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**[2022] PBRA 54**

**Application for Reconsideration by Atere**

## Application

1. This is an application by Atere (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 28 March 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; the dossier consisting of 426 pages; the representations relating to Reconsideration dated 14 April 2022; Representations which appear to be made in advance of an MCA decision and request for an oral hearing (which was granted); the decision of the Oral Hearing Panel (OHP) dated 28 March 2022.

## Background

4. On the 30 of November 2004 the Applicant was convicted of the offence of murder and was sentenced to life imprisonment. His tariff of 16 years expired on 30 November 2020. Atere was 19 years old at the time of the of the sentence, he is now 37 years old

5. The victim of the index offence was a stranger to the Applicant. After a confrontation in the street the victim was fatally stabbed with a knife on multiple occasions. The judge referred to the ferocity and persistence of the offence. The Applicant's account of the offence was that he was approached by the victim. The victim had the knife and was the initial aggressor. At the time of the offence the Applicant was examined by a psychiatrist who found no evidence of mental disorder. In later years the Applicant has been diagnosed with Autism Spectrum Disorder (ASD).

6. The Applicant has spent time during his sentence in a specialist mental health hospital. At the time of the hearing he was in a specialist treatment unit within a prison.

## Request for Reconsideration

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

a) That the panel irrationally placed weight upon the evidence of the prison psychologist who gave evidence and who recommended that the Applicant continue with intervention work to address risk;
b) That the panel failed to balance the psychologist's evidence against other evidence of a positive nature;
c) That the panel failed to take account of other evidence; and
d) That the panel should have provided further time to allow the Applicant's solicitors to instruct an independent specialist psychologist.

**Current parole review**

8. This was the Applicant's first Parole review. The Secretary of State had requested that the Parole Board consider whether the Applicant could be released and if not whether a recommendation for open conditions was indicated.

9. The oral hearing was adjourned at the request of the Applicant. The initial hearing date was set for November 2021. That date was adjourned to March 2022 on the request of the Applicant. The Applicant had indicated that he wished to instruct an independent expert. Two days before the panel date an application was made by the Applicant to defer the hearing. The basis of that application was firstly that the Applicant was not ready for the hearing. Secondly. he did not feel that all necessary reports and professionals were included within the hearing. No further detail was offered.

10. Also, in the deferral application the Applicant indicated that he wished for an autism expert to be appointed to the Parole Board panel.

11. The panel chair refused this application to defer. The deferral application by the Applicant did not make mention of the instruction of an independent expert by the Applicant or apply for any further adjournment or deferral in relation to the independent expert.

12. The panel hearing took place on 16 March 2022. The panel itself consisted of a psychologist member and two independent members. The witnesses consisted of the Prison Offender Manager(POM), the Community Offender Manager (COM), the prison psychologist from the specialist unit the Applicant was resident on and a prison psychologist who had prepared a psychological risk assessment. The Applicant also gave evidence at the hearing.

**The Relevant Law**

13. The panel correctly sets out in its decision letter 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*

14. 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)).

15. 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*

16. 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."*

17. 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.

18. 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*

19. 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.

20. 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.

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

22. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

23. 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.

24. 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 take into account 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.

25. 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.*"

26. 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 such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. 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. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

27. The Secretary of State made no representations.

**Discussion**

28. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. The Applicant was also legally represented throughout. Where there is a conflict of opinion, it is plainly a matter for the panel to determine which opinion they 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. 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.

29. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as 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

30. Dealing with the individual grounds for reconsideration in this case.

    7 a) That the panel irrationally placed weight upon the evidence of the prison psychologist who gave evidence and who recommended that the Applicant continue with intervention work to address risk;

    7 b) That the panel failed to balance the psychologist's evidence against other evidence of a positive nature; and

    7 c) That the panel failed to take account of other evidence.

31. These three grounds appear to address a similar point. It is clear from the reconsideration application that the Applicant strongly disagreed with the opinion of the prison psychologist relating to the need for further behavioural work and interventions. The position of the panel was that they heard evidence not only from the prison psychologist but from a second specialist psychologist within the unit occupied by the Applicant at the time of the hearing. There was also a psychologist member of the panel. The panel also heard evidence from other witnesses namely the POM and the COM. The panel considered the dossier which set out in some detail the Applicant's background and concerns about his presentation. The panel also considered the evidence of the Applicant himself. The panel were bound to exercise their judgement on the basis of the evidence presented to them. Whilst I accept that the Applicant disagreed with the views of professionals, the panel's role was to weigh all the evidence and reach a conclusion applying the statutory test. The decision indicates that they carefully considered the totality of the evidence. I therefore reject the contention that the panel decision indicates that the panel failed to consider all the evidence in this case objectively.

32. 7 d) That the panel should have provided further time to allow the Applicant's solicitors to instruct an independent specialist psychologist.

33. As noted above the Applicant had applied for an adjournment in October of 2021 to allow further time to instruct an independent expert. That application was granted and the hearing was adjourned. In December of 2021, in the Panel Chair Directions, the Chair agreed that an independent witness could be added to the timetable for the hearing. It appears no witness name was submitted, and no report was served. As indicated above a further application to adjourn was submitted by the Applicant two days before the scheduled date of the hearing. The application indicated that the Applicant was insistent that an Autism expert should be appointed to the panel. The application also indicated the Applicant did not 'feel' that all the necessary reports and professionals were included 'within the hearing'. I note that no mention was made of an independent expert or of an independent report. The application made no reference

as to whether an independent report had been commissioned or completed or as to whether an expert was expected to join the hearing.

34. Within the decision itself, no mention is made of any application by the Applicant (at the hearing) to adjourn the hearing. No mention is made in the detailed written post-hearing submission by the Applicant's legal representative of any application to adjourn. In these circumstances I can find no evidence of irrationality or procedural unfairness. The Applicant himself or his representatives had the opportunity to apply to adjourn at the hearing. In the absence of any further application and in the light of the history of a lengthy period being granted to secure an independent report in advance of the hearing, I reject the submission that the panel failed to give time to instruct a specialist. The evidence indicated that the panel were not asked to give further time and gave a substantial period of time in advance of the hearing.

**Decision**

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

**HH S Dawson**
**29 April 2022**