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**[2021] PBRA 138**

**Application for Reconsideration by Hannah**

## Application

1. This is an application by Hannah (the Applicant) for reconsideration of a decision of an oral hearing panel which, on 22 August 2021, after a hearing on 12 August 2021, decided not to direct his release on licence but to recommend he remains in 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 696 page dossier provided by the Secretary of State which included the decision reasons, the application for reconsideration, additional representations in support of the application and representations from the Secretary of State.

## Background and current parole review

4. The Applicant is now aged 51. On 17 June 2011, when he was aged 41, he received a sentence of Imprisonment for Public Protection for s18 wounding with intent. He received no separate penalty for perverting the course of justice, possession of an offensive weapon, and two offences of failing to surrender to custody. The sentencing judge highlighted that this was a pre-meditated "gang operation" where the victim was lured to a particular place, held down and attacked. The victim was vulnerable and during the police investigation, the Applicant offered him a large sum of money to drop the charges. The Applicant then absconded at the beginning of the trial and was convicted in his absence.

5. His minimum term was set at 7 years less time on remand and expired on 16 May 2018.

6. During this sentence the Applicant has completed accredited programmes to address offending behaviour. At an oral hearing in May 2018, the parole board panel recommended that he transfer to open conditions and this recommendation was accepted by the Secretary of State.

7. This was his second review by the Parole Board. His case was referred by the Secretary of State in December 2018, just seven months after his previous oral hearing and two months after he had been transferred to open conditions.

8. The case was directed to an oral hearing. The hearing was then deferred three times (in October 2019, March 2020 and August 2020). The August 2020 deferral was on application by the Applicant to enable him to complete further periods of temporary overnight release. The case then came to the panel which made the decision but that panel initially adjourned the case in March 2021 for the same reason as the deferral in August 2020.

9. The oral hearing took place by telephone link on 12 August 2021. The oral hearing panel heard evidence from the Applicant, his Prison Offender Manager (POM), his Community Offender Manager (COM), a psychologist employed by the prison service and a psychologist instructed by the Applicant's legal representative. The Applicant was legally represented throughout the hearing. The Secretary of State was not formally represented.

**Request for Reconsideration**

10. The application for reconsideration is dated 10 September 2021. It was submitted by the Applicant's solicitor and runs to 16 pages. Additional representations dated 24 September 2021 were received by email following the response from the Secretary of State (see paragraph 21 below).

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

That the decision is irrational because the panel;

Ground (i) failed to properly take into account the delays in this case
Ground (ii) failed to properly take into account the extensive testing the Applicant had gone through and his lack of violence during that time
Ground (iii) placed too much weight on the evidence of three of the witnesses
Ground (iv) failed to provide a ruling or sufficient commentary on the three main areas of dispute
Ground (v) were unfair in criticising his incomplete risk management plan.

That the decision was procedurally unfair because;

Ground (vi) there was evidence given by one of the witnesses which neither party had been given any prior warning about
Ground (vii) the panel ought to have adjourned to obtain a fully formed risk management plan.
Ground (viii) the panel ought to have adjourned to enable the Applicant to undertake further periods of temporary release.

**The Relevant Law**

12. The panel correctly sets out in its decision reasons dated 22 August 2021 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*

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

14. 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**.

*Irrationality*

15. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, 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."*

16. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. 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. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

*Procedural unfairness*

18. 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.

19. 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.

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

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

21. The Secretary of State sent written representations dated 20 September 2021. The representations explain some of the delay referred to by the Applicant and respond to some of the issues raised about areas of dispute in ground (iv). Further representations were also received by email on 27 September 2021 retracting point 5 in the submissions following the additional legal representations.

**Discussion**

*Irrationality. Grounds (i) to (v)*

22. When considering these five grounds, it must be highlighted that assessing future risk can never be a precise science. The question for me is not whether a differently constituted panel might have come to a different conclusion but whether the conclusion this panel reached and the basis for it, met the high test for irrationality or not.

23. I will deal with the first two grounds together. The panel acknowledged the delays in this case within its decision. However, I remind myself that this is not a sentencing exercise where factors in mitigation such as delay may have a bearing on the result. The panel must make its risk assessment and apply the legal test. It cannot vary that test because a case took a long time to reach conclusion. Whilst it is unfortunate that there was a delay in accessing periods of temporary release and this caused frustration to the Applicant, it is clear from the decision reasons that the panel was more concerned with the behaviour when accessing periods of temporary release rather than the number of times he had accessed it. Whilst the Applicant argues that during the delays to his review, he demonstrated restraint and positive skills such as not retaliating when assaulted and this was "overlooked" by the panel, it is apparent from the reasons that the panel did acknowledge that that situations had "*not manifested incidents of harm*" (paragraph 3.1 of the decision) but did not hold the same optimism as to his progress and it referred to numerous incidents which gave it concern. It is also noted that the concerns had been shared by the decision makers in the prison as his temporary release privileges had been suspended.

24. During the hearing, the panel had the benefit of hearing from a number of witnesses and the Applicant himself as set out in paragraph 9 above. The POM, COM and psychologist employed by the prison service did not recommend release. The psychologist instructed by the Applicant's legal representative did support

release but the panel described in its reasons that this recommendation did not appear to be a particularly confident recommendation, as the psychologist recognised that there had been issues on temporary release and this made the management of risk more challenging. From the decision reasons, it is quite clear to me that the panel carefully considered each recommendation to enable it to arrive at its own decision. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion it preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

25. The written reasons for this decision ran to 20 pages, which is far more lengthy than most. The Applicant submits that the panel did not provide a 'ruling' or sufficient commentary on the three main areas of dispute namely: the Applicant's denial that he was told he could not have a mobile telephone in the community, only one without internet access; the issue of the Applicant going to the gym and L's apartment; and returning late to the prison following temporary release. The Applicant also appears to submit in the alternative that undue weight was placed upon those incidents.

