

[2025] PBRA 16

Application for Reconsideration by Moden

Application

1. This is an application by Moden (the Applicant) for reconsideration of a decision of a panel of the Parole Board made on the papers. The date of the decision is 3 December 2024 and the decision was not to release the Applicant and to make no recommendation for open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2024) (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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These include a dossier of 405 pages, the decision letter and the application for reconsideration, made on behalf of the Applicant by his legal representatives. I also asked for and received a chain of emails between the legal representatives, PPCS and the Case Manager, and a chain of emails between Parole Board staff (Case Manager and Panel Chair Support officer and the Chair of the panel). The content of some of these emails are relevant to my consideration. I also considered the Parole Board Guidance on Allegations.

Request for Reconsideration

4. The application for reconsideration is dated 20 December 2024.
5. The grounds for seeking a reconsideration are somewhat confused or perhaps just conflated in the Application. I will use the concluding summary of the Application to inform me of these grounds and then impose my own structure on them. These are stated as:
 - a) that the incorrect test was applied within the decision letter with regards the burden of proof (I therefore consider this relevant to the ground of Error of Law).
 - b) that the unproven allegation was not dealt with correctly, nor in accordance with the Parole Board's own guidelines, and the oral hearing should have continued to allow the Applicant to give oral evidence (I will deal with this under Procedural Unfairness).



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

Background

6. The Applicant is serving a sentence of imprisonment for public protection (IPP) for the offence of s.18 Wounding with intent (grievous bodily harm). He was 28 years of age at the time of sentence. He was given a tariff of 39 months and this tariff expired on 31 May 2010. He has been released on licence by the Parole Board on 5 different occasions and his licence was revoked on each occasion, which mean that he was sent back to custody. The most recent release was on 30 May 2023, and his licence was revoked on 20 October 2023 and the Applicant was returned to custody the next day on 21 October 2023. The review under consideration is the first review of this fifth recall.

Current parole review

7. The Secretary of State referred the case to the Parole Board to consider release, and failing that, whether the panel recommended transfer to open conditions. The referral is dated 15 November 2023. A single member of the Parole Board (MCA member) considered the referral on 31 January 2024 and adjourned it for further information relating to further alleged offences. The MCA member panel adjourned the case again on 22 April 2024 for further information because the allegations continued to be under investigation by the police. The allegations were for the offences of robbery, going equipped for theft and using threatening/abusive insulting words/behaviour with intent to cause fear of/provoke unlawful violence.
8. There were no legal representatives on file at that time. The MCA member noted in the second adjournment that the Applicant denied the allegations. This information was obtained from a report by the Community Offender Manager (COM).
9. Undated legal representations followed the second adjournment. In these representations it was submitted that there had been a delay in taking instructions from the Applicant, however they had now been received. The representations stated that the Applicant disputed the allegations, but because they were still under investigation, full representations on them would not be provided in order not to prejudice the ongoing criminal investigations. The representations however went on to say that should the Applicant be charged with the matter he would plead not guilty. It was also stated that he would be applying for release from any panel of the Parole Board. An oral hearing was requested.
10. On 21 June 2024 the MCA member adjourned the review for a third time because the direction for a police report had not been complied with. On 27 July 2024 the Applicant's legal representatives provided further submissions. These stated concerns about the delays and the impact on the Applicant. It was submitted that there should be a further adjournment or that the case should be directed to an oral hearing in the hope that the police investigation would be concluded by the time of the hearing.
11. On 26 July 2024, the MCA member directed the case to an oral hearing. By this time a police report had been added to the dossier that stated that there would be no further action taken in respect of the allegations. In directions made by the MCA



member, further information was directed from the police about the allegations, including any witness statements and CCTV information.

12. I can see from the dossier that CCTV information was provided and seen by both parties as well as the panel and the COM.
13. The case was listed for an oral hearing on 12 December 2024. On 14 November 2024, the panel chair provided directions. In these they indicated that in light of the CCTV material, additional police report and an update from the COM, submissions were directed under Rule 21 for parties to make representations 'to see if the matter can be concluded on the papers'. A deadline of 2 December 2024 was provided for the representations. The panel chair also sought to ensure that the legal representatives and the Applicant had also viewed the CCTV material.
14. I now turn to the chain of emails that I referred to in paragraph 3 above. The panel chair was waiting for the Rule 21 submissions from parties. I can see that the dossier contains a note to the Parole Board from the Secretary of State for Justice indicating that they made no submissions under Rule 21 and it was a matter for the Parole Board. I can see that no submissions were received from the legal representatives by the deadline of 2 December 2024. What appears to have happened was that, in error, the Applicant's legal representatives sent an email to PPCS, the Secretary of States representatives. This email to PPCS is dated 2 December 2024 and states as follows: "*Further to my previous email in this matter, I was due to have a telephone call with [the Applicant] this morning to take further instructions, however he was taken to the hospital for an MRI scan and so this could not go ahead. I apologise that I cannot provide any further update today, however endeavour to do so by the end of Wednesday.*" I am reminded that 2 December 2024 was the deadline for any submissions. This email does not ask for an extension for the deadline but I consider that it likely that any panel chair seeing this would assume that this was a request for an extension. I note that the 'Wednesday' in question would be the 4 December 2024.
15. As I indicated, this email was sent in error to the Secretary of State. I can see that the panel chair queried from the Parole Board secretariat whether anything had been received from the Applicant or his legal representatives on 2 December 2024, but obviously nothing had been sent to the Parole Board. The panel therefore went ahead and finalised its decision the next day, noting that there were no submissions.
16. It appears that the earliest the panel chair was advised that there were any legal submissions was around 3pm on 3 December 2024. From reading the chain of emails it appears that staff at PPCS forwarded the email sent to them in error to the Parole Board Case Manager on 3rd December. The decision had been finalised by then and therefore the panel was *functus officio*.
17. On 3 December 2024, having received the decision letter, the Applicant's legal representatives emailed the case manager at the Parole Board. In this email the legal representations state that they had replied twice to the email chasing directions. After some investigation into this, I have found no evidence that the Parole Board sent any chasing emails with respect to the Rule 21 directions. I can see that one email was sent from PPCS to various recipients including the legal representatives, and this does look a little like an email chasing directions (which



