

[2020] PBRA 83

## Application for Reconsideration by Borland

### Application

1. This is an application by Borland (the Applicant) for reconsideration of a decision of an oral hearing dated the 1 June 2020 not to direct his release.
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 letter, the dossier and the application for reconsideration.

### Background

4. The Applicant was sentenced to imprisonment for public protection on 1 November 2011 following conviction after trial for robbery. A minimum term of seven and a half years, less time spend on remand was imposed. This tariff expired on 18 October 2018.
5. The Applicant was released on licence on 5 November 2018. His licence was revoked on 9 August 2019 and he was returned to custody three days later.
6. It is reported that his recall followed an incident in which police were called to an incident in which loud bangs were heard and a number of males in balaclavas were seen entering an address. The Applicant drove off at speed. Following a police pursuit, he was apprehended and found to have been shot twice to the knee. He was subsequently convicted of dangerous driving and received a four-month sentence.

### Request for Reconsideration

7. The application for reconsideration is dated 16 June 2020.
8. The grounds for seeking a reconsideration are as follows:
  - i. The decision was procedurally unfair as the Applicant was not offered an opportunity to make further representations or admit further evidence before the panel made its decision.

- ii. The decision was procedurally unfair as the panel did not adjourn the hearing for a psychological assessment or to obtain further police evidence regarding the allegations which led to recall.
- iii. In consequence of grounds i and ii above, the decision is also irrational.

## Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State in September 2019 to consider whether it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on whether he was suitable to remain in open prison conditions. This is the first parole review since recall.
10. An oral hearing took place on 27 April 2020 before a three-member panel. It took evidence from the Applicant's Offender Supervisor (OS) and Offender Manager (OM) before adjourning. The Applicant was legally represented throughout. At the end of the hearing it was agreed that closing legal submissions would be made in writing in order to enable the Applicant's legal representative to take instructions before doing so. Submissions were made on 29 April 2020. The case was concluded on the papers on 27 May 2020.

## The Relevant Law

11. The panel correctly sets out in its decision letter dated 1 June 2020 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*

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)). This is an eligible decision.

### *Irrationality*

13. 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."*

14. 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.

15. 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*

16. 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.
17. 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 Applicant's case was dealt with justly.

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

18. The Secretary of State has submitted no representations in response to this application.

### **Discussion**

19. While this application is put both on the basis that the procedure adopted by the panel in deciding the case without further evidence/representations was unfair and, on the basis that the decision was irrational, I consider that the real issue is whether the procedure was unfair. The suggestion of irrationality does not add anything.
20. The two grounds on which procedural unfairness is advanced both flow from the section in the decision headed '*Indication of possible next steps to assist future panels*'. It is clear from the wording of the heading that nothing suggested within this section is mandatory or directed. It is an indicative and non-exhaustive list. Evidence directed for the next hearing is a matter for the MCA member who reviews it on re-referral, and the allocated Panel Chair if an oral hearing is directed.
21. That said, this section went on to say that the next panel '*would be assisted by a psychological risk assessment*' and '*would also be assisted by a police report*'. The detail for the future police report was put in very specific terms, including whether



the Applicant made a statement, whether certain items of the Applicant's clothing from that time had been recovered, and whether anyone has been arrested in connection with the recall incident. It also sought '*relevant witness statements*'.

22. There are already police reports in the dossier which include a summary of the Applicant's explanation of events. Having considered these as part of the totality of the evidence available to it at the time, together with the closing written submissions, the panel made its decision not to direct release.
23. However, the level of detail put forward for a possible future police report suggests that the panel must have considered what was missing from the information before it and considered it to be materially significant enough for it potentially to be interesting to a future panel.
24. Therefore, if the missing (and detailed) information could potentially have had a bearing on a future panel's risk assessment, it begs the question why this panel did not adjourn to direct it. There was no indication that it could not have been provided (or the panel notified if it did not exist) within a reasonable time.
25. The Applicant's account of the recall was dismissed as not credible by both witnesses and the panel. The Applicant's OS described it as 'far-fetched'. Given the Applicant's steadfast adherence to his story, it was incumbent on the panel to adduce as much evidence as possible in order to test the veracity of the Applicant's account against it.
26. It is a matter for each individual panel to decide what, and how much, evidence it needs to make its decision. If a panel is satisfied that it has adduced sufficient evidence on which to base a decision, then it does not need to direct anything further. Doing so would add further delay to proceedings which would be at odds with the Parole Board's obligation to undertake a speedy review of a prisoner's detention.
27. The panel may have considered that its decision would have remained the same no matter what a more detailed police report might have said. If so, it was perfectly entitled not to direct one and to conclude as it did.
28. This case, however, is distinguishable to the general principle that a panel can stop directing evidence once it considers it has sufficient to make its decision.
29. The panel in this case listed out the evidence it considered to be missing (and that would be helpful to a future panel). This evidence related to the specific circumstances of the recall in the Applicant's case on which the panel made a determination. In the ordinary course of proceedings, the circumstances of a recall determined by one panel would not be a matter that would fall to a future panel for consideration. To have concluded a specific issue relevant to recall in this case without considering further identified (and potentially helpful) evidence is unfair to the Applicant.
30. This is not so in relation to the psychological risk assessment. There is nothing to suggest that the panel needed psychological input to make its decision and, as set



out above, the panel does not need to direct information it does not feel necessary to make its decision at the time it is making it.

31. The submission regarding the lack of opportunity for further representations prior to making the decision becomes immaterial. As the panel did not consider it needed further evidence to make its decision, then there were no issues before it that required further representations. If, however, the panel had directed the information set out above, the opportunity for further representations would have arisen in the normal course of proceedings.

32. Finally, as set out above, I do not find that the decision was irrational.

## Decision

33. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, the decision to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

## Directions

34. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

35. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel by way of oral hearing.

36. The following further directions are now made:

- (a) The re-hearing should be expedited (whilst bearing in mind the time necessary for the newly directed information below to be provided).
- (b) The original decision must be removed from the dossier and must not be seen by the new panel.
- (c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
- (d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.
- (e) A full psychological risk assessment is directed.
- (f) Any additional information from the police and/or CPS in relation to the incident that led to recall must be provided.

**Stefan Fafinski**  
**30 June 2020**

