

[2022] PBRA 46

## Application for Reconsideration by Abdullahi

### Application

1. This is an Application by Abdullahi (the Applicant) for reconsideration of the decision of a Panel of the Board contained in a letter dated 10 March 2022 (the Decision Letter) not to release him. This followed an oral hearing held on 28 February 2022 conducted remotely via a video link.
2. The Panel consisted of an independent Panel Chair and a judicial member
3. 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.
4. I have considered the application on the papers which comprise the Decision Letter, the Application for Reconsideration dated 2 April 2022 and the dossier now paginated to 453 pages.

### Background

5. The Applicant is serving a sentence of detention during Her Majesty's Pleasure imposed, after a trial, for an offence of murder committed when the Applicant was 17 years of age.
6. The minimum specified term was 12 years less time spent on remand in custody which expired on 1 July 2019.
7. The victim of the offence was a friend of the Applicant. They had a night out together consuming alcohol and smoking cannabis. A verbal altercation between them in the street close to the Applicant's home degenerated into a physical confrontation involving pushing and shoving.
8. Members of the Applicant's family including his mother sought to separate the two of them, but the Applicant knocked the victim to the ground, broke free from the restraints of his family, went into his home, took a lock knife from the kitchen and then pursued his friend down the street and inflicted fatal stab wounds.
9. The Applicant is now aged 32 and had previous convictions for five offences which included attempted robbery, robbery, using threatening behaviour and failing to surrender to bail.



10. The Applicant completed a number of offence-focused interventions during his sentence and was released on life licence by direction of the Parole Board on 1 July 2019. He is described as a "*model service user*", attending all appointments and engaging well with supervision and staff.
11. He was recalled to prison on 27 February 2020 having been arrested on suspicion of the attempted kidnap of a 12-year-old girl on 25 February 2020.
12. The Applicant was charged with attempted child abduction and, following a retrial, he was found not guilty at the Central Criminal Court in June 2021.

### **Request for Reconsideration**

13. The application for reconsideration is dated 2 April 2022.
14. The grounds for seeking a reconsideration appear in the Application under the headings:
  - *Procedural Unfairness*
  - *Failure to Give Adequate Reasons*
  - *Conclusion*

### **Current parole review**

15. The Secretary of State referred the Applicant's case to the Parole Board in March 2020 to consider whether to direct his re-release or, if not, to consider whether he was ready to be moved to open prison conditions.
16. The parole review was adjourned on four occasions to await the conclusion of criminal proceedings and non-compliance with Board directions.
17. At the hearing on 28 February 2022 the Panel considered a dossier of 436 pages and CCTV footage lasting 13 mins 51 secs. There was no evidence which could not be disclosed to the Applicant and the Secretary of State did not express a view and was not represented.
18. The Applicant was represented by his solicitor who sought a direction for release.
19. The Panel heard evidence from:
  - a) The Prison Offender Manager (POM);
  - b) The Applicant; and
  - c) The Community Offender Manager (COM)
20. The professional witnesses were supportive of release. However, the Panel concluded that it continued to be necessary for the protection of the public that the Applicant

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should remain confined. Therefore, the Panel did not direct the release of the Applicant.

## The Relevant Law

21. The Panel correctly sets out in the Decision Letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

### *Parole Board Rules 2019*

22. 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)).

23. 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*

24. 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."*

25. 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.

26. 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*

27. 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.

28. 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 the panel was not impartial.

29. The overriding objective is to ensure that the Applicant's case was dealt with justly.

30. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

31. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

*Other*

32. 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.*"

## The reply on behalf of the Secretary of State

33. By email dated 11 April 2022 the PPCS on behalf of the Secretary of State offered no representations in response to the Application.

## Discussion

34. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the Panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the Panel.

35. The second matter of material importance is that when deciding whether a decision of the Parole Board was procedurally unfair and/or irrational, due deference has to be given to the expertise of the Parole Board in making decisions relating to parole.
36. Third, where a Panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the Panel.

