

[2023] PBRA 94

Application for Reconsideration by Mahdi**Application**

1. This is an application by Mahdi (the *Applicant*) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 21 February 2023 following an oral hearing held remotely by video on 9 February 2023. The Panel decided not to direct the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019, as amended by the Parole Board (Amendment) Rules 2022 (the *Parole Board Rules*), provides that applications for reconsideration may be made in eligible cases (as set out in Rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational, and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. The papers are:
 - (a) an application for reconsideration dated 15 March 2023 submitted by the Applicant's solicitors;
 - (b) a copy of a transcript of the sentencing remarks made by His Honour Judge Morris QC on 16 December 2014, consisting of eight pages, supplied by the Applicant;
 - (c) the Panel's decision dated 21 February 2023; and
 - (d) a dossier of 475 numbered pages.
4. I have also listened to the Panel's recording of the hearing which was approximately four hours and 53 minutes in duration.

Background

5. The index offence was committed in the early hours of the morning of 14 February 2012 when the Applicant was 25 years old. The Applicant became embroiled unnecessarily in an altercation with a female stranger (*FS*) on the street. When *FS*'s friend and the victim of the index offence intervened, the Applicant felt threatened and punched the victim very hard on the mouth. The victim fell to the ground backwards onto his back. The Applicant left the scene but returned a minute later and kicked and stamped on the victim's head and upper body with force. The victim had a serious heart condition and the Applicant's assault ultimately led to his death. The victim was 35 years old. After his attack on the victim, the Applicant threatened two female witnesses at the scene telling them that they had seen nothing and



warning them not to give evidence against him. The Applicant left the scene and 'lay low' avoiding arrest for over a year.

6. The Applicant was initially charged with murder. At his first trial, the jury was unable to agree on a verdict. The Applicant was re-tried and was acquitted of murder because it was accepted that the Applicant had punched the victim in lawful self defence in anticipation of violence from the victim. The Applicant was subsequently charged with and convicted of wounding with intent to do grievous bodily harm. On 16 December 2014, the Applicant was given an extended determinate sentence of 16 years, comprising a custodial term of 12 years and an extended licence period of four years.
7. He completed the Thinking Skills Programme and the RESOLVE programme in 2016 and reports that he found both helpful. His custodial behaviour has, at times, been problematic and unstable and he has accrued a significant number of proven adjudications but he has not been physically violent since 2014. The Applicant was assaulted from behind in November 2022 and did not retaliate at the time or later. He has been subject to open Assessment Care in Custody and Teamwork (ACCT) documents on several occasions following threats to harm himself.
8. The Applicant's communication style and personality traits as well as his feelings of mistrust and of having been treated unfairly have made developing positive working relationships with supervisory staff difficult, compounded by frequent changes of community offender manager. The situation has undoubtedly been exacerbated by the Applicant's decision to isolate himself based on fears that his safety is at risk. Over the past few years, he has, mainly by choice, been located in segregation units across the closed prison estate. He is currently subject to an isolation regime. Over the last three months, his behaviour has been described as excellent and compliant. This is in contrast to descriptions of him when he arrived at his current location which referred to him as demanding, disrespectful, and entitled.
9. The Applicant enjoys a close relationship with his son and is actively involved in co-parenting him with his son's mother. The Applicant is currently in a relationship with another woman and is in regular contact with her.
10. It is noted that the Applicant holds Foreign National status and was served with a decision to deport in July 2021. There are no further updates about his immigration status in the dossier.

Request for Reconsideration

11. The application for reconsideration is dated 15 March 2023.
12. The Applicant argues that the Panel's decision is procedurally unfair and irrational. He submits that the Panel relied on information that was factually incorrect and/or incomplete in making its assessment of risk and in considering if he met the test for release, and that he highlighted this several times during the hearing.
13. Based on the arguments outlined in the application for reconsideration, I have distilled the main grounds of challenge and shall consider the following:

Ground 1: the Applicant submits that the transcript of the judge's sentencing remarks included in the dossier is not the correct transcript because: (i) he has obtained a copy of the transcript and the transcript in his possession correctly records that he was sentenced by HHJ Morris QC whereas the transcript in the dossier records that the sentencing judge was HHJ J Bevan QC; (ii) there is a difference in the timing of the sentencing between the two transcripts; and (iii) the transcript in the dossier makes reference to the pre-sentence report (*PSR*) and the Applicant being adjudicated for setting fire to his cell when this incident is not mentioned in the *PSR*.

