

[2023] PBRA 83**Application for Reconsideration by Henry****Application**

1. This is an application by Henry ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 27 March 2023, after an oral hearing on 21 March 2023, issued a decision not to direct his release on licence.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is aged 34. He has a long criminal record which includes convictions for a number of serious offences of violence. He is currently serving an extended sentence for a robbery (the 'index offence') of which he was convicted after a contested trial. In the same trial he was convicted of six other offences (blackmail x 2, unlawful wounding x 2, battery and another robbery). Some of those offences were committed against the victim of the index offence and the others against another man. Both victims are said to have been vulnerable.
4. The Applicant was aged 28 when, on 25 August 2017, he was sentenced for these 7 offences. The extended sentence for the index offence was made up of a custodial term of 8 years and a licence extension period of 4 years. There were shorter concurrent determinate sentences for the other offences.
5. The Applicant became eligible for early release on licence from his extended sentence on 30 September 2022. His case had been referred by the Secretary of State to the Board in January 2022 to decide whether to direct his release on licence when he became eligible for it. If the Board does not direct his early release he will be released automatically on licence in May 2025. His sentence will not expire until May 2029.
6. On 14 June 2022 a single member MCA panel of the Board directed that the case should proceed to an oral hearing. That hearing took place on 21 March 2023. At the hearing oral evidence was given by:
 - his prison offender manager ('POM') (Mr O);
 - the Applicant himself;
 - a forensic psychologist (Ms B); and
 - the Applicant's community offender manager ('COM') (Mr H).



7. The panel decided not to direct the Applicant's early release on licence. The Applicant, through his partner (Ms P) now seeks a direction that that decision should be reconsidered.

The test for release on licence

8. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

9. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
10. Reconsideration will only be directed if one of more of the following three grounds is established:
- (a) It contains an error of law or
 - (b) It is irrational or
 - (c) It is procedurally unfair.
11. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
- (a) A paper panel (Rule 19(1)(a) or (b)); or
 - (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)); or
 - (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).
12. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made both on the ground of procedural unfairness and on the ground of irrationality. No error of law is suggested.

The test for irrationality

13. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)** (the "**Worboys** case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

"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 was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.
15. The Administrative 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 Board in making decisions relating to parole.



16. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

The test for procedural unfairness

17. 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 from the issue of irrationality which focuses on the actual decision.

18. The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

19. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The application for reconsideration in this case

20. The Applicant through his partner Ms P advances two grounds for reconsideration of the panel's decision:

(1) He did not have adequate legal representation as his solicitor was unavailable on the day and he was assigned another member of the firm who had no knowledge of his case and was therefore unable to offer full assistance or guidance or defence.

(2) An irrational decision was made due to procedural error and the absence of evidence which would have exempted the Applicant from being the culprit in the two index offences, which was not challenged via his legal team or the Parole Board. (In fact, as explained above, there was one index offence and six other related offences of which he was convicted).

The Secretary of State's position (the Respondent)

21. By e-mail dated 21 April 2023 the Public Protection Casework Section ('PPCS') on behalf of the Respondent stated that he offers no representations in response to the application.

Documents considered

22. I have considered the following documents for the purpose of this application:



- (i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 550 and includes a copy of the panel's decision letter;
- (ii) The representations submitted by Ms P on the Applicant's behalf;
- (iii) The e-mail from PPCS stating that the Respondent offers no representations in response to the application;
- (iv) Two documents provided by the Applicant; and
- (v) Information provided at my request by the solicitors who acted for the Applicant at the hearing (see below).

Discussion

The panel's reasons for their decision

23. In any case where a panel's decision is suggested to have been irrational, it is necessary to examine the reasons given by the panel for that decision. If those reasons can be shown to have been flawed, or insufficient to support the panel's conclusions, a finding of irrationality may be made.