## Decision

37. The main plank of the Application for reconsideration is the Applicant's criticism of the Panel's decision to conduct a finding of fact hearing in relation to the allegation of attempted child abduction of which the Applicant had been acquitted by a Jury and to obtain and view CCTV footage of the incident ("the February 2020 incident").
38. The Applicant's solicitors made written submissions in January 2022 arguing that there should not be a finding of fact hearing and that sight of the CCTV footage was not necessary to make a determination of risk if this would result in a further adjournment of the case. The Panel, in their discretion, did not accept either suggestion and, in my view, they were right to do so.
39. The Panel correctly directed themselves in accordance with the Board's Guidance on Allegations in the light of the case of **Pearce [2022] EWHC Civ 4** and decided that the allegation was relevant to their statutory task of making an assessment of risk and that it was in a position to make a finding whilst ensuring that the Applicant had a fair opportunity to contest the allegation.
40. It correctly recognised that it was not convicting to the criminal standard but considering the facts as they found them to be on a balance of probabilities.
41. I find nothing procedurally unfair in the Panel's decision to hold a finding of fact hearing and, in my view, they were bound to do so and to view the CCTV footage for that purpose.
42. At numbered paragraphs 2 and 3 of the Application, the Applicant complains that the CCTV footage was not available to him at the hearing and that consideration should have been given to convening a face-to-face hearing so that all parties could view the CCTV together and make appropriate comments.
43. It was obviously the intention of the Panel that the Applicant should have access to this footage both in advance, and on the day, of the hearing and it made directions to the Secretary of State to ensure this. Unfortunately, the footage was not made available to the Applicant in the prison on the day of the hearing.

44. The Panel records in its Decision Letter (p.4) the steps it then took to ensure a fair procedure and the stance adopted by the Applicant and his solicitor:

*"His legal representative (who had seen the footage) said that [the Applicant] was happy to proceed without having access to the CCTV footage, which he last viewed at his criminal trial in 2021. The Panel made it clear to [the Applicant] that he was entitled to request an adjournment at any point throughout the oral hearing to familiarise himself with the footage. He and his legal representative made no such request. Key points in the CCTV footage were put to [the Applicant] by the panel in question form so he had an opportunity to address them. In closing submissions his legal representative confirmed that it would not be necessary for [the Applicant] to see the CCTV footage again. The Panel, while regretting that arrangements had not been made for [the Applicant] to see the CCTV again at the hearing, is satisfied that he had a fair opportunity to put his case about it.*

*[The Applicant] was permitted to request breaks during the hearing to seek legal advice which he did."*

45. I am satisfied that the Panel took great care to ensure a fair hearing.

46. As regards numbered paragraph 1 of the Application it is difficult to discern what is suggested to be procedurally unfair. There is nothing in the point that the footage was without sound while the "substantial evidence" relating to the February 2020 incident included:

(a) The Applicant being invited to give a full account in his own words and to comment at length on what is seen in the CCTV footage and contained in the relevant statements; and

(b) In addition to the Probation Service reports following recall, the Panel had access to the CCTV footage, notes from the Achieving Best Evidence interview with the complainant, MG5 Charge Summary, MG11 Witness Statements (including that of a witness, GC), Police Reports, Defence Statement, legal representations and witness statements made on behalf of The Applicant.

47. As to numbered paragraph 4 of the Application, this would not appear to be a matter of procedural unfairness but rather a criticism of the findings made by the Panel having viewed the CCTV. The fact that the Applicant seeks to suggest that some of the footage should be interpreted differently does not, in my view, go to the issue of procedural unfairness.

48. I take the same view with regard to numbered paragraph 6 of the Application. The Panel considered the school report (dossier p.399) referred to "as a means of testing the veracity of the allegation." (Decision Letter p.7).

49. At numbered paragraph 5 of the Application, the Applicant alleges a lack of impartiality on the part of the panel. This is a serious allegation. However, it appears to rest solely on one question being put to the COM "on at least three occasions".