The Applicant states that he drew the issue of the transcript to the Panel's attention throughout the hearing but was unable to show the Panel the correct transcript, which he states he had in his possession, because the hearing was a remote hearing held by video link.

The Applicant submits therefore that the proceedings were procedurally unfair because in making its decision the Panel referred to an incorrect transcript raising the possibility that the transcript before it did not provide an accurate record of what was said by the sentencing judge and consequently that the Panel's assessment of risk may have been adversely affected.

Ground 2: the Applicant submits that the *PSR* in the dossier erroneously refers to the Applicant accumulating 27 adjudications during the period between his initial remand into custody and the date he was sentenced. The Applicant states that only 12 of the 27 adjudications were proven and that the other 15 adjudications were either dismissed or did not proceed. In addition, the *PSR* highlights three violent adjudications involving an assault on another prisoner or fighting with another prisoner. The Applicant states that two of the adjudications were dismissed and the other adjudication did not proceed. The Applicant states that he made reference to this matter during the hearing.

The Applicant submits therefore that the proceedings were procedurally unfair because in making its decision the Panel referred in paragraph 2.1 of its decision to the adjudications described in the *PSR* and gave no weight to the fact that over 50% of them were dismissed or did not proceed and consequently that the Panel's assessment of risk may have been adversely affected.

Ground 3: the Applicant submits more generally that the proceedings were procedurally unfair because the Panel did not make further enquiries of him when he drew attention to errors in the information before them and did not give him an opportunity to present documentary evidence to support his contention that the dossier contained inaccuracies relevant to the Panel's assessment of risk.

Ground 4: the Applicant submits that the Panel's decision is irrational because it relied on factually inaccurate and misleading information in making its assessment of risk and in determining his suitability for release. By way of example, the Applicant points to paragraph 2.6. of the Panel's decision which states that his "*confrontational style caused an assessment of the need for a 4-man unlock when he first arrived*" at his current location.

The Applicant states that the 4-man unlock is a standard procedure for all prisoners on first being located in a segregation unit and is not a reflection of his behaviour. He submits that the Panel's conclusion that his behaviour was disruptive is based on factually incorrect information.

The Applicant further submits that the Panel's decision is irrational because given the inaccuracies he highlighted, the Panel did not give sufficient weight to his evidence, in particular on the issues of his dangerousness and manageability in the community.

The reply on behalf of the Secretary of State

14. The Reconsideration Team of the Public Protection Casework Section (PPCS), on behalf of the Secretary of State, made the following representations:

- (a) PPCS confirms that the Applicant is correct that he was sentenced by HHJ Morris at the Central Criminal Court.
- (b) On the issue of the PSR containing incorrect information, PPCS confirms that the Applicant is correct about his adjudications.

"... from 27 adjudications, 21 were dealt with, 12 were proven, 5 were dismissed, 4 were not proceeded with and 6 of the total adjudications were not dealt with."

"... among the adjudications for fighting other inmates, the adjudication dated 28/01/2014 was dismissed, and adjudications dated 29/01/2014 and 27/05/2014 were not proceeded with."

- (c) PPCS contacted the Applicant's prison offender manager (POM) who confirms that the 4-man unlock system is not standard procedure and was employed in the Applicant's case after his failure to comply with staff.

Current parole review

- 15. This is the Applicant's first review. The Secretary of State referred the Applicant's case to the Parole Board in May 2020. His parole eligibility date is given as 13 March 2021, his conditional release date given as March 2025, and the sentence expiry date is given as February 2029.
- 16. A Member Case Assessment panel directed the case to an oral hearing on 22 December 2020. The review of the Applicant's case was deferred twice, in August 2021 and in March 2022. The first deferral was made to give the Applicant's legal representative time to commission a psychological risk assessment (PRA) on behalf of the Applicant and the second deferral was made because a report from the community offender manager (COM) was outstanding.
- 17. The Applicant's case was subsequently listed to be heard on 22 September 2022. The case was adjourned on the day because more information was required by the Panel. Comprehensive directions were made for two reports from the POM, a security report, a report from the mental health in-reach team, a report from the

COM, a report from the Home Office about the Applicant's immigration status, and an addendum to the PRA dated 1 April 2021. It was agreed that the hearing would resume on 9 February 2023.