24. The panel in this case set out a summary of their reasons, as follows, in the concluding section of their decision letter:

"The panel carefully considered the written evidence in the dossier, the detailed evidence taken at the hearing and the written representations made on behalf of [the Applicant] by [his legal representative].

The panel took into account the work that [the Applicant] has put into his progress; he has achieved a trusted status, his engagement has improved and he is clearly an able person with the potential to succeed in living a pro-social life in the community. He expressed concern that the positives were not being taken into account and the panel acknowledged that the questioning in a hearing will necessarily focus on areas of risk or concern, but that the full picture was taken into account when assessing his case.

The panel noted the serious nature of [the Applicant's] offending against a range of vulnerable victims. Relationship difficulties were likely to be linked to [the Applicant's] difficult experiences as a teenager, including lack of structure and support and the personality difficulties that he developed. He has started to gain an understanding of some of these issues, certainly on an intellectual level.

[The Applicant] understands the strategies taught to him on the [risk reduction programme which he has undertaken], though the panel considered that there was further work for him to do in fully understanding his offending and his risks and the links to his own experiences. He needs to strengthen the learning on issues relating to intimate partner violence and he needs to address personality difficulties that have to date remained untreated.

The panel considered the statutory test for release; for the reasons set out the panel was not satisfied that it was no longer necessary for the protection of the public that [the Applicant] remained confined and the panel therefore declined to direct his release."

25. I am satisfied that there was no flaw in those reasons and that they were fully supported by the evidence in the case. In reaching that conclusion I have read the



whole of the written evidence in the dossier and, for reasons explained below, I have also listened to the recording of the oral evidence at the hearing.

26. That is not, however, the end of the matter because I must consider the two specific grounds advanced by the Applicant and Ms P in support of this application for reconsideration. For reasons which will be apparent I will start with the second ground (procedural error and the absence of evidence which would have exempted the Applicant from the index offences: as pointed out above he was convicted of seven offences including the one index offence).

The second ground

27. I can deal with this ground fairly shortly. It is based on a misunderstanding of the Board's role and powers. In carrying out its task of assessing a prisoner's risk to the public, the Board is obliged by law to proceed on the basis of the jury's verdict(s) in respect of the offence(s) of which he was convicted: it has neither the authority nor the resources to re-investigate the case. That is the task of the Court of Appeal. If there has already been an unsuccessful appeal, the Criminal Cases Review Commission may consider the case and has power to refer the case back to the Court of Appeal for fresh consideration.

28. It follows that in this case the Board cannot go behind the jury's findings that the Applicant was guilty of all the offences of which he was convicted. It appears that on the occasions of all those offences the Applicant was not alone and some of the violence was inflicted by another person. However, it was the prosecution case (and must have been accepted by the jury) that on each occasion the Applicant and the person by whom he was accompanied were acting together in a joint venture, aiding and abetting each other. Each of them was therefore liable to be convicted of being a party to the actions of the other.

29. All of that being so, the panel acted entirely correctly in approaching this case on the basis that the Applicant was guilty of all the offences of which he was convicted. It would not have been permissible for the panel to take account of any evidence (if there had been any) suggesting that the Applicant was not guilty of the offences of which he had been convicted. I cannot therefore uphold this ground for reconsideration.

The first ground

30. This ground requires more detailed consideration. Although there appears to be no authority on the point, I am prepared to accept for the purposes of this decision that there may be a reasonable argument for saying that, where (a) a prisoner's legal representative failed to present his case properly and effectively and (b) the outcome of the hearing might have been different if that failure had not occurred, those matters might be regarded as grounds for reconsideration. Where an individual's liberty is at stake, it is essential that he should have a fair hearing. Even where there has been no error on the part of the Board, it is arguable that a failure of the system due to a significant failure on the part of the prisoner's legal representative might amount to procedural unfairness.

31. In order to see whether that was the position in this case I have:



- (a) considered the representations made by the Applicant and Ms P;
- (b) considered the response given by the Applicant's solicitors to my request for further information; and
- (c) listened to the whole of the recording of this hearing, which lasted for 4 hours and 24 minutes.