50. The Applicant submits that this was an attempt to elicit a particular answer and that this was "*ultra vires*". The Panel, in order to fulfil their statutory duty, must, on occasion, press witnesses in order, if possible, to obtain clear answers to relevant questions and propositions which are of legitimate concern to it. The principle of "*ultra vires*" has no application here.
51. Professional witnesses can be expected to deal with questioning within their sphere of knowledge and expertise, even if robustly pursued, and the Panel properly records the COM's response which was that her recommendation for release and her assessment of risk remained the same whether or not the Panel accepted the Applicant's account of the February 2020 incident since she believed that the risk management plan (RMP) was sufficient to manage his risk. In its conclusions, the Panel provided reasons for its disagreement with that position.
52. The suggestion that the Panel used "*patronising language*" (which is a subjective judgement) does not, in my view, amount to a procedural irregularity nor does the putting of a particular proposition on three occasions to a witness, without more, persuade me to the conclusion that the Panel was guilty of undue influence and/or was biased.
53. Numbered paragraph 7 of the Application appears to relate to a discrepancy between the note of part of the evidence of the Applicant taken by the Panel Chair and that taken by his solicitor. That is not something that I can resolve although, even if the Panel Chair has mis-recorded the Applicant's answer, this would not, I find, amount to an irregularity of such fundamental importance as to justify reconsideration of the Panel's decision since there were a number of other areas in which the Panel found the Applicant's evidence to be unreliable.
54. The Applicant goes on to submit that the Panel failed to give adequate reasons for its decision. It is not made clear whether this complaint is made under the heading of irrationality or that of procedural unfairness but, in any event, the basic principle is well established.
55. Having reached conclusions upon the evidence a Panel is then required to explain its reasons, especially if (as here) they are departing from the professional recommendations. A Panel is not obliged to adopt the opinions and recommendations of professionals but a rational explanation for doing so must be given and the Panel must ensure that its stated reasons are sufficient to justify its conclusions.
56. I find that the Panel considered a wealth of evidence which it dealt with in a balanced and even-handed manner.
57. The Panel bore "*carefully in mind*" that both professionals recommended release and gave careful consideration to the RMP. They accepted that it was the professional judgement that no core risk reduction work remained outstanding and that the Applicant's wife was assessed to be supportive. The Panel also acknowledged the

Applicant's positive custodial behaviour and progress and the description of him as a "model service user" whilst on licence up until his arrest. They also found that Terrorism Act-related concerns were not an area of past or current risk.

58. The Panel reminded themselves that the Applicant denies the allegations made against him and "importantly" that he was found not guilty of attempted child abduction and that the allegations were "remarkably" different to his other offending and victim profile.

59. The Panel provided a detailed analysis of the evidence (in particular, that contained in the CCTV footage) in relation to the February 2020 incident, its findings and the reasons for them and, crucially, it found that the Applicant was not telling the truth about the February 2020 incident and that it occurred in the manner described by the complainant and the witness and as shown on the CCTV footage.

60. Thereafter, the Panel went on in a number of paragraphs (Decision Letter 4.7-4.11) to address the Applicant's level of risk, why this remains to be explored and addressed and, contrary to the submissions made on behalf of the Applicant, the Panel sets out in detail those risk factors identified at the time of the index offence which the Panel found remained active at the time of the February 2020 incident.

61. The Panel found that, as the Applicant did not give a truthful account of the February 2020 incident, they had been unable to explore with him his motivation for behaving as he did, and they noted that the February 2020 incident took place in the context of deteriorating mental health.

62. The Panel was not satisfied that the Applicant had made sufficient progress in addressing and reducing his risk to a level consistent with protecting the public from harm and they explained why the unexplored and unaddressed risk factors required further work to be undertaken in closed prison conditions and why the RMP was not, in their view, sufficiently robust to manage the Applicant's high level of risk of serious harm to children.

63. I am satisfied that the Panel provided sufficient reasons to justify its decision based on its detailed assessment of the evidence.

64. Finally, for the sake of completeness, I note that the Applicant's solicitors utilise the heading "**Conclusion**" to suggest that the decision not to direct his release or recommend him for open conditions is irrational.

65. Aside from the fact that a decision not to recommend a move to open conditions is not eligible for reconsideration, a bald assertion of irrationality without detailed argument in support is unhelpful while, in relation to those points raised in the Applicant's submissions which could more properly be described as arguments based on irrationality, I have, I believe, made clear findings.



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

**Peter H.F. Jones**  
**19 April 2022**