

[2021] PBRA 17

## Application for Reconsideration by Cooper

### Application

1. This is an application by Cooper ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('OHP') which on 15 January 2021, after a hearing on 6 January 2021, decided not to direct his release on licence.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. The following documents have been provided for the purposes of my consideration of this application.
  - The 383-page dossier provided by the Secretary of State in the Applicant's case;
  - The OHP's decision letter of 15 January 2021;
  - Representations submitted on 25 January 2021 by the Applicant's solicitor in support of the application; and
  - An email dated 29 January 2021 from PPCS stating that they offer no representations on behalf of the Secretary of State in response to the application.

### Background

4. The Applicant is aged 54. On 17 August 1990, when he was aged 23, he murdered his wife in the course of an altercation. On 1 July 1991 he was sentenced to life imprisonment with a tariff of 9 years. His tariff expired in August 1999.
5. During his sentence the Applicant has been released on licence three times (in 2003, 2005 and 2015) and recalled to custody three times, most recently in October 2018 after a period of more than three years during which probation's assessment of his risk of serious harm was reduced from high to medium.
6. It is apparent that, whilst the Applicant's behaviour in custody has always been good and he has successfully completed appropriate courses to reduce his risk to the public, in the community he has not always been able to apply his learning from those courses. His second recall was largely due to his difficulty in handling the breakdown of his relationship with his then partner, which resulted in him harassing



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her; and his latest recall was due to his difficulty in handling problems with another partner (S) which resulted in his committing a serious assault on her on 14 October 2018.

7. The report from probation which requested his recall on the ground of his arrest for that assault quoted the following account of the incident in question as recorded in the police log:

*"Victim and suspect have been in relationship for 4 months, suspect comes to victim's locus and begins shouting at her, puts hands around her neck and squeezes twice until she pleads with him to let her go".*

The probation officer added:

*"I have spoken with police who confirm that [the Applicant] is being investigated for a section 39 assault, which involved an attempted strangulation. It is said that [the Applicant] only let go when the victim felt compelled to reassure [him] that she still loved him. Her adult son was in the house and called the police. [The Applicant] returned to his sister's address, where he is temporarily residing, and told her that he felt like he wanted to kill the victim. He then returned to the victim's address but she refused him entry and the police arrested him."*

8. The Applicant was not charged with an attempt to kill S or to cause her harm. He was charged with the basic offence of assault, to which he pleaded guilty in the magistrates' court on 16 October 2018. He pleaded guilty on a written basis, which denied that he had told his sister that he wanted to kill S. That written basis was accepted by the prosecution and the court. He was then sentenced to 18 weeks imprisonment, to run concurrently with his life sentence.
9. Following his recall, his case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence (he is not eligible for another period in open conditions because in 2001 he had failed to return to an open prison from a temporary release on licence).
10. In due course, an oral hearing was directed and the case was allocated to the OHP. The panel chair directed a psychological risk assessment to assist the panel in its risk assessment. That assessment was carried out by a prison psychologist on behalf of the Secretary of State. A further psychological risk assessment was carried out by an independent psychologist instructed by his solicitor's firm.
11. Both psychologists recommended that the Applicant should be re-released on licence under strict conditions, as did the two probation officers responsible for the management of his case in prison and in the community respectively. The panel, however, decided not to direct his re-release.

## **The Relevant Law**

### ***The test for release on licence***

12. The test for release on licence is whether the prisoner's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the OHP at the start of its decision.

### ***The rules relating to reconsideration of decisions***

13. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
14. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
- a paper panel (Rule 19(1)(a) or (b)) or
  - an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
  - an oral hearing panel which makes the decision on the papers (Rule 21(7)).
15. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.
16. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds.

### ***Irrationality***

17. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, 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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.
19. 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.
20. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under rule 28: see **Preston [2019] PBRA 1** and others.

