

[2022] PBRA 27

Application for Reconsideration by Hatton

Application

1. This is an application by Hatton (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 28 January 2022 not to direct 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:
 - a) The Decision Letter dated 28 January 2022;
 - b) A request for reconsideration in the form of written representations dated 18 February 2022; and
 - c) The dossier, numbered to page 396, of which the last document is the Decision Letter. The panel considered a dossier which ran to 385 pages.
4. The application was not made on the published form CPD 2, which contains guidance notes to help prospective Applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused. The document explains how I will look for evidence to sustain the complaints and reminds Applicants that being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made and I am satisfied that the written representations provide reasonable explanation as to the proposed grounds for reconsideration.

Background

5. The Applicant is now 43 years old. On 19 September 2006, when he was 28, he received an Indeterminate Sentence for Public Protection (IPP), with a requirement that he should serve a minimum of four years and 361 days before he could be considered for release by the Parole Board. That minimum term was subsequently increased to seven years and 6 months by the Court of Appeal Criminal Division. The Applicant's minimum term expired on 14 March 2014.
6. The sentence was imposed following conviction for possession of a firearm at the time of committing an offence and making use of a firearm with intent to resist arrest (the



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Index Offences). The Applicant was also sentenced to determinate custodial terms for offences of attempted burglary and possession of a prohibited firearm, and all the sentences were concurrent with a sentence imposed on 3 October 2002 for offences of arson, two escapes from lawful custody and four assaults.

7. The circumstances of the Index Offences were that on 7 March 2006, whilst on licence from an earlier sentence, he unsuccessfully attempted a smash and grab raid on a jeweller's shop, using a sledgehammer. He attempted to escape on a motorcycle, fell off, and when approached by a police officer, he produced a loaded firearm and pointed it at the officer, although he did not discharge it.
8. The Applicant has a lengthy history of offending, first coming before the courts in 1994 following his conviction for criminal damage. He has committed acquisitive crimes and criminal damage, together with arson and violence (referred to above).
9. A panel of the Parole Board considered the Applicant's case at an oral hearing on 18 May 2016. That panel directed that he be released, the Applicant was released on 8 June 2016. He was recalled to custody on 5 December 2019 following his arrest on 28 November 2019 on suspicion of murder. It also emerged that the Applicant had breached his licence by failing to disclose use of hire vehicles and there were concerns that he had not been residing as directed.
10. The Secretary of State referred the applicant's case to the Parole Board on 20 December 2019 to determine whether he should be re-released, or in the alternative whether he should be moved to an open prison.
11. The Parole Board's review faced significant delay, in part due to the ongoing police investigation and also due to a failure by the Secretary of State to comply with directions set by the Parole Board.
12. By the time of his oral hearing on 20 January 2022, the Applicant had been charged with conspiracy to pervert the course of justice in relation to the alleged part he played following a murder. He faces a trial on 3 October 2022.

Request for Reconsideration

13. The application for reconsideration is dated 18 February 2022.
14. The grounds for seeking a reconsideration are that the decision was "*procedurally flawed, and irrational*", the detail of the application is as follows:

Irrationality – Ground One

- a) It was irrational for the panel to assess that the Applicant would be likely to abscond if he were released because this was based on attempts to escape in 2000 – 2001, which were many years ago. It is submitted that there is no evidence to suggest that there would be an ongoing risk given the passage of time, the Applicant's previous compliance with his placement in open conditions and his near three years on licence prior to being recalled.

- b) It is submitted that the Applicant did not attempt to abscond in the few days when released following his arrest and prior to his recall to custody and that the panel was in error when it identified that the Applicant may not have appreciated the seriousness of the allegations or the extent of the evidence against him. The Applicant states that when he was arrested he was told that he was under investigation for murder, as detailed in the dossier. Therefore, it is submitted that it was irrational for the panel to have relied on this and, in any event, the charge of perverting the course of justice is a *"much lesser charge than murder without doubt"*. The Applicant also points out that he was subject to unconditional bail and if he had been deemed to be an abscond risk then *"the police would have remanded him into custody from the start ..."*
- c) It is submitted that there is no evidence to suggest that the Applicant would influence the outcome of his trial because he has no offences of this nature, that it was irrational for the panel to consider this as a reason to refuse his release and *"it [was] based upon a disproportionate assessment that absconding was a live risk"*.

