

[2020] PBRA 89

## Application for Reconsideration by D.R

### Application

1. This is an application by D.R (the Applicant) for reconsideration of a decision of the Parole Board made under rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision).
2. Rule 28(1) of the 2019 Rules 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, comprising a dossier of 487 numbered pages and written submissions by the Applicant's solicitors dated 19 June 2020.

### Background

4. The Applicant is serving a sentence of life imprisonment for an offence of murder. The minimum tariff was set at nine years and expired in 1989. The Applicant was released three times during the sentence on indefinite licence, but on each occasion the licence was revoked leading to the Applicant's return to prison. The most recent release on indefinite licence was from 2011 until 2018. Following his return to prison in 2018, the Applicant was transferred to hospital under **sections 47 and 49 of the Mental Health Act 1983**. In July 2019, the First-tier Tribunal (Health, Education and Social Care Chamber) Mental Health notified the Secretary of State that, if the Applicant was a restricted patient, the Tribunal would grant him a Deferred Conditional Discharge.

### Request for Reconsideration

5. The application for reconsideration was received by the Board on 19 June 2020.
6. The grounds for seeking a reconsideration may be summarised (and numbered) as follows:

- (a) The Secretary of State's referral included a request for advice concerning whether the Applicant should move to open conditions, but the Parole Board failed to provide such advice (Ground 1).
- (b) The Parole Board acted unfairly in making findings of fact relating to unproven allegations of criminal conduct by the Applicant, on which it placed weight when reaching the Decision (Ground 2).
- (c) The Parole Board's assessment of the risk posed by the Applicant of serious harm to women was irrational (Ground 3).
- (d) The Parole Board's assessment of the risk posed by the Applicant in the context of confrontation arising from his use of racially abusive language was irrational (Ground 4).
- (e) The Parole Board was mistaken about the recommendations made by two of the professional witnesses in oral evidence (Ground 5).

### **Current parole review**

- 7. The Decision was made on the Secretary of State's referral of the Applicant's case to the Parole Board under **section 28(6)(a) of the Crime (Sentences) Act 1997** to consider whether or not it would be appropriate to direct the Applicant's release.
- 8. The Decision was made by a panel that considered the Applicant's case at an oral hearing on 21 May 2020.

### **Relevant Law**

- 9. Rule 28 of the Parole Board Rules 2019 provides that a party may apply to the Board for the case of a prisoner who is serving a sentence of a type that is specified by the rule to be reconsidered on the grounds that a decision on the prisoner's suitability for release is irrational or procedurally unfair.

### *Irrationality*

- 10. 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 review 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."*



11. 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.
12. The application of this test in applications for reconsideration under rule 28 has been confirmed in previous decisions, such as **Preston [2019] PBRA 1**.

### *Procedural Unfairness*

13. 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.

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

14. On 30 June 2020, the Board was informed by the Public Protection Casework Section of the Public Protection Group in Her Majesty's Prison and Probation Service, on behalf of the Secretary of State, that no representations were offered in response to the Applicant's reconsideration application.

### **Discussion**

#### **Ground 1**

15. Two referrals by the Secretary of State appear in the dossier. The first referral is dated 06 April 2018 and the second is dated 9 August 2019, which post-dated the Applicant's transfer to hospital under **sections 47 and 49 of the Mental Health Act 1983**. The first referral requests a decision on suitability for release and advice on the prisoner's suitability for a move to open conditions if immediate release is not directed. The second referral requests a decision on suitability for release only. The Applicant's suitability for open conditions was not considered in the Decision.
16. I do not determine whether or not the Parole Board remained seized of the first referral, and I consider that it is unnecessary and that it would be inappropriate for me to do so. That is because reconsideration under rule 28 of the 2019 Rules applies only to decisions made by the Board under rule 19(1)(a) or (b), 21(7) or 25(1) of those Rules, which are decisions on suitability for release. Recommendations as to suitability for a move to open conditions are outside of the scope of rule 28, so reconsideration could not be directed on the grounds that the Board has erred in its consideration of a request by the Secretary of State to make such a recommendation. See also **Barclay [2019] PBRA 6**.



## Ground 2

17. This Ground requires me to determine whether the Applicant's case should be reconsidered on the grounds of procedural unfairness in the 21 May 2020 panel's approach to allegations of misconduct or criminal offending by the Applicant that had not been established to either the civil or criminal standard of proof elsewhere.

18. Any hearing must be fair and comply with the 2019 Rules and **section 6 of the Human Rights Act 1998** makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. **Article 5(4) of the European Convention on Human Rights (ECHR)** is a Convention right for this purpose, and states:

*"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

19. Rule 6 of the 2019 Rules provides the Board with the power to make directions.

20. Rule 24 of the 2019 Rules concerns the procedure at the oral hearing. Rule 24(6)-(7) provides that:

*"(6) A panel may produce or receive in evidence any document or information whether or not it would be admissible in a court of law.*

*(7) No person is compelled to give any evidence or produce any document which they could not be compelled to give or produce on the trial of an action."*

21. The Board has produced guidance on the issue of its consideration of allegations, titled Guidance on Allegations (the Guidance), dated March 2019.