would not be appropriate for PPCS to do with the prisoner's legal representatives) but about an entirely different matter. It may be that, having responded directly to the PPCS about that different matter, the legal representatives then carried on responding directly and in error to that particular email address asking, effectively, for more time for the Rule 21 submissions.

18. Having queried this issue on 3rd December 2024, the legal representatives were informed that the decision had now been made and their only recourse was an application for reconsideration.

The Relevant Law

19. The panel correctly sets out in its decision letter dated 3 December 2024 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 (as amended)

20. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
21. 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)).
22. 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**.

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;



- (e) the panel did not properly record the reasons for any findings or conclusion; and/or
- (f) the panel was not impartial.

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

Error of law

26. An administrative decision is unlawful under the broad heading of illegality if the panel:

- a) misinterprets a legal instrument relevant to the function being performed;
- b) has no legal authority to make the decision;
- c) fails to fulfil a legal duty;
- d) exercises discretionary power for an extraneous purpose;
- e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- f) improperly delegates decision-making power.

27. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Reconsideration as a discretionary remedy

28. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Secretary of State (the Respondent)

29. The Respondent made no submissions in response to the application.

Discussion

30. I will first deal with the complaint that the panel used the wrong test in making any findings in relation to discontinued criminal allegations. The application states that in the decision letter the panel incorrectly applied the criminal standard of proof and not the civil standard in its approach to making any findings. In brief, the criminal standard of proof is a higher standard – beyond reasonable doubt, whereas the civil standard of proof offers a lower bar to any finding – on the balance of probabilities, or that something was 'more likely than not' to have occurred.

31. The panel did indeed use the following words in relation to the identification of the Applicant on CCTV that they had seen: "*The panel was therefore certain that [the Applicant] was involved ...*"



32. In my view the word '*certain*' is not necessarily indicative of the use of the wrong standard of proof and I note that in the same paragraph, in relation to a finding that the Applicant had a knife, the panel used words indicating the application of the correct civil standard of proof '*more likely than not*'.
33. In any event, even if the panel had applied the wrong standard of proof, this actually would present an even higher bar for the finding of a particular matter because the criminal standard of proof is as explained above, a higher one (beyond reasonable doubt). There was no injustice or unfairness to the Applicant if the panel did indeed use the higher standard of proof.
34. I therefore dismiss this part of the application.
35. The second ground is of procedural unfairness. The application quotes both case law and parole Board Guidance on Allegations (Guidance) in support of the application. In essence, the application states that since there were unproven allegations, instead of concluding the case on the papers the Applicant should have been allowed to answer any questions with respect to the allegations and provide his account at an oral hearing. The application states that the use of the Rule 21 process did not allow the Applicant to answer the allegations against him, and therefore the process was unfair. The application also states that this remains the case even though they accept that the panel did not have any Rule 21 legal representations on behalf of the Applicant before them prior to concluding the case on the papers.
36. I have no difficulty in accepting the submissions made in the application on the case law and with respect to the Parole Board Guidelines. However, I cannot see that there was, in this case, any procedural unfairness to the Applicant.
37. Firstly, the Rule 21 procedure was correctly followed. That the legal representatives unfortunately appear to have sent their Rule 21 representations to the wrong recipient (PPCS) is not the fault of the panel. The panel chair correctly checked whether any representations had been received by the deadline, and when advised none had been received, the panel concluded the matter on the papers. There is no procedural unfairness.
38. Secondly, the application indicates that in any event, given that there were (unfounded) allegations that the panel considered, it would have been appropriate to hold an oral hearing to consider them. I can see no direction in case law or in the Guidance that states that if there are allegations that need to be considered, the case cannot be concluded on the papers. Nor is there any such Rule in the Parole Board Rules. The relevant part of the Guidance states that a "*prisoner must have a fair opportunity to contest any allegation.*" It then goes on to state that "*this may be achieved through oral evidence, written submissions, or in interview with a Community Offender Manager (COM) depending on what is fair in the case.*"
39. I note the reference to written submissions in the Guidance. There are legal submissions in the dossier that state clearly that the Applicant denied the allegations. I further note the reference to any interview between the COM and the Applicant in the Guidance. The most recent report from the COM in the dossier



indicates clearly that they had a full discussion with the Applicant about the allegations, all of which he denied and also that they (the COM) had seen CCTV footage (which was seen by all parties including the Applicant and his legal representative) and that he was 'clearly seen holding a sharp knife' during the incident alleged.

40. The decision letter indicates that the panel was fully aware that the Applicant denied the allegations and took that into account. The decision letter also refers to the evidence of the COM following interview with the Applicant about the Applicant's response to the COM. The panel also viewed the CCTV footage. I find that the panel therefore had carried out its duty to ensure fairness to the Applicant before it made its decision.

Decision

41. Refusal – For the reasons I have given, I do not consider that the decision was procedurally unfair or wrong in law and accordingly the application for reconsideration is refused.

Chitra Karve
21 January 2025