The panel invited the Applicant's legal representative to source a second statement from A (if they were still in contact with her and she agreed) as an alternative to her giving oral evidence. The case was relisted for 28 January 2021.

26. On 8 January 2021, a statement written by the Applicant's legal representative on behalf of A (following a conversation they had on 24 December 2020) was added to the dossier (the **second statement**). In it, A acknowledged signing the first statement. However, she now said the first statement was false and the Applicant had not assaulted her.
27. Further legal submissions accompanied the second statement. It was submitted that the panel should accept the second statement without the need for A to be called as a witness, given the clarity of her current position. It noted that complainants often make false statements. It was further submitted that the two police witnesses could also be stood down unless the panel had concerns with regard to the Applicant's conduct.
28. On 19 January 2021, PCDs were issued, reconfirming the attendance of the two police witnesses.
29. The case proceeded to oral hearing on 28 January 2021, but adjourned due to insufficient time, to reconvene on 19 February 2021. The Applicant's legal representative submitted written closing submissions (20 pages) on 24 February 2021 seeking the Applicant's re-release. In these submissions, the Applicant's legal representative reminded the panel of the Parole Board's guidance on making findings of fact, summarised the evidence in relation to the three allegations, and submitted that it would not be possible for the panel to make a finding of fact in respect of any of them (with reasons). No objection was raised in the closing representations in respect of A not giving oral evidence.
30. On 1 March 2021, the panel adjourned the case for a further 14 days so it could fully consider the extensive written closing submissions before reaching and issuing its decision.
31. The panel did not direct the Applicant's release. In doing so, it made findings (on the balance of probabilities) that the Applicant assaulted A, behaved recklessly and harmfully towards his son, and resisted arrest in a violent way.

## The Relevant Law

32. The panel correctly sets out the test for release in its decision letter dated 12 March 2021.

### *Parole Board Rules 2019*

33. 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)). This is an eligible decision.

## Procedural unfairness

34. 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.
35. 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

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

## Discussion

37. The application submits that it was procedurally unfair to refuse the attendance of A as a witness at the oral hearing.
38. The starting point for my analysis is the current Parole Board Guidance on Allegations (March 2019, v1) (the **Guidance**). This sets out guidance for panels presented with allegations that have been made against a prisoner (para. 1). For these purposes an '*allegation*' refers to conduct alleged to have occurred, but which has not been adjudicated upon by a civil or criminal court or prison adjudication (para. 2). The matters which led to the Applicant's recall are allegations which fall within the scope of the Guidance, having been discontinued and therefore not determined by the criminal courts. Panels need to consider allegations which are relevant to the parole review (para. 8). Relevant allegations explicitly include allegations of harmful behaviour (para. 8(a)). The three allegations arising from the time of recall all relate to violent behaviour and are therefore relevant allegations as far as the Guidance is concerned.
39. The application for reconsideration only takes issue with the panel's finding of fact in relation to the alleged assault on A. I take this as implied acceptance of the panel's findings of fact that the Applicant (on the balance of probabilities) behaved recklessly and harmfully towards his son and resisted arrest in a violent way.
40. Panels faced with a relevant allegation will need to disregard it, make a finding of fact, or make an assessment of it to decide whether and how to take it into account as part of the parole review (para. 9).

41. The guidance with regard to findings of fact is set out at para. 11 as follows:

Panels may need to make a finding of fact regarding the allegation when:

- (a) It is capable of being relevant to the parole review;
- (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. This may be achieved through oral evidence, written submissions, or in interview with an Offender Manager, depending what is fair in the case.

42. It is self-evident that the alleged assault on A was capable of being relevant to the Applicant's parole review. Therefore, it is next necessary for me to consider whether the panel had a reasonable sufficient body of evidence on which properly to make its finding.

43. The panel had the benefit of the following evidence:

- (a) Witness statements from eleven police officers
- (b) The first statement from A
- (c) Witness statement from a neighbour
- (d) Body-worn camera footage from the two officers called to the hearing
- (e) The second statement from A
- (f) Oral evidence from the two officers called to the hearing
- (g) Oral evidence from the Applicant.

44. It is argued that the absence of oral evidence from A rendered the (otherwise extensive) body of evidence insufficient for the panel properly to make a finding of fact and therefore the Applicant's case could not be fairly considered. I shall consider these two points together as they are closely linked.

