

[2022] PBRA 11

## Application for Reconsideration by the Secretary of State in the case of Sheppard

### Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated the 14 December 2021 to direct the release on licence of Sheppard (the Respondent). This followed an oral hearing held on 7 December 2021 when the Panel consisted of a judicial and an independent member.
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:
  - A) The Decision Letter;
  - B) Application for Reconsideration dated 29 December 2021 together with Annex A;
  - C) The dossier which is now paginated to 270 pages;
  - D) Representations dated 7<sup>h</sup> January 2022 from Solicitors on behalf of the Respondent.

### Background

4. On 16 May 2008 the Respondent received a sentence of imprisonment for public protection for an offence of aggravated burglary (the index offence) committed with a co-defendant. The minimum term was set at 2 years less time spent on remand in custody and the Tariff Expiry Date is given as 24 December 2010.
5. The index offence was committed after the Respondent and co-accused had consumed a large amount of cocaine and cannabis. The victim's property was targeted because it was thought there might be drugs and/or cash in the house. The property was entered by force and the occupants threatened with a claw hammer which was found there. The Respondent and co-accused shouted threats and menaced the victims with the hammer,



3rd Floor, 10 South Colonnade, London E14 4PU



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0203 880 0885

demanding money and drugs. They took £30 from the victim's pocket and left saying they would return later.

6. The Respondent has a formidable criminal record for offences of violence and dishonesty against a backdrop of drug and alcohol misuse and a history of poor compliance.

### **Request for Reconsideration**

7. The application for reconsideration is dated 29 December 2021.

8. The grounds for seeking a reconsideration are as follows:

On 24 June 2021 the Respondent's case was directed to an Oral Hearing and a direction was made for the filing no later than 4 weeks prior to the hearing of details of any security concerns since the Respondent was returned to custody, dated and graded as to reliability ("the report").

The Hearing Date was set for 7 December 2021 and in the Panel Chair Directions of 25 November 2021 it was noted that the report had not been added to the dossier and a further direction was made.

Again, this was not complied with and the Applicant states that the report (which is dated 13 August 2021) was not uploaded to the dossier until 14.17 on the day of the hearing.

It appears to be common ground that the report was not seen by the Panel which heard the case.

The Applicant submits that the report contains recent information regarding the Respondent which was relevant to any assessment of current risk and which was capable of affecting the decision reached and that, arguably, the Panel should have adjourned to ensure it had all of the necessary evidence and information before taking its decision and that the decision to release was procedurally unfair.

### **Current parole review**

9. The Applicant referred the Respondent's case to the Board in September 2020. The Applicant did not express a view and was not represented. The Panel considered a dossier paginated to 244 pages and heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM) and from the Respondent who was represented by his solicitor who sought a direction for release.

10. The professional witnesses were supportive of release and the Panel directed the release of the Applicant subject to a Risk Management Plan containing standard and additional licence conditions.

### **The Relevant Law**

11. The Panel correctly sets out in its decision letter dated 14 December 2021 the test for release and the issues to be addressed in making a recommendation to the Applicant for a progressive move to open conditions.

### *Parole Board Rules 2019*

12. 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)).

### *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.

14. 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 Respondent's case was dealt with justly.

15. 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).

16. 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.

17. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board.

### **The reply on behalf of the Respondent**

18. In helpful representations dated 7 January 2022 the Respondent's solicitors submit that the entries in the report would not have led the Panel to make a different decision on the question of release, particularly given the evidence of the POM.

## Discussion

19. I can dispose of this application shortly since, as was made clear in **Williams** (above), omitting to put information before a Panel is not a ground for procedural unfairness and when making the decision in this case the Panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available.

20. The Applicant is seeking to rely on its own egregious inefficiencies. Sadly, such omissions to provide evidence directed are not uncommon and it is unsurprising that the Panel in this case should have decided that it was fair and appropriate to proceed, despite the report's absence, with a referral made to the Board over a year previously relating to a recall which took place in August 2020, particularly as it had the benefit of written reports from the COM and POM (both supporting release) and was able to question witnesses and to hear, in particular, from the POM about the Respondent's custodial behaviour and any concerns arising.

21. For the sake of completeness, I have considered the intelligence contained in the entries in the report. There appear to be thirteen entries dating from December 2020 to 5 August 2021. The December 2020 entry appears in the previous security report seen by the Panel.

22. The January 2021 entry relates to the taking of a "screenshot" (not by the Respondent) during a purple (i.e. virtual) visit. The most recent from August 2021 involves the finding in a cell shared by the Respondent of scissors and an extension cable. The Respondent and his cellmate were not placed on report as the scissors were part of a hair grooming kit issued through prison reception. In my view, these entries are not relevant to risk.

23. The balance of the entries are by no means recent, are confined to March and May 2021 and relate to monies said to have been sent to the Respondent on behalf of other prisoners and suspected to represent payment for illicit items. None of these entries appear to have led to action being taken against the Respondent, such as adjudications, warnings or negative entries, and, had the Panel seen the report, it would have been obliged to decide what weight should be given to this unproven intelligence in the context of the other evidence before it.

24. There was professional support for release and the Panel noted the diagnosis of a serious illness which the Respondent had received in July 2021 for which he was undergoing treatment and that, during the hearing, he was visibly fatigued and in pain and it concluded that this illness would probably significantly impact on his physical mobility and strength for the foreseeable future.

25. The Panel was impressed by the evidence of the POM who had maintained regular contact with the Respondent. She set out a very positive picture of how he was behaving in custody. He had maintained good behaviour and the POM spoke of how he received positive feedback from staff regarding his attitude and had displayed a willingness to work, receiving positive feedback, before his diagnosis took over. The Respondent had

maintained Enhanced status since January 2021 and there was no suspicion that he was taking substances.

26. I find that the intelligence contained in the report would not have allowed of the Panel making any findings which would have affected their decision and, as such, was, in my view, incapable of altering its decision.

## **Decision**

27. For the reasons I have given, I find the application to be without merit, I do not consider that the decision was procedurally unfair and, accordingly, the application for reconsideration is refused.

**PETER H.F.JONES**  
**19 January 2022**