22. Such guidance is produced pursuant to **section 239(7) of the Criminal Justice Act 2003**, which provides that "*Schedule 19 shall have effect with respect to the Board*". **Schedule 19**, paragraph 1(2) provides that:

*"It is within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of—*

...

*(b) its functions under Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) in relation to life prisoners within the meaning of that Chapter."*

23. The Guidance includes the following relevant statements:



- "5. Panel decisions must be made objectively, based on (a) the information and evidence provided to the panel and (b) information and evidence obtained as a result of the panel's inquiries and (c) what can properly be inferred from that information and evidence.
6. Panels faced with information regarding an allegation, will have to assess the relevance and weight of the allegation and either:
- a. Choose to disregard it; or,
  - 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."

24. The Guidance states, in summary, that allegations should be disregarded only where not relevant (at paragraphs 8-10). If relevant, the Board should go on to consider whether it can make a finding of fact (paragraphs 11-16)). If the Board cannot make a finding of fact, it is nevertheless encouraged to consider the "level of concern" raised by the allegation.

25. Paragraphs 11-16 of the Guidance is as follows:

- "11. 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. This may be achieved through oral evidence, written submissions, or in interview with an Offender Manager, depending what is fair in the case. Fairness may be particularly difficult to achieve as panel hearings do not have the safeguards that are present in criminal proceedings. Fairness may be particularly difficult with allegations arising out of events which happened a long time ago.



12. *Panels can make findings of fact on allegations where the individual was not charged, or the allegation was charged but did not result in a conviction or any other judicial determination, whether linked to the index offence or not. Panels should exercise caution when considering such allegations as it may be that it would not be possible for the prisoner to have a fair hearing.*
13. *A finding of fact in relation to alleged criminal conduct against the prisoner will not equate to a criminal conviction. It will, however, be something that the panel can take into account when reaching their decision.*
14. *In recall cases the panel will need to decide whether recall was appropriate in the light of all the evidence including evidence from the prisoner. In some cases, the facts on which recall was based will be admitted but in other cases they may be denied or partially admitted, and panels may need to make findings of fact.*
15. *Panels must apply the 'balance of probability' test when making a finding of fact.*
16. *Panels should be very careful about making findings of fact in relation to allegations that are being investigated and may result in further enforcement action, such as a prosecution. It is not the panel's role to pre-judge any future case that may be brought against the prisoner. Prisoners and their representatives may claim that it is unfair that a finding of fact is made to a lower standard of proof than the criminal standard (beyond reasonable doubt) and in circumstances where the procedural safeguards of a criminal trial do not apply. Panels should be clear on what they are making findings of fact about and why."*

26. It is noted in the Decision that the Applicant had been arrested by police in relation to allegations of sexual offending and making threats to a vulnerable adult female made when he was living in the community prior to his most recent recall to prison and the panel found, on the balance of probability, it was quite likely that the Applicant had behaved in the way that the complainant had described.

27. The allegations were, in my judgement, capable of being relevant to the decision on suitability for release, in terms of the assessment of the Applicant's behaviour when most recently in the community on licence, his current risk of causing serious harm in the community, and the manageability of that risk.

28. The Guidance is that the Board is entitled to consider allegations where it is not in a position to make a full finding of fact, which is an aspect of the Guidance that was recently approved by the Divisional Court (Lord Justice Irwin and Mrs Justice McGowan)



in **Morris, R (on the application of) v The Parole Board & Anor [2020] EWHC 711 (Admin) (25 March 2020)**. In my judgement, the Guidance also provides a helpful framework for the consideration of whether the Board is in a position to make a full finding of fact.

29. Applying the Guidance, the Parole Board would have been in a position to make a finding of fact on the allegations on the balance of probabilities only if it had a reasonably sufficient body of evidence on which it could properly do so and the Applicant had a fair opportunity to contest the allegations.
30. In the Applicant's case, the Board decided that it could make a finding of fact, but it did not explain why it considered that it could do so.
31. The Guidance states that the Parole Board can make findings of fact on allegations where the individual was not charged but that panels should exercise caution when considering such allegations as it may be that it would not be possible for the prisoner to have a fair hearing. It is noted in the Decision that the Crown Prosecution Service (CPS) had declined to bring charges against the Applicant in relation to the allegations.
32. The Guidance states that fairness may be particularly difficult with allegations arising out of events which happened a long time ago. The allegations made against the Applicant related to events that were said to have occurred some two years prior to the oral hearing, which may be considered as being relatively recent. However, it is noted in the section of the Decision addressing the Applicant's risk factors that the Applicant had been assessed as having difficulties in learning new things and having a memory that functions at a below average level. Those factors would self-evidently have the potential to have increased the Applicant's difficulty in contesting allegations relating to events that occurred as recently as two years ago. It is not stated that in the Decision that the potential difficulty had been borne in mind when considering the Applicant's response to the allegations, and in particular his oral evidence.
33. The Guidance also states that fairness may be achieved through oral evidence, written submissions, or in interview with an Offender Manager, but that fairness may be particularly difficult to achieve in parole hearings because such hearings do not have the safeguards that are present in criminal proceedings.
34. In the Applicant's case, the panel had the benefit of exploring the incident with the Applicant "*and witnesses*" in oral evidence. However, the Decision only refers to evidence heard from the Applicant in this context, that he had not been able explain how the complainant would have known about the index offence if he had not mentioned it to her, that he stated that he probably kissed the woman but in the same way that he would have kissed his mother, and that he denied touching the woman. The finding that the allegation was more likely than not to be true was said by the panel to be based on its view that it was difficult to identify other reasons for the