32. The representations by the Applicant and Ms P have been set out in full above, and need not be repeated here.

33. The information provided by the solicitors may be summarised as follows:

"Ms X (who was to have represented the Applicant at the hearing on 21 March 2023) found on the evening of 19 March 2023 that she was unlikely to be able, for pressing personal reasons, to attend the hearing. She contacted her colleague Ms Y that evening to see if she would be able to take the case over, which she was. They discussed the case and Ms Y was provided with the dossier. Ms Y was also able to access the digital case system used by the firm, from which she could see what instructions had been received from the Applicant during the time that he had been represented by the firm. Ms Y was thus able to prepare for the hearing which was on 21 March 2023."

"Ms Y was able to have a half hour telephone conference with the Applicant on the morning of the hearing. While it would have been preferable to have had an opportunity to speak to him for a longer time, she had no control over his production for the telephone conference and she was content that she had all the information necessary to proceed."

34. The recording of the hearing shows that at the outset the panel chair, who had been made aware of the change of representative, asked Ms Y whether she had sufficient time to discuss the case with the Applicant, and she said that she had.

35. The only specific complaint which the Applicant and Ms P make about Mr Y's conduct of the case is that she did not present any evidence to challenge the Applicant's guilt of the offences of which he was convicted. For the reasons explained above, she could not properly do such a thing, and if she had attempted to do it she would have displayed an ignorance of the law and incurred the displeasure of the panel.

36. This was the Applicant's first parole hearing, and he may have been surprised and disappointed that Ms Y did not ask any questions of Mr O, Ms B or the Applicant himself.

37. As regards Mr O and Ms B, it is often wise for an experienced legal representative not to ask any questions of a professional witness. The panel members, who question each witness first, will usually (as in this case) have elicited all the evidence which the witness can give which is favourable to the prisoner. Insofar as the witness's evidence is not favourable to him (as parts of these witnesses' evidence was) there is often little to gain by challenging it: indeed, challenging it will often elicit answers even less favourable to the prisoner and strengthen the point being made against him. I am satisfied that Ms Y's decision not to ask Mr O or Ms B any questions was a sensible one.

38. Likewise, I am satisfied that Ms Y's decision not to ask the Applicant himself any questions was a sensible one. He had given extensive evidence in response to questions from the panel, and at some points his answers were damaging to his own case. It was



unlikely that his answers to further questions by Ms Y would have repaired the damage: indeed, they might very well have made it worse.

39. Ms Y did ask Mr H quite a lot of questions but unfortunately the quality of the recording was poor at that point in the hearing and much of what they each said was difficult to make out. From the little of what I could hear, Ms Y's questions appeared to be sensible and to the point, and they elicited sensible answers from Mr H. The panel in their decision letter referred to one of the proposed licence conditions which was challenged by Ms Y as being unclear, and the panel appear to have agreed with her.
40. At the end of the hearing Ms Y asked the panel chair if she could provide her closing submissions in writing after discussing them with the Applicant. The panel chair agreed, and Ms Y duly provided her submissions. They were all sensible and to the point.
41. For the above reasons I am satisfied that, whilst of course it was unfortunate that Ms X was unable to attend the hearing, these things do happen from time to time through nobody's fault and there is no substance in the complaints made against Ms Y. She was able to be properly prepared for the hearing and she clearly presented the Applicant's case professionally and effectively. I cannot therefore uphold this second ground.

Decision

42. I am sure that the panel's decision was disappointing for the Applicant and Ms P, and this decision will be equally disappointing. However, I cannot direct reconsideration of a panel's decision unless there is evidence establishing one or more of the grounds specified in the Rules. For the reasons which I have explained in detail above there was no such evidence and my decision must therefore be that I cannot direct reconsideration of the panel's decision. It was in no way irrational and there was no procedural unfairness.

Jeremy Roberts
9 May 2023