18. A remote hearing by video took place on 9 February 2023. The dossier contained a report dated 30 January 2023 from the POM, a report dated 31 January 2023 written by the probation practitioner standing in for the COM, and a PRA addendum dated 6 February 2023 from the prison psychologist (*Prison Psychologist*). It was agreed with the Applicant's legal representative that evidence would be taken in the following order: the POM, the Prison Psychologist, the probation practitioner standing in for the COM, and the Applicant.
19. There is a victim personal statement in the dossier from the victim's mother who describes the significant and devastating impact of the victim's death on her and other members of the victim's family.

The Relevant Law

20. The test for release is correctly set out in the Panel's decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

The Parole Board Rules 2019 (as amended)

21. Under Rule 28(1) of the Parole Board Rules, the only types of decisions which are eligible for reconsideration are those concerning whether 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)).
22. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (Rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (Rule 28(2)(c)) and serious terrorism sentences (Rule 28(2)(d)).

Procedural unfairness

23. 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.
24. 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.

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

Irrationality

26. 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 paragraph 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."

27. 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.

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

Discussion

29. **Ground 1**: the Applicant submits that the dossier included an incorrect transcript of the sentencing judge's remarks raising the possibility that the Panel did not have an accurate record of what was said by the sentencing judge and consequently that its assessment of risk may have been adversely affected.

30. PPCS has confirmed that the Applicant was sentenced by HHJ Morris QC but this does not address the Applicant's submission that the Panel did not have an accurate record of what was said by the sentencing judge.

31. The judicial sentencing remarks form an extremely significant piece of evidence in this case as they describe the index offence in detail and discuss the basis on which the sentencing judge makes a finding that the Applicant meets the statutory test of dangerousness. In his report dated 30 January 2023, the POM stated, "[The Applicant] believes there are certain discrepancy in his case file: in particular he tells me the judge's comments on file are incorrect along with his pre-sentence report. We discussed these issues at length, and I agree that there seems to [be] some issues with both reports, but it is not my role to unpick these issues and I

advised him this needs to be addressed with his legal representative and seek the correction."

32. There is an overriding duty to ensure that the Applicant has a fair and just hearing. Having had this potential issue drawn to her attention in the POM's report, the panel chair should have raised it with the legal representative before the hearing or directly with the Applicant at the hearing. Having listened to the recording of the hearing, the Applicant mentions the "*transcript*" at least twice during his evidence. This presented the panel chair with two further opportunities to address this issue, which were not taken up.
33. The question is therefore whether this amounts to procedural unfairness. A word for word comparison of the transcript in the dossier with the copy of the transcript provided by the Applicant reveals that different judges were named as the sentencing judge. There is also a difference of seven minutes in the time taken to deliver the judgement, but this is accounted for by additional remarks made by HHJ Morris QC directly to the Applicant (which are noted on the Applicant's copy of the transcript). While there are differences between the two transcripts, they are minor in nature and are either typographical errors, stylistic differences, or drafting improvements. It is clear that the Applicant's copy of the transcript is an earlier draft of the transcript in the dossier.
34. I obtained the correct transcript of the sentencing judge's remarks from PPCS. Apart from the change in the sentencing judge, who is HHJ Morris QC, the correct transcript is the same as the transcript included in the dossier.
35. While I find that there was a procedural irregularity, I am satisfied that it did not produce a manifestly unfair or unjust result because the sentencing remarks in the dossier represented a true and accurate record of what was said by the sentencing judge, albeit that the sentencing judge was incorrectly named.
36. **Ground 2:** the Applicant submits that in paragraph 2.1 of its decision the Panel accepted information from the PSR on his pre-sentence adjudications and gave no weight to the fact that over 50% of them were dismissed or did not proceed, and consequently the Panel's assessment of risk may have been adversely affected.
37. Paragraph 2.1 of the Panel's decision does not refer to the PSR and there is no suggestion that the Panel relied on the PSR for an accurate summary of the adjudications made against the Applicant between the time he was remanded and the date of his sentence. The dossier contains a list of the adjudications made against the Applicant from 8 May 2013 to 16 February 2022 and provides details of how they were dealt with. I can see no error in the Panel's summary of the adjudications that were made before the Applicant was sentenced, and I am satisfied that there was no procedural unfairness in the proceedings based on the submissions made under Ground 2.
38. **Ground 3:** the Applicant submits as a general point that the Panel did not make further enquiries of him when he drew attention to inaccuracies in the information before them and did not give him an opportunity to present documentary evidence to support his contention that the dossier contained inaccuracies relevant to the Panel's assessment of risk.