45. In her second statement, A definitely and clearly changed her position to the benefit of the Applicant. Her position was so clear that, in submitting it, the Applicant's legal representative was confident that she would not to be called to give oral evidence, arguing:

*"Given that the panel was so willing to accept the statement of complaint from [A], we trust it will also accept the statement we have now provided, without the need for her to be called as witness, given the clarify [sic] of her position".*

46. As the panel did not call A, it is not unreasonable for the Applicant's legal representative to conclude from this submission that the panel did "accept" A's second statement.



47. I can see two potential interpretations of “*accept*” in this context: to accept the second statement as written evidence or to accept the second statement as true.
48. The panel clearly accepted the second statement into the body of written evidence. It was added to the dossier, fully disclosed to the Applicant and the Secretary of State, and oral evidence was taken on it at the hearing.
49. However, as the panel made a finding of fact that the Applicant had assaulted A contrary to the assertions in her second statement, it is clear from the panel did not accept the second statement as true; quite the opposite. If the Applicant’s legal representative took the panel’s decision not to call A as a tacit acceptance of the veracity of her second statement, this may be why no objection to her absence was raised at the hearing.
50. The application argues that the panel’s concerns that Parole Board hearings may offer insufficient safeguards for complainants as witnesses, particularly when there are allegations of domestic abuse, are unfounded. It notes the hearing took place by video and the Applicant, being legally represented, would not have asked A questions directly. Under the particular circumstances of this case, I agree. I find no reason why A could not attend to give oral evidence if the panel thought it necessary. However, the panel did not think it was necessary.
51. At the time the panel raised its concerns about A’s attendance, it was only in possession of her first statement. However, in fairness to the Applicant, the panel invited a second statement. By the time of the hearing, the panel was faced with two conflicting statements.
52. Complainants in criminal proceedings may lie for a whole variety of reasons. It does not follow that a diametric change in stance by a complainant between two statements automatically renders the later statement true. It is just as possible for an initial allegation to be true and a subsequent retraction to be false. The retraction of an allegation does not magically imbue that retraction with unchallengeable truth. It follows as a matter of logic that either the allegation or the retraction must be untrue. Therefore, the tribunal charged with evaluating the two statements must decide which of them it believes (to the standard of proof appropriate to the proceedings). In this case, the question for the panel became ‘which of A’s statements was more likely than not to be true?’
53. The corollary to that question is ‘did the panel need to hear from A to decide fairly between them?’. This is the question at the heart of the application.
54. The application relies upon **R(Sim) v Parole Board [2003] EWCA Civ 1845. [2004] QB 1288 [57]** in submitting that fairness requires an offender to be able to test “*fundamental*” evidence by cross-examination. However, in the same passage cited, Keene LJ goes on to say, “*what is or is not fair will depend on the circumstances of the individual case*”. The right to test fundamental evidence by cross-examination is therefore qualified by reference to a case-by-case assessment of overall fairness.
55. It is argued that the finding of fact made by the panel was fundamental to the recommendations of the Applicant’s Prison Offender Manager (POM) and Community



Offender Manager (COM) not to direct release. This cannot be true. It cannot be said that the panel's finding of fact influenced the recommendations of the Applicant's POM and COM. The panel made its finding of fact after the POM and COM had given their evidence and would have taken the views of POM and COM into account when doing so. The POM and COM reached their own views on A's statements.

56. The Applicant had the opportunity to give his account of the circumstances which led to recall. He would also have had no reason to challenge the second statement from A as that was clearly in his favour. He had the opportunity to challenge the accounts of the two attending police officers. The only benefit to him in questioning A would have been to seek re-emphasis of the reasons for retracting her allegation and reaffirming her second statement to persuade the panel that her first statement was false.

57. If the panel had only been faced with the two statements, it would have been virtually impossible to decide between them without hearing from A. However, the panel had a significant body of evidence (as set out in paragraph 43 above) within which to contextualise its analysis. While the panel should not be predisposed to favour official accounts, the careful analysis set out in the decision shows that, although the panel preferred the police accounts (and thus A's first statement over the second) it did not do so unthinkingly or without an appropriate level of consideration.

58. In assessing the totality of the evidence from the time of the recall, the panel did not consider it necessary for fairness to have A attend in the circumstances of the Applicant's case. They were entitled to reach that conclusion and I find no procedural unfairness in the way in which they did.

## Decision

59. 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**  
**6 May 2021**