

[2022] PBRA 9

## Application for Reconsideration by McCann

### Application

1. This is an application by McCann (the Applicant) for reconsideration of a decision of a Parole Board panel which heard his case at an oral hearing on 28<sup>th</sup> June 2021, and, following adjournments, issued a Decision Letter (DL) on 20<sup>th</sup> December 2021, in which it declined to direct his release or to recommend to the Secretary of State for Justice (SOSJ) that he be transferred 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:
  - a) The dossier of 629 numbered pages including the decision letter (DL) under review; and
  - b) The Applicant's representations.

### Background

4. The Applicant is now 54. In 2004 he was sentenced to life imprisonment following his conviction for murder, with a '*tariff period*' of 14 years less time served on remand. He was released on licence on 9<sup>th</sup> May 2016 and recalled to prison on 24<sup>th</sup> January 2017. He was released again on 27<sup>th</sup> December 2017 and recalled to prison on 14<sup>th</sup> October 2019.

### Request for Reconsideration

5. The application for reconsideration is dated 21<sup>st</sup> December 2021.
6. The grounds for seeking a reconsideration are, in summary, as follows:
  - a) The panel's decision was '*procedurally unfair*' in that, the non-disclosure process followed in the case after the oral hearing in June 2021 and prior to the DL being issued was seriously defective and had the consequence that neither the Applicant nor his legal representative had access to material which may have been relevant to the panel's decision.


### Current parole review

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7. Following referral by the SOSJ to the Parole Board on 6<sup>th</sup> November 2019 an oral hearing was directed on 13<sup>th</sup> December 2019. The hearing took place on 22<sup>nd</sup> June 2020. This was adjourned following the taking of evidence from the Applicant and his Prison and Community Offender Managers. The adjournment notice expressed the hope that the hearing could be reconvened in January 2021. The panel concluded that further (psychological) evidence should be obtained before it could reach a final decision.
8. In the same month an application that the reconvened hearing should be conducted by video link was granted.
9. The case was heard on 28<sup>th</sup> June 2021 by video link. The panel heard oral evidence from the Respondent's Prison Offender Manager (POM), his new Community Offender Manager (COM), 2 psychologists, a Substance Abuse Worker, and the Respondent. The Applicant was legally represented at both hearings.
10. The panel decided to adjourn its decision for further enquiries to be made of the Applicant's partner. These enquiries resulted in an application for non-disclosure. That process was the subject of appeal and a gist being disclosed to the Applicant, who made written representations of his own concerning the case generally in July 2021.
11. The DL was finally issued on 20<sup>th</sup> December 2021.

### **The Relevant Law**

12. The panel correctly set out the test for release in the DL.

#### *Parole Board Rules 2019*

13. 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 its decision on the papers (Rule 21(7)).

#### *Procedural unfairness*

14. Procedural unfairness means a procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result.

15. 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; and/or
- (b) The Applicant was not given a fair hearing; and/or
- (c) The Applicant was not properly informed of the case against him/her; and/or



- (d) The Applicant was prevented from putting his/her case properly; and/or
- (e) the panel was not impartial.

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

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

17. On 6<sup>th</sup> January 2022 the Secretary of State informed the Parole Board that it had never received any notification of the outcome of the Applicant's appeal against the non-disclosure ruling – see below para 18.

### **Discussion**

18. In order to put the application in context it is necessary to set out some of the events which followed the oral hearing of 28<sup>th</sup> June 2021 and resulted in the Decision Letter of 20<sup>th</sup> December 2021.

- a) As set out above at paragraph 10, following the hearing the panel adjourned the issue of its decision for further inquiries.
- b) On 16<sup>th</sup> August 2021 the panel issued further directions with a view to issuing its Decision Letter following a deadline of 30<sup>th</sup> August 2021.
- c) On 31<sup>st</sup> August 2021 the panel issued further directions concerning an application for non-disclosure and indicated that it intended to complete the process by 5<sup>th</sup> October 2021.
- d) On 15<sup>th</sup> September 2021 the application for non-disclosure was received at the Parole Board. A '*disclosable gist*' of the material – now at page 612 of the dossier was submitted by the Secretary of State. This made it clear that the application concerned solely certain addresses which were of concern and, so it was contended, justified the imposition of an exclusion zone in licence conditions were the Board to direct release.
- e) On 22<sup>nd</sup> October 2021 the application for non-disclosure was granted by the Panel Chair.
- f) On 25<sup>th</sup> October 2021 the Parole Board provided the Applicant's legal representative with the Community Offender Manager's Note containing the material sought to be withheld and the '*disclosable gist*'. The same day the Applicant's legal representative undertook not to disclose the full contents of the unredacted material to his client.
- g) On 27<sup>th</sup> October 2021 the Applicant's legal representative submitted an appeal against the decision.
- h) After a number of requests for information on the progress of the appeal from the Applicant's legal representative, on 12<sup>th</sup> December 2021 the appeal was "*allowed*" only to the extent of authorising the Applicant's legal representative to "*assure the Applicant that no new allegations are being made against him to which he will need to respond*".



