

[2022] PBRA 13

Application for Reconsideration by Mead

Application

1. This is an application by Mead (the Applicant) for reconsideration of a decision of a panel dated 20 November 2021 who after considering the application for parole on the papers refused to release the Applicant or to recommend his transfer to open conditions.
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 the decision of the panel issued 22 November 2021, the application for reconsideration, the notification from the Public Protection Casework Section (PPCS) that the Secretary of State did not intend to make any submissions in response to the Application for Reconsideration and the Applicant's dossier comprising of 179 pages.

Background

4. On 18 May 2009, the Applicant, who was then 37 years old, following a guilty plea was sentenced to imprisonment for public protection with a minimum term of 2 years, less time already served for an offence of committing arson being reckless as to whether life would be endangered. He is now 50 years old.
5. He was released on licence on 20 July 2015 after the Parole Board had directed his release to Designated Accommodation (DA), but his licence was revoked on 22 September 2020. He returned to custody on 23 September 2020.

Request for Reconsideration

6. The application for reconsideration is dated 8 January 2022.
7. The ground for seeking a reconsideration is that it was procedurally unfair not to release the Applicant because *"the no release decision was made on the basis that the Applicant was going to be charged soon with further offences, but he hasn't been"*.



Current parole review

8. After the Applicant's licence was revoked by the Secretary of State on 22 September 2020, the Secretary of State referred the Applicant's case to the Parole Board on 15 October 2020 to consider:
 - a) whether it would be appropriate to direct the Applicant's release if it was satisfied that it was no longer necessary for the protection of the public that the Applicant should be confined; and
 - b) (If the Parole Board does not direct the Applicant's release) whether it would be appropriate for the Applicant to be transferred to open conditions and if so to recommend that the Applicant is ready to be moved to open prison conditions.
9. The Applicant did not request an oral hearing and the panel found no reason why an oral hearing was appropriate. His case was therefore concluded on the papers. The Applicant's case was heard by a panel consisting of one member
10. This offence was committed on 1 October 2008 when the Applicant set fire to the privately rented flat where he was residing. Two weeks before he committed this offence, the Applicant's brother moved out of the flat due to tension between the two brothers.
11. The Applicant states that on the day of the offence, he had spent the day gambling and drinking heavily so that he was heavily intoxicated before he returned home to the flat. The Applicant's recollection is that on his return, he set fire to his brother's clothes in the middle of a room in the flat and then fell asleep.
12. The Applicant recalls being awoken with the flat filled with smoke whereupon he fled the flat and hid in a nearby garden. The police were called. After the fire was put out, the fire investigator stated that in his opinion the fire had been started deliberately
13. The Applicant accepts that he was responsible for the fire but contends that he would not have started the fire if he had not been under the influence of alcohol when he started the fire.
14. The Applicant has an extensive record of offending having been convicted on 27 occasions between 1988 and 2020 for 89 offences and which included convictions for 52 theft and kindred offences. Alcohol has been an acute risk factor for the Applicant. He had been convicted of arson in 1992 for which he was sentenced to 18 months' custody in a Young Offender's Institution.
15. The Applicant had been generally compliant with the regime in the places in which he served his sentence although there were concerns over his increased alcohol

consumption, his habit of staying out overnight in breach of his licence conditions and his attempts to engage in sexual communication with an under-age female.

16. The Applicant was released on licence on 20 July 2015. The police were contacted by a paedophile hunter group which reported that the Applicant had been having on-line chats on a social media platform with a decoy child who informed the Applicant that she was 14 years old. He continued to have conversation with the decoy girl. He sent the 14-Year-old girl a highly explicit photograph and he asked her for a highly explicit photograph of her. There was also evidence of the Applicant having met and bought alcoholic drinks for three girls who were under the age of 16 years.
17. The Applicant's licence was revoked on an emergency basis on 22 September 2020 and his recall was initiated. He was returned to custody on 23 September 2020.
18. The panel noted that there had been concerns about the Applicant's increasing alcohol consumption, that he had been staying overnight (without prior approval), that he had been mixing with a peer group involved in heavy drinking and in Class A drug use. In addition, a named female friend of the Applicant is said to have reported that the Applicant was "pestering" her and regularly drinking.
19. Confirmation had been received from the police that the Applicant was to be charged with "adult attempt to engage in sexual communication with a child (23/8/20-20/9/20); offender 18 years or over attempt to cause a child aged 13-15 to watch/look at an image of sexual activity (23/8/20 -20/9/20)".
20. The Community Offender Manager noted the admission made by the Applicant when he stated that:

"[the Applicant] has been advised by his solicitor not to comment on the charges until they have been formally issued, however, he has indicated his agreement that he has attempted to engage in sexual communication with a female he believed to be under the age of 16. It is my assessment at this stage that [the Applicant] did not fully understand the implications of his actions ..."
This will hereinafter be referred to as "the Applicant's admission".
21. The panel noted that an assessment of risks and their origin was that the Applicant belonged to a group assessed as presenting a high risk of causing serious harm to children. The panel concluded in its assessment of the Applicant's current risk having referred to the Applicant's admission that the circumstances leading to recall strongly indicate that the Applicant presented a high risk to children and the impact on any children would be serious.
22. The panel then explained to the Applicant that:

"You have a concerning history of offending which, even before the new alleged offences are taken into account, [is] diverse and persistent. The panel recognises that you spent some considerable time in the community but there is evidence of emerging concerns about your alcohol consumption, which has been a key figure in much of your previous offending, and the allegations for sexual offending are of considerable concern. Whether or not you are convicted of these matters, there is very risky behaviour which requires exploration"

23. The panel decided that in the light of its analysis that it was not satisfied that it was no longer necessary for the protection of the public that he should be confined. So, the panel did not direct his release. The panel then went on to consider whether it would be appropriate to recommend his transfer to open conditions and concluded that it was not appropriate.

The Relevant Law

24. The panel correctly sets out in its decision 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

25. 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)).

26. 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**.

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
- e) the panel was not impartial.

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

Other

30. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must consider when applying the test are:

- a) the progress of the prisoner in addressing and reducing their risk.
- b) the likeliness of the prisoner to comply with conditions of temporary release
- c) the likeliness of the prisoner absconding; and
- d) the benefit the prisoner is likely to derive from open conditions.

31. 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

32. The Secretary of State stated that he did not wish to make any representations in response to the Ground for Reconsideration.

Discussion

33. In dealing with the grounds for reconsideration, it is necessary to stress four matters of basic importance. First, the Reconsideration Mechanism is not a process by which the judgment of the panel can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled

to substitute his own views 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.

34. The second matter of material importance is that when deciding whether a decision of the Parole Board was procedurally unfair, due deference must be given to the expertise of the Board in making decisions relating to parole.

35. Third, where a panel arrives at a conclusion, exercising its judgment 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.

36. Fourth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

The Ground of Appeal

37. The ground for seeking a reconsideration is that it was procedurally unfair not to release the Applicant because *"the no release decision was made on the basis that the Applicant was going to be charged soon with further offences, but he hasn't been."*

38. The basis of this contention is that the Decision Letter does explain that the panel noted that *"confirmation has now been received from [the police] that you are to be charged with adult attempt to engage in sexual communication with a child (23/8/20-20/9/20); offender 18 years or over attempt to cause a child aged 13-15 to watch/look at an image of sexual activity (23/8/20 -20/9/20)".*

39. The first reason why I cannot accept this contention is that the decision to refuse to direct the release of the Applicant was not based on the fact that he was going to be charged with further offences. That decision was based on the facts that first, he has *"a concerning history of offending which, even before the new alleged offences are taken into account, [is] diverse and persistent"*; second, there is *"evidence of emerging concerns about [the Applicant's] alcohol consumption, which has been a key figure in much of [his] previous offending"* and third that *as for the allegations of sexual offending, they are of considerable concern and have been the subject of the Applicant's admission set out in paragraph 20 above so that they require "exploration"*.

40. Second, it is never stated expressly or implicitly anywhere that the decision not to release the Applicant was based on the decision that he was going to be prosecuted for these matters.



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

41. Third, in any event there is no reason to believe that release of the Applicant was refused because of the decision to prosecute the Applicant bearing in mind the Applicant's admission, namely that the Community Offender Manager reported that:

"[the Applicant] has been advised by his solicitor not to comment on the charges until they have been formally issued, however, he has indicated his agreement that he has attempted to engage in sexual communication with a female he believed to be under the age of 16".

42. Fourth, a claim for procedural unfairness can only succeed if it can be shown that the Applicant's case was not dealt with justly, but there is no evidence that the Applicant's was not dealt with justly or unfairly bearing in mind the Applicant's admission and the other evidence especially as the Applicant does not dispute the correctness of this other evidence or of the Applicant's admission.

43. In any event there are further or alternative reasons why this ground must fail, and those reasons are that.

(a) Due deference must be given to the *expertise* of panels of the Board in making decisions relating to parole; and/or that

(b) It is 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. There are no such compelling or indeed other reasons in this case for interfering with the panel's decision that it was *"not satisfied that it [was] no longer necessary for the protection of the public that [he is] confined"*.

Decision

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

Sir Stephen Silber
25 January 2022