woman making such an allegation, particularly as the Applicant had accepted in evidence that he had kissed the complainant.

35. The source of the description of the allegations that is adopted in the Decision appears to have been drawn from Probation Service reports in the dossier. Those reports briefly describe, rather than reproducing, information that is said to have been taken from the complainant's interview by police. The dossier did not include any record of such an interview nor any other information supporting or undermining the truth of the allegations. The description of the complainant's allegations in Probation Service reports is hearsay, which is admissible. The Applicant complains that the panel was not in possession of sufficiently detailed information about the complainant's allegations, which is a submission that was also made on the Applicant's behalf in the written closing submissions that were before the panel when it made its decision, but the submission was not addressed by the panel.
36. It is my judgement that the information that was in the possession of the panel was not sufficiently detailed to provide this Applicant with a fair opportunity to contest the allegations in this review. The description of the allegations was brief and was hearsay. The panel was aware that the description had been taken from a police interview with the complainant and I consider that the panel should at least have directed the provision by the CPS and/or the relevant Police authority of the information on which the decision to not bring charges was made before considering whether it could fairly make a finding of fact. The Applicant's difficulties with learning and memory are likely to have made it even more difficult for him to contest allegations that were so lacking in detail, in oral evidence or otherwise.
37. I therefore consider that the panel's finding that the allegation was more likely than not to be true was marred by procedural unfairness.
38. The finding of fact on the allegations was material to the Decision as a factor that was given significant weight in the assessment of the current likelihood of the Applicant causing a risk of serious harm. In the assessment, the applicant causing a risk of serious harm., in the assessment that the Applicant needed to reside in suitable single sex accommodation with 24 hour support, which was not available as part of the plan that was proposed to manage the Applicant's risk in the community.
39. Reconsideration must therefore be directed on Ground 2.

### **Grounds 3, 4, and 5**

40. I have already decided in response to Ground 2 that the Parole Board's assessment of the risk posed by the Applicant of serious harm to women was marred by procedural unfairness and that reconsideration must be directed on Ground 2. I consider that it is





unnecessary and that it would be inappropriate for me to consider Grounds 3, 4, and 5.

## Decision

41. The application for reconsideration is granted on Ground 2, that the Decision is marred by procedural unfairness.

## Directions

42. The case shall be listed for an oral hearing by a panel comprised of different members of the Board to avoid the possibility or appearance of bias on the part of the panel whose decision has been found to be procedurally unfair.

43. The following directions are also made:

- (a) The listing of the oral hearing is to be expedited with accommodation of the time limits stated in directions below.
- (b) The original decision to be removed from the dossier and must not be seen by the new panel.
- (c) The new panel to be told that this is a reconsideration but not made aware of the reasons why it was ordered.
- (d) The following persons shall be directed to attend the oral hearing as witnesses:
  - (i) The Applicant's Responsible Clinician;
  - (ii) The Applicant's Social Worker;
  - (iii) The Applicant's Care Co-ordinator;
  - (iv) The Applicant's Nurse; and
  - (v) The Applicant's Probation Service Offender Manager.
- (e) The following materials must be added to the dossier not later than eight weeks after this reconsideration decision is provided to the parties:
  - (i) Key evidence and statements relating to the allegations for which the Applicant was arrested prior to his recall, to include: police and court reports/further report to Crown Prosecutor (include any DV checklists, hate crime incident reports); Previous Convictions of suspect and key prosecution witnesses; key witness statement(s) or record(s) of interview;



any other relevant material including (but not limited to) pocketbook entries, witness statements, photographs and interview records.

- (ii) CPS statement of reasons why charges were not brought in relation to the allegations for which the Applicant was arrested prior to his recall.
- (e) Update reports by the following persons must be added to the dossier not later than four weeks prior to the oral hearing:
- (i) The Applicant's Responsible Clinician;
  - (ii) The Applicant's Social Worker;
  - (iii) The Applicant's Care Co-ordinator;
  - (iv) The Applicant's Nurse; and
  - (v) The Applicant's Probation Service Offender Manager.

**Timothy Lawrence**  
**17 July 2020**