### ***Procedural unfairness***

21. 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 from the issue of irrationality which focusses on the actual decision.
22. It has been established that the things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
  - (b) A failure to conduct the hearing fairly;
  - (c) A failure to allow one party to put its case properly;
  - (d) A failure properly to inform the prisoner of the case against him or her; and/or
  - (e) Lack of impartiality.
- The overriding objective is to ensure that the case was dealt with fairly.

### ***Failure to give sufficient reasons***

23. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.
24. The reason for requiring adequate reasons had been explained in a number of decisions including:
- R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
  - R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
  - R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
  - R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**
25. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

### **Request for Reconsideration**

26. In support of the Application the Applicant's solicitor submitted (1) that the OHP's decision was irrational in that it failed to give sufficient reasons for its rejection of the unanimous recommendations of the four professional witnesses, and (2) that

it was irrational and/or procedurally unfair for the OHP to make a decision adverse to the Applicant without adjourning to obtain further evidence.

27. The further evidence which it was submitted should have been obtained was (1) an assessment of any outstanding treatment needs which the Applicant had (2) police reports relating to the assault which led to the Applicant's latest recall and (3) more information about a community project recommended by the professional witnesses.

## Discussion

28. It is convenient first to set out the reasons given by the OHP for their decision not to direct re-release on licence as recommended by the professional witnesses. These were set out at the end of the decision as follows:

*"The panel gave careful consideration to all the information provided to it in reaching its decision. [The Applicant is] serving a life sentence for the brutal and extremely violent murder of [the Applicant's] wife. The pattern of [the Applicant's] sentence has been one of compliance in closed conditions, but recurring concerns when [the Applicant had] been in open prisons or release on licence. Key themes have been excessive drinking, problems with volatile and unstable relationships, and at times, deteriorating mental health, with withdrawal from medication. [The Applicant has] not always been straightforward with those supervising [him]. These themes were apparent in the events which led to [the Applicant's] latest recall, after a reasonable and relatively successful period of time in the community.*

*"The panel took the allegations of violence, of which [the Applicant was] convicted, seriously and was concerned that [the Applicant] appeared to minimise to some extent what [he] had done to [his] partner and the physical and psychological implications of [his] actions. [The Applicant's] insight into [his] risks seemed limited. There were certainly elements of offence-paralleling behaviour although the outcome was clearly a long way removed from [the Applicant's] index offending. Those assessing [the Applicant] appeared to have largely based their assessments on [his] account of events. The panel formed the conclusion that [the Applicant] had done relatively little direct work recently to address [his] risks in relationships especially when [he has] been drinking and have used aggression and violence as a means of emotional control.*

*"In these circumstances, while the risk management plan was in itself a robust one, the panel considered that [the Applicant's] risks needed to be addressed more directly before it would be safe to release you back into the community at this point in time. The panel considered that [the Applicant] needed to remain in custody to protect the public at present and therefore did not direct [his] release."*

29. The criticism of the professionals for proceeding on the basis of the Applicant's version of the recall incident was reflected in an earlier passage in the OHP's decision, which recorded that the prison psychologist "acknowledged that her considerations were based on [the Applicant's] account of events rather than that of the police, which regarded it as a serious assault."