26. I am reminded that 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.*"

27. On the first area of dispute, the Applicant seeks to introduce new evidence within his application by referring to the results of a subject access request made after the hearing. The panel cannot be criticised for failing to take into consideration something which it did not know about. For the avoidance of doubt, this also does not make the decision procedurally unfair as 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. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them.

28. In relation to all areas of dispute, each is mentioned and analysed within section 2 of the decision. In particular the Applicant's evidence on such matters was discussed in detail and it is noted that he gave different versions of various incidents. Whilst it may have been helpful for the panel to specifically reference that it applied the Parole Board Guidance on Allegations to these incidents (given these were allegations related to the Applicant's reliability to comply with licence conditions) it is apparent that the panel considered each of them to be an example of the pushing of boundaries which caused the panel concern. In my view, the panel has made that clear. It also specifically mentioned that these did not lead to incidents of harm as noted in paragraph 23 above. I do not accept the submission

that the pushing of boundaries in the community on temporary release is not a relevant consideration when deciding whether a prisoner meets the test for release.

29. Finally, the Applicant submits that the panel was unfair to criticise the incomplete risk management plan. The panel had been told that the Applicant was unhappy with the choice of designated accommodation for release due to its distance from his family. However, despite enquiries this was not possible. The Applicant submits that he was restricted in finding out about new areas due to the conditions placed upon him. From the decision reasons it appears that the concern was actually his "*rapid and repeated changes in choice of resettlement area*" which included uncertainty regarding his future relationship with his current partner. Witnesses thought that some were not well considered and that his lack of enthusiasm for the proposed designated accommodation had led to a lack of engagement with the staff and regime when he went there on temporary release. The panel formed a clear conclusion from the information it had, expressed at paragraph 2.73 of its decision, namely that it '*was not satisfied the Applicant had a developed resettlement plan, or even that he had settled goals for such a plan'*. I see no reason at all why the panel was not entitled to reach that conclusion.

*Procedural unfairness. Grounds (vi) to (viii)*

30. The Applicant submits that the POM gave evidence which no party had prior warning of. This related to the number of calls which the Applicant had made to 'L' in a recent five month period. The Applicant argues that he was not given an opportunity to counter this by obtaining a statement from L, but it is of note that the Applicant did not make this application during the hearing or afterwards, despite being afforded the opportunity by the Panel Chair to submit closing submissions in writing following a conference between him and his legal representative. He was represented throughout the hearing and effectively no challenge was made. Oral hearings are directed when issues need exploring in live evidence. These can be issues already raised in reports which require further discussion or new areas, for example issues relating to recent developments, matters witnesses have reflected on or matters causing concern to the panel but not highlighted by witnesses. Whilst it is fair to say that the psychologists were unable to comment in detail about this further information, it did not prevent them giving a recommendation to the panel. The Applicant himself was given ample opportunity to explain these calls and his evidence on that issue is recorded in the panel's decision (para 2.38). Given the Applicant's history, including convictions for domestic violence related offences, I reject any inference that the Applicant would not have expected to be asked questions around his current relationship, one that was formed during the serving of this sentence.

31. The Applicant did however make an application to adjourn to enable him to undertake further temporary release. He did so shortly before the hearing. He repeated this as an 'option' within his closing submissions. This case suffered delays as set out above. As confirmed in the reconsideration application of **Connelly [2020] PBRA 10**, any possible adjournment engages **Article 5.4 of the European Convention on Human Rights** which imposes on the court or other body exercising judicial functions the duty: *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the*

*detention is not lawful."* An application for an adjournment in any jurisdiction has to consider the potential delay it would cause and its likely consequences. This case had been postponed twice to enable the Applicant to pursue temporary release. The panel indicated in section 4 of its decision that it had weighed up the various considerations in refusing any adjournment for further temporary release (paragraph 4.2 of the decision) and concluded that there was "*no reason to think that significant new information would be obtainable in the immediately foreseeable future*", especially given the fact he was currently suspended from temporary release.

32. At no point did the Applicant apply for an adjournment based specifically on an opportunity to develop his risk management plan. The submission made by the Applicant is that the panel ought to have adjourned of its own volition and he relies on the words used in paragraph 4.6 of its decision that "*without a fully viable community-based risk management plan, the panel could not consider release*". However, those words from the panel must be put into context. The panel highlighted that the COM had in essence done all they could. This was not a case where the panel had not been given any information from the COM about the proposed risk management plan including licence conditions, agency support and an initial place of residence. All that information was provided in reports in the dossier. The panel was in fact criticising the Applicant regarding his involvement with the plans and where he might go after a period of time in designated accommodation, the follow on plan (a point discussed above, ground (v)). Whilst it is accepted that all follow on plans will need some further development which can be done only when someone is in the community, it is a question of degree. Given the Applicant's different proposed plans for settlement and employment, including a very recent proposal for a new area, and the issues raised by witnesses about his relationship, the panel was entitled to conclude that the plan was not yet "fully viable" and rely on that as part of its decision. As detailed in this decision, it was not the only concern of the panel.

**Decision**

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

**Cassie Williams**
**24 September 2021**