- i) The next day – 13<sup>th</sup> December 2021 - the Parole Board team responsible for handling such appeals emailed the person dealing with the case with a request to send the appeal decision to PPCS (Public Protection Casework Section at the Ministry of Justice) and the Chair of the panel.
- j) On 20th December 2021 the DL was issued. Under the heading **Any other information** were the following words:

*“First hearing took place on 22 June 2020. It was adjourned after the hearing for a psychological risk assessment and reconvened on 28 June 2021. Full evidence was taken given the lengthy time between hearings and changes in personnel. That hearing was adjourned after full evidence was taken for further enquiries to be made with [the Applicant’s] partner. Following those enquiries a non-disclosure application with gist was made. This was agreed by the Panel Chair and appealed by [the Applicant]. The appeal was allowed and an amendment to the gist was provided which assured [ the Applicant] that no further allegations had been made against him.”*

19.It is therefore clear that;

- a. The application was made outside the framework set out in the Parole Board Rules. Rule 17(2) stipulates that such applications must not be made later than 8 weeks before the date allocated for the oral hearing. Understandably no point was taken on this by the Applicant’s legal representative in his submissions for the appeal.
- b) Neither the Applicant nor his legal representative had had any prior notice of the non-disclosure appeal decision before they read about it in the DL. The wording of the DL quoted above clearly suggests that the panel assumed that the Applicant and his legal representative had known of the decision in advance.
- c) The failure of the Board to acquaint the Applicant and his legal representative of the result of the appeal against non-disclosure before the issue of the Decision Letter amounted to a serious procedural irregularity.

20.The question for decision is therefore whether that clear procedural irregularity is such as to require the case to be reconsidered by a fresh panel.

21.The DL contains a lengthy summary of the evidence heard by the panel from a variety of witnesses, a description of the risks the Applicant is still thought to pose to the public, the risk management plan/licence conditions sought to be imposed with a view to minimise those risks, and a clear exposition of why, in the end, the panel concluded that it could not direct his release or make a recommendation to the SoSJ for his transfer to open conditions.

22.A careful reading of the appeal decision makes it clear that the substantive appeal was rejected. All the material sought to be withheld from the Applicant but disclosed to his legal representative against an undertaking not to disclose it to his client remained withheld. In that sense the appeal was not effectively “allowed” but the decision-maker in dismissing the appeal directed as he did in order to reduce the



Applicant's possible concern as to the extent of the information which the panel had before it and of which he was unaware.

23. In the end the concerns which had led to the application, namely – as explained in the '*disclosable gist*' – the extent of the exclusion zone appropriate if release was directed, were irrelevant since the panel decided that it could not direct release for reasons wholly unconnected with that issue which it set out clearly at paragraphs 4.2-4.12 of the Decision Letter.
24. The wording of the DL quoted above strongly suggests that the panel assumed that the result of the appeal had already been communicated to the Applicant's legal representative for onward communication to the Applicant himself.
25. The series of events set out above resulted in a serious procedural irregularity in a case concluded in December 2021 which had been referred to the Board more than 2 years earlier. I have considered whether, even though that irregularity in the end had no bearing on the reasoning of the DL which declined to direct release, the right course would be to direct that a fresh panel consider the case.
26. Had the proper procedure been followed and the legal representative received the appeal decision before the issue of the DL he would have been in a position to make further submissions to the panel in support of his contention that his client's release should be directed. The fact that in this case the likelihood of those submissions being successful was minimal because of the eventual irrelevance of the extent of, and the reasons for, the proposed exclusion zone to the panel's decision is not, in my judgment, sufficient to allow me to overlook this serious procedural irregularity in which a decision which '*allowed*' an '*appeal*' on a potentially important preliminary matter was not communicated to the '*appellant*' before the ultimate decision was given. The maxim '*justice must not only be done but be seen to be done*' is of particular significance in this case.

## Decision

27. For the reasons I have given, I grant this application for reconsideration.

**Sir David Calvert-Smith**  
**12 January 2022**

