

[2020] PBRA 135

## Application for Reconsideration by Brown

### Application

1. This is an application by Brown (the Applicant) for reconsideration of a decision of an oral hearing panel dated 27 July 2020 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 (including the decision letter) of 595 pages and the Applicant's submissions drafted by his legal representative.

### Background

4. On 27 June 2002 the Applicant was sentenced to an automatic life sentence for offences of robbery and possession of an imitation firearm with intent to commit an indictable offence, committed on the 3 November 2001. There were concurrent determinate sentences for a further attempt of robbery and a theft.
5. The minimum custodial term was set at three years and expired on 27 June 2005.
6. On 11 May 2018, the Applicant was moved to open conditions but returned to closed conditions on 3 July 2019 because of his poor conduct.
7. The Applicant was aged 42 years old at the time of conviction and is now aged 60.

### Request for Reconsideration

8. The application for reconsideration was received on 21 August 2020 and is made on the basis that the decision not to release the Applicant was both irrational and procedurally unfair.
9. The grounds for seeking a reconsideration on the basis that the decision was irrational are as follows:



- a. *"The panel made a finding of fact in respect of the Applicant's behaviour on two occasions, the 21 March 2019 and the 15 May 2019, in the presence of two dental nurses which was contrary to the evidence given at the hearing;*
  - b. *There is a lack of evidence to conclude that the Applicant has developed a new area of risk, namely sexual violence;*
  - c. *The panel did not give sufficient weight to the positive aspects of the Applicant's case".*
10. The grounds for seeking a reconsideration on the basis of procedural unfairness are as follows:
- a. *"There is an inaccurate recording of the evidence in respect of the Applicant's behaviour on the two occasions in 2019 in the presence of the two dental nurses".*

### **Current parole review**

11. On 10 December 2018, the case was referred to the Parole Board by the Secretary of State to consider whether or not to direct the Applicant's release or, failing that, whether or not to recommend his move to open conditions.
12. The oral hearing had to be adjourned twice but finally took place on 27 July 2020; the hearing had to be held remotely by telephone because of the restrictions caused by the Covid-19 pandemic. The panel heard from the Applicant who was legally represented, and from the Offender Supervisor, the Offender Manager a prison psychologist and the two dental nurses.

### **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.

#### *Irrationality*

14. 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."*

#### *Procedural unfairness*

15. 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.

16. 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.

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

#### Other

17. 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.*"

#### The reply on behalf of the Secretary of State/the prisoner

18. The Secretary of State did not make any representations in response to the application.

#### Discussion

19. The primary submissions made on behalf of the Applicant concern allegations of sexually objectionable behaviour on the part of the Applicant in the presence of two dental nurses who were engaged in his treatment.
20. The first occasion occurred on 21 March 2019. The submissions describe the witness as having said that she had not seen any specific sign of sexual arousal, and that when asked the question "*were you in any doubt it was reality*", she replied "*may be*". She also said she had not felt at risk of serious harm, that the Applicant had made no eye contact with her and had said nothing inappropriate.
21. The decision letter said the nurse had noticed the Applicant rubbing himself and that he had been seen to be sexually aroused. It recounted that the nurse had not complained on that occasion in case she had been mistaken about what he was doing.
22. As to the second occasion, it is submitted that the evidence was that the Applicant had been rubbing himself and had a hand on his groin next to his penis; the nurse on this occasion said his hand was more on his leg than his groin.

23. The decision letter records the nurse telling the panel she had noticed the Applicant rubbing the top of his leg in the groin area with his open hand. It is also recorded that the nurses said they had not felt concerned or threatened at