Irrationality – Ground Two

- a) The panel placed unfair weight on the pending trial because it identified the significant body of factual evidence in the police report about the Applicant and because he was unable to provide any cogent explanation. It is submitted that it was not for the burden of proof to be on the Applicant and that the report of the police was only one side of the evidence and was not a balanced view. The Applicant points out that he is entering a not guilty plea in respect of the matter before the court and *"so there is another side of evidence"*.
- b) It is submitted that *"whilst not directly refusing [the Applicant's] release ... based on the trial alone according to the decision ... This was obviously a large contributing factor, when a significant amount of weight should not have been put on this matter given [the Applicant] is awaiting trial and has not been convicted"*.

Irrationality and Procedural Unfairness – Ground Three

- a) The evidence of the Community Offender Manager (COM) was not balanced because he had not met with the Applicant prior to the completion of his report and had only conducted one video link with him prior to the oral hearing. The COM placed weight on the risk of absconding and the possibility of the Applicant trying to influence the outcome of his trial, without presenting evidence to support this, aside from the past escapes.
- b) The panel should not have relied upon the COM's evidence who also placed weight on a lack of transparency on behalf of the Applicant despite his limited knowledge of him and despite the Prison Offender Manager, who had known him for a longer period, finding no evidence of dishonesty.
- c) The Applicant also identifies that the COM appeared to persuade the panel regarding him not disclosing to Probation that he had fathered a child,

however, this was not a requirement of his licence and should not have formed a part of the decision making.

The Relevant Law

15. The panel correctly sets out in its decision letter dated 28 January 2022 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.

16. 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)).

17. In **R (on the application of 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."

18. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

20. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. 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.

21. 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.

22. 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.

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

The reply on behalf of the Secretary of State

24. The Secretary of State provided a response on 1 March 2022. His comments are limited to the complaint in respect of the COM and he does not seek to make any representations about the other grounds within the application. Within his response, he sets out the contact the COM had with the Applicant.

Discussion

25. In summary, the Applicant seeks to challenge the oral hearing decision of 28 January 2022 because he believes that it was irrational of the panel to consider him likely of abscond on release or likely to seek to interfere with his criminal trial. It was irrational of the panel to attach weight to the outline of the charge against him because it was based on the police evidence, and he is yet to advance his defence at trial. It was irrational and procedurally unfair for the panel to attach weight to the COM's assessment of the case because the COM had only recently been allocated to the case and had only undertaken one direct contact with the Applicant which was after his report had been produced.

Absconding

26. It is relevant to note the detail of the Applicant's attempted escapes, albeit that they took place many years ago.

27. In August 2000, while seven months into a five-year custodial sentence, the Applicant was being transported in a prison van from one prison to another. He set a fire in his cell in the van and when the driver and custody officer opened the door to extinguish the flames, he escaped, and in the course of that escape the custody officer sustained a broken finger and a bruised hip. The Applicant was then unlawfully at large for a month, living rough, before he handed himself in.

28. In October 2000, the Applicant was being transported from the magistrates court to a prison in a prison van and set fire to his cell. His cell was unlocked and the fire, having taken hold, led to the driver and custody officer being obliged to move him. They had difficulty in breathing. As the cell was opened, the Applicant was handcuffed to the driver, whom he then attacked. The driver was rapidly becoming unconscious and the custody officer then saw the Applicant release himself from the handcuffs and escape. The custody officer lost consciousness but was eventually dragged from the van by the driver. The Applicant's escape was then thwarted by members of the public.

29. The Applicant then tried to escape for a third time in June 2001. He was handcuffed to a prison officer in the van and was handcuffed himself. He made a serious effort to escape but was eventually subdued.
30. The oral hearing panel took note of the Applicant's escapes and attempted escape and the evidence before them demonstrated that there was a degree of planning in his efforts. The oral hearing panel also noted that the Applicant had previously offended whilst subject to licence and whilst subject to bail. The Applicant had also offended during his period on licence on the current sentence, committing theft offences in 2019. The oral hearing panel established its concerns about compliance which it found remained an issue for the Applicant. In its review of the risk management plan, the oral hearing panel determined that the Applicant had failed to evidence transparency during his last period on licence, which it considered to be essential in terms of the likely effectiveness of the plans to manage risk.
31. The points put forward by the Applicant were raised in submissions by his legal representative at the oral hearing. The oral hearing panel was entitled to consider the issue of compliance and it provided its assessment of them in the decision letter. The Applicant may not have considered the issue to be a 'live risk' but clearly the panel disagreed, it was entitled to do so, exercising its judgement based on the evidence before it, and it provided its reasoning in the decision letter. In my view, it cannot be said that no reasonable person, applying his mind to the issue of absconding, could not have come to the same decision. There is a high standard for irrationality and the Applicant's argument does not meet it.

