

[2021] PBRA 56

Application for Reconsideration by Brown**Application**

1. This is an application by Brown ('the Applicant') for reconsideration of a decision of an oral hearing panel of the Board ('the panel') which on 19 March 2021, after a hearing on 15 March 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:
 - a) The 360-page dossier provided by the Secretary of State for his case, which contains a copy of the panel's decision letter;
 - b) Representations submitted on 9 April 2021 by the Applicant's solicitor in support of this application; and
 - c) An email dated 30 April 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 40. He is serving an extended sentence of imprisonment for an offence of rape which was imposed in July 2015 when he was 34 years old. The sentence is made up of a custodial term of 8 years and a licence extension period of 4 years. The rape involved a breach of a Sexual Offences Prevention Order ('SOPO'), for which the Applicant received a concurrent 3-year sentence. He had previously been convicted of a series of other breaches of the SOPO.
5. On 2 October 2020 the Applicant became eligible for early release on licence on the direction of the Parole Board. The Board can direct his release if, but only if, it concludes that his risk of serious harm to the public is at a level which no longer requires his continued confinement in prison. If he is not released early, he will be automatically released on licence on 3 June 2023. Whenever he is released, he will remain on licence until his sentence expires in February 2027, and he will be liable to be recalled to prison if his risk becomes unmanageable on licence during that period.

6. The Applicant has mental health, personality and intellectual difficulties which may have contributed to his offending and, as will be explained below, have some relevance to the issues arising on this application.
7. In November 2019 his case was referred by the Secretary of State to the Parole Board to decide whether to direct his early release on licence. In July 2020 the case was reviewed by a single member of the Board who directed an oral hearing. The single member expressed the view that the case was suitable for a remote hearing by video or telephone link but that a video link hearing was preferable.
8. The hearing was accordingly listed to take place by video link. It was initially to have taken place on 16 November 2020.
9. On 22 September 2020 the Applicant's solicitor applied for a deferral of the hearing to allow time for the completion of an independent risk assessment by a psychologist instructed by the solicitor on the Applicant's behalf (and for the psychologist's report then to be considered by the panel and the other professional witnesses). The panel chair granted that application, and the hearing was re-listed to take place on 15 March 2021.
10. The independent psychologist's report was completed on 12 November 2020 (though it was not disclosed until the Applicant had considered it and given his consent to its disclosure). In her report the psychologist assessed the Applicant's risk of future sexual offending as high and concluded that core risk reduction work in custody was needed before release on licence would be appropriate.
11. On 25 February 2021 the Applicant's solicitor made a further application for a deferral of the hearing so that the psychologist could re-assess the Applicant's risk in the light of what were submitted to be significant recent changes in his mental health and custodial behaviour. On 9 March 2021 the panel chair refused that application.
12. At the outset of the video-link hearing on 15 March 2021 the Applicant's solicitor made a further application for a deferral so that there could be a face-to-face hearing which, it was submitted, was required in the light of the Applicant's mental health, personality and intellectual difficulties. That request was refused by the panel.
13. The Applicant then requested, and was permitted, a private consultation with his solicitor. The solicitor appears to have been, understandably, uncertain about whether the Applicant could address further submissions to the panel on a point which had been decided against him. However the Applicant was permitted to address the panel himself, and he told them - as he had told his solicitor - that he had had a COVID-19 vaccination a couple of days previously, that he was suffering from flu-like symptoms, had slept badly and was very tired. He suggested that the decision not to defer the hearing had been unfair.
14. The panel rightly treated this as a request to reconsider the decision not to defer the hearing. They duly reconsidered that decision but declined to alter it.



15. At that point the Applicant withdrew from the proceedings, which continued in his absence (as permitted by the Rules), and the panel reached the decision which is the subject of this application.

The Relevant Law

The test for release on licence

16. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel at the start of their decision.

The law relating to reconsideration of decisions

17. 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.

18. 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)).

19. 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.

20. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on the ground of procedural unfairness. In those circumstances it is unnecessary to discuss the law relating to irrationality.