39. The Applicant claimed that a great deal of the information in the dossier about his behaviour was false, incomplete, or misleading, and that he had been unfairly treated. Having listened to the recording of the hearing, I note that the Applicant told the Panel on several occasions during the hearing and towards the end of the hearing, that he had papers including letters of complaint which supported his claims. He said expressly that the drug-related security intelligence about him was false as he did not drink alcohol or smoke drugs and he told the Panel that he had all his urine tests. He also mentioned that in 2020 after he had reported a prison officer for colluding with other prisoners in breach of prison rules, his life had become hell and false information was recorded about him. The Applicant said that the prison officer he had reported had since been convicted of a drug-related offence.
40. The Panel makes a series of generalised and non-specific statements about the Applicant's behaviour, attitudes and thinking throughout its decision. There are no findings of fact on areas which are disputed by the Applicant and no indication of what weight was given to certain allegations or the security intelligence recorded about him. There is no assessment of the strategies he is currently using to manage his risk of violence and no meaningful discussion of his protective factors. Given the issues raised by the Applicant during the Panel's questioning of him, in particular about the security intelligence and the negative behaviour entries recorded against him, it was open to the Panel to seek further evidence from the POM to assist it in making findings about these areas of dispute however, this was not done.
41. At no stage did the panel chair ask the Applicant what papers he had in his possession and whether he wanted the Panel to see any of that information. Since the Panel did not explore what information that Applicant held, there is nothing to be gained by speculating about its possible value or relevance to the credibility of the Applicant's claims, the reliability of the security intelligence about him, his fears for his safety, or the manageability of his risk. If the hearing had been conducted in person, the panel chair is likely to have taken time to review the Applicant's information and taken a considered and pragmatic decision about how to proceed. The Applicant should not have been prejudiced by the remote format of the hearing.
42. I am satisfied that the failure to discuss expressly with the Applicant what information he had in his possession and to explore its relevance to the review of his case constituted a procedural unfairness resulting in the proceedings being fundamentally flawed.
43. **Ground 4:** the Applicant submits that the Panel's decision is irrational because it relied on factually inaccurate and misleading information in making its assessment of risk and in determining his suitability for release, and that the Panel did not give sufficient weight to his evidence in particular on the issues of his dangerousness and manageability in the community. These submissions are in effect addressed in Ground 3 and it is therefore unnecessary for me to determine whether the Panel's decision is irrational.



44. An issue to be addressed for completeness is the Applicant's contention that the 4-man unlock is a standard procedure for all prisoners on first being located in a segregation unit and not an indication of a prisoner's behaviour. In its representations, PPCS confirms based on information from the POM that the 4-man unlock system is not standard procedure and was employed in the Applicant's case after his failure to comply with staff. This matter was addressed thoroughly by the Panel during the hearing by asking questions of the POM and the Prison Psychologist. The POM told the Panel that the 4-man unlock reflected an assessment of the risk the Applicant presented at the time and that it had been reduced to a standard unlock on 13 October 2022. The Prison Psychologist told the Panel that due to the huge pressure on resources, a decision to employ four prison officers for an unlock would not have been taken lightly. As the Panel's assessment of this information was entirely correct, the issue of irrationality does not arise.

Decision

45. I find that the Panel's decision dated 21 February 2023 to be procedurally unfair. I do so solely for the reasons set out above in relation to Ground 3. The application for reconsideration is therefore granted.

Hedd Emrys
18 May 2023