30. I do not think there was any disagreement that the assault was a serious one. The Applicant has always admitted that he had put his hands round S's throat and squeezed it before desisting and leaving S's address. As the Applicant is well aware, that was an extremely serious assault which could have resulted in very serious consequences. The professional witnesses all approached the case on that basis.
31. The police version of events was contained in the brief summary in the log referred to above. The Applicant's account of the incident was more detailed and included a significant amount of information not mentioned in the police log. There is force in the Applicant's solicitor's submission that, if the OHP was going to reject the Applicant's account and criticise the professionals for relying on it, they should not have done so on the basis of the brief summary in the log. The full police file (including any statement(s) made by S herself) might be expected to have contained details which either confirmed or contradicted the details in the Applicant's account which did not appear in the log.
32. As noted above, the log did contain the specific statement that after the assault the Applicant told his sister that he felt like he wanted to kill S. The Applicant in his written basis of plea denied that he had said that. Although the prosecution and the court accepted the basis of plea and the Applicant was sentenced on that basis, it might be thought that that reference in the log can only have come from the Applicant's sister (who actually reported the incident to the police) and that she is unlikely to have invented or imagined it.
33. That being so, it would have been open to the OHP - notwithstanding the acceptance by the prosecution and the court of the basis of plea - (a) to make a finding of fact on balance of probabilities that the Applicant did make the statement in question or (b) if it did not feel able to do that, to make an assessment of the "level of concern" raised by the allegation and attach some weight to it in accordance with the Board's Guidance of Allegations. They did not, however, do either of those things.
34. Both psychologists used the standard risk management tool to assess the Applicant's risk of future intimate partner violence, and both gave detailed reasons for concluding that with an appropriate risk management plan it could be managed safely in the community. The proposed plan involved a significant period of residence in at specialist designated accommodation, close supervision, engagement with mental health services and 1:1 work of a kind which could be provided in the community through a specific project identified by the prison psychologist.
35. Both psychologists also identified a number of "protective" factors likely to reduce the Applicant's risk: those are not mentioned by the OHP in its decision.
36. Since there was no dispute that the Applicant presents a significant risk of future offending, the central question which the panel had to decide was whether that risk could be managed safely in the community or whether it required his continued confinement in prison.

37. The professional witnesses gave detailed reasons in support of their view that the risk could be safely managed in the community and that 1:1 work in the community was a preferable means of addressing the risk to anything which could be provided in prison.
38. Insofar as the professionals were proposing that the community project referred to above would be an appropriate and effective intervention for the Applicant, the OHP do not seem to have been impressed by that proposal: they recorded in their decision the evidence of one of the probation officers that she had been in touch with that project whose initial response was that the Applicant should be suitable, but that she had little further information about how the project would run, and what its expectations would be, especially under the present COVID restrictions.
39. It seems that in rejecting the professionals' recommendations for effective risk management in the community the OHP was significantly influenced by the absence of further information about the community project. There is force in the Applicant's solicitor's submission that before making a decision adverse to the Applicant the OHP should have adjourned for that information to be obtained.
40. All in all I am persuaded by the Applicant's solicitor's submission that the OHP gave insufficient reasons for departing from the unanimous recommendations of the professional witnesses and for concluding that the further work which needs to be done by the Applicant must be done in prison rather than in the community as recommended by the professionals. That being so, I must allow this application on the ground of irrationality.
41. It is unnecessary in those circumstances to make any finding on the issue of procedural unfairness. I have taken into account the absence both of the full police documentation and of further information about the community project in reaching a conclusion on the ground of irrationality.

### **Decision and directions**

42. It follows from the above that this application must succeed, following the principles established in the cases cited in paragraph 23 above, on the ground that inadequate reasons were given by the OHP for their decision which must therefore be treated as irrational. This case must therefore be reconsidered.
43. The fact that the case is to be heard will provide an opportunity for the full police file to be obtained and further information obtained about the community project.
44. I have given careful consideration to the question whether the case should be reconsidered by the original OHP or whether it should be considered afresh by another OHP. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, justice must not only be done but be seen to be done. If the original OHP were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that that decision had been wrong. However inaccurate or unfair

that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh OHP.

45. The following further directions are now made:

- (a) The re-hearing should be expedited.
- (b) The original decision must be removed from the dossier and should not be seen by the new OHP.
- (c) The new OHP should be told that this is a reconsideration but not made aware of the reasons why it was ordered. They should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.
- (d) The hearing is suitable to be heard by video link but not by telephone link. It is important that the new panel should be able to observe both the Applicant and the other witnesses when they give their evidence.
- (e) The full police file relating to the assault on 14 October 2018 which led to the Applicant's recall should be obtained and added to the dossier.
- (f) The community offender manager should obtain as much information as possible about the community project recommended by the professionals, and provide a further report with the details.

**Jeremy Roberts**  
**16 February 2021**