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.

23. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.



The Request for Reconsideration

24. In support of the application the Applicant's solicitors have presented helpful written representations setting out the various grounds on which it is submitted that there were procedural irregularities in this case. The grounds were:

- a) That the panel chair should have acceded to the application for a deferral which was made by the solicitor on 25 February 2021;
- b) That the panel should have acceded to the application for a deferral which was made by the solicitor at the start of the hearing; and
- c) That the panel should have acceded to the application for a deferral which was then made by the Applicant himself on the basis that he was not in a fit state to participate effectively in the hearing.

Discussion

25. It is convenient to discuss each of the solicitor's submissions separately.

Submission (1): The panel chair should have acceded to the application for a deferral which was made by the solicitor on 25 February 2021

26. The decision whether to defer a hearing before the hearing date rests within the discretion of the panel chair. The panel chair has a wide discretion, but it must be exercised in a way which is fair to both parties (the prisoner and the Secretary of State). If the reasons given for refusing a deferral can be shown to be flawed (for example if the panel chair has taken into account something which could not reasonably be taken into account or has failed to take into account something which could not reasonably be ignored) that may be a ground for deciding that the refusal was procedurally unfair.

27. The reasons given by the panel chair in this case for refusing to defer the hearing were expressed as follows:

"The panel chair has considered all the available reports including the recently received independent psychological report. It is noted that the assessment highlights a high risk of sexual violence, that there is no support for [the Applicant's] transfer beyond the closed estate and that core offending behaviour work remains outstanding."

"It is acknowledged that [the Applicant] reports some changes since his interview with [the independent psychologist] but the panel chair does not consider it is necessary to defer the scheduled hearing in order that these issues can be considered and addressed in an updated report from [the independent psychologist]. In the panel chair's view these developments can be considered in oral evidence at [the Applicant's] hearing."

28. I cannot regard these reasons as being in any way flawed. It must not be forgotten that the independent psychologist was instructed by the Applicant's solicitor and



could readily be updated by the solicitor on the recent developments so as to be prepared to answer questions about them at the hearing. If, when questioned at the hearing, the psychologist then told the panel that she was not in a position to express a view without a further formal assessment, and explained why, a deferral would in all probability have been appropriate.

29. In fact, having examined the psychologist's report and the whole of the evidence in the dossier, I have serious doubts as to whether there was any realistic prospect of the latest developments (as reported by the Applicant) changing the psychologist's opinion that there was outstanding core risk reduction work which the Applicant needed to complete in closed conditions.

30. For these reasons I cannot uphold the first submission advanced by the solicitor.

Submission (2): The panel should have acceded to the application for a deferral which was made by the solicitor at the start of the hearing

31. This decision not to defer the hearing was made by the panel as a whole. The same principles as are explained in paragraph 22 above apply to the panel's decision.

32. The reasons for refusing the request for a deferral were set out as follows in the panel's decision letter:

"On 29 July 2020, a [single] Member of the Parole Board assessed your case as being suitable for an oral hearing by video link. Up until the morning of the hearing, the Panel had not received any representations from you or the Secretary of State to indicate that a remote hearing by video link would be inappropriate".

*"The panel considered Parole Board guidance issued in light of current Covid-19 restrictions, and the need to balance the principle of fairness of proceedings with the Parole Board's duty to speedily review the detention of prisoners in cases referred by the Secretary of State (ECHR Article 5(4)). In addition, the panel has paid regard to Parole Board Rules 2019 and the discussion within the Reconsideration decision in the case of **Fathers [2020] PBRA 64**".*

"While the panel noted your preference for a face-to-face hearing, this is not a sufficient ground to grant such a hearing. The panel also noted that you had: successfully completed video link interviews with professionals, including the independent psychologist, and that no significant concerns had been raised regarding your capacity or ability to engage during those interviews; there was a consensus amongst professionals in written evidence to the Parole Board that outstanding areas of risk remained untreated and those professionals did not support your release on licence; the panel was satisfied that evidence taken remotely via a video-link with professionals would be sufficient for it to make an informed assessment of your risk; and the panel did not consider there to be any other evidence to suggest you would be more or less able to participate in a remote hearing than you would be in a face-to-face hearing".