The Criminal Trial

32. Any reading of the oral hearing decision letter demonstrates that although the panel was mindful of the potential for the Applicant to seek to interfere with the outcome of his trial, it was not the deciding factor in its determination not to direct his release. Nevertheless, the oral hearing panel provided reasons, explaining its view on the potential for the Applicant to seek to influence the outcome of his trial. Whether or not he has a history of such behaviour is not the overriding point in this case, the panel was concerned with his compliance and its relevance to risk. It disagreed with the applicant's view, but this does not meet the high standard of irrationality.
33. I should point out that the Applicant's assertion that he was subject to unconditional bail and if he had been deemed to be an abscond risk then "*the police would have remanded him into custody from the start ...*" is not a particularly compelling point. Any decision on remand into custody would be for the Courts and not the police and it is highly likely that his subsequent recall to custody was an influential point in any assessment of bail. Although disregarded by the oral hearing panel in its decision making, it did note that the COM had been advised that the police were now considering seeking his remand into custody.
34. The Applicant rightly points out that the oral hearing panel had regard to the recent case law of **Pearce [2022] EWCA Civ 4** which dealt with the Parole Board's current Guidance on Allegations. The Applicant's complaint was that the oral hearing panel placed weight on the facts provided within the police report and that there was "*another side of evidence*". There was no obligation for the Applicant to give any evidence to the oral hearing panel which might potentially incriminate him. Nevertheless, he was

prepared to answer the panel's questions about the pending criminal matter. Aside from claiming he was not involved, he could offer no explanation as to how the vehicle he had use of was seen at the location where the victim of the murder was found. Nor could he offer any explanation as to why phone data linked him to the owner of another vehicle which was seen to travel with his vehicle. The Applicant submits that the burden of proof should not have been on him, however, in the panel's review of the matter it never was. It was for the panel to assess the facts before them, to the civil standard of proof.

35. The oral hearing panel quite properly explored the facts as they are presently known. Given that the Applicant is yet to face trial, it would not have been appropriate for the panel to have made any finding of fact based on the balance of probability, however, it was perfectly entitled to consider what weight it should attach to the facts before it. The panel gave proper consideration to the recent case law of Pearce and focussed on the facts of the case rather than any general concerns that might exist. It quite rightly considered the relevance to risk if the matter was later found proved or if the Applicant was later acquitted. Its careful review of the material led it to determine that it could not ignore the allegation based on the extent of the factual evidence before it. In my view, there is nothing irrational about such an approach. The oral hearing panel was entitled to consider the facts before it, determining the weight it would attach to them in its decision, without going on to make any finding of fact in terms of the Applicant's likely guilt or innocence.

The Community Offender Manager

36. It was no doubt frustrating for the Applicant that he was provided with a new Community Offender Manager shortly before the oral hearing. The Parole Board's review had been delayed due to non-compliance with directions at a time when the Probation Service in his release area were struggling with staff shortages due to the Coronavirus Pandemic. A further frustration for the Applicant was that the COM's plan to speak with him prior to the filing of a report for the panel could not take place because either the Applicant was not produced by the prison or due to some technical difficulty. Nevertheless, the COM produced his assessment of the Applicant and had reviewed Probation and Prison records in completing his task. He then spoke with the Applicant prior to the oral hearing taking place and was present at the hearing when the Applicant gave his own evidence.

37. On 17 January 2022, three days before the oral hearing, the Secretary of State advised of the change in Community Offender Manager. The Applicant's legal representative had opportunity to comment on this but did not do so. In response to the Secretary of State's application to amend the witness list, the Panel Chair noted that it was not clear as to the extent of contact between the COM and the Applicant but that this could be addressed within oral evidence. The Panel Chair also identified that the COM should be fully familiar with the case.

38. There is nothing within the Applicant's submissions to suggest that the issue of the COM's knowledge of the case was raised at the oral hearing and disregarded by the panel. Cases in which the party has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant, save in the event for instance of a failure by the other

party (for example, a failure to disclose material relevant to the ultimate decision to the Applicant).

39. In my view, the oral hearing panel was alive to the limited involvement of the COM in the case, but it was also entitled to consider the COM's evidence and weight it accordingly. The COM completed a professional assessment of the case, the panel and the Applicant were at liberty to ask him questions about it and ultimately the panel was required to reach its own judgement. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

40. In my view, there is nothing within the complaint about the panel's approach to the COM's evidence that demonstrates irrationality or procedural unfairness.

Decision

41. 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.

Robert McKeon
1st March 2022