33. The solicitor submits (and I agree) that there is a very real difference between a 1:1 assessment being undertaken by video link and the situation where a prisoner suffering from mental health and personality and intellectual difficulties is expected

to participate by video link in a parole hearing where there are a total of nine participants. The independent psychologist apparently made the same point when answering the panel's questions at the hearing.

34. That leads to a further point made by the solicitor in their representations. He submits that:

"It was of concern to the legal representative" (i.e. the solicitor himself) "that, before the Panel adjourned to consider the application for a deferment, one of the Panel members ... became extremely close to 'badgering' the independent psychologist by demanding that the psychologist simply answer 'yes or no' to questions put to [them]."

35. The questions referred to were directed to the issue whether the Applicant had successfully completed video-link interviews with professionals. I have not listened to the audio recording of the hearing and have not therefore been able to assess the manner in which the panel member questioned the psychologist. Given my conclusions below it has been unnecessary to do so. I would simply observe, however, that it is sometimes necessary for panels to ask searching questions of witnesses and to press them for direct answers.

36. All in all, whilst I have some sympathy with the solicitor's submissions on this part of the case, at the end of the day I am not persuaded that the panel's decision to proceed with the video-link hearing was - on the evidence available to them at the time - unreasonable or unfair. The Applicant's ability to engage positively in video link interviews with professionals was clearly relevant to (though not determinative of) the question whether fairness required a face-to-face hearing. The panel were entitled to explore that matter, to place some reliance on the evidence which they elicited, and to reach the conclusion which they did.

37. My conclusion is, therefore, that at that stage there was no procedural irregularity.

Submission (3): That the panel should have acceded to the application for a deferral which was then made by the Applicant himself on the basis that he was not in a fit state to participate effectively in the hearing.

38. The panel expressed its reasons for rejecting this application as follows:

"You told the panel that you had recently been given a Covid-19 vaccination, were experiencing flu-like symptoms, felt tired and again sought a deferral of your hearing. There was no medical report before the panel to suggest your physical health was affecting your daily functioning. The panel refused to defer your case."

39. The solicitor submits, and I agree, that it was unrealistic to expect the Applicant or his solicitor, at that late stage and in the circumstances that had arisen, to obtain a medical report to confirm the Applicant's account of his current difficulties.

40. The comment that there was no medical report strongly suggests that the panel were sceptical about the Applicant's account of his current difficulties and unwilling to accept it at face value. If they had accepted his account, it is hard to believe that they would have insisted on the hearing proceeding. If (as appears to have been the case) they were not prepared to accept his account, it would have been open



to them - notwithstanding the difficulties caused by the fact that this was a remote hearing - to cause enquiries to be made to confirm or disprove what he was saying and to establish whether he was or was not in a fit state to participate in the hearing.

41. The difficulties from which the Applicant said he was suffering must be viewed in the context that he is a man with significant mental health, personality and intellectual problems and that the hearing was being conducted remotely. Whilst he might have been able to participate effectively but for the physical symptoms that he reported, the cumulative effect of all his difficulties must be regarded as having placed a large question mark over his ability to do so in the circumstances that had unfortunately arisen.

42. Whilst I understand the desire of the panel to conclude this review without further delay, and I am sure that they were not consciously doing anything unfair, I cannot avoid the conclusion that (viewed objectively) it was unfair to insist on proceeding with the hearing without making any enquiries to establish whether the Applicant was really in a fit state to participate effectively in it.

Decision

43. It follows from the above that, on the third ground alone, I am driven to the conclusion that there was a significant degree of procedural unfairness in this case, and I must accordingly direct reconsideration of the panel's decision at a fresh hearing by a different panel.

Jeremy Roberts
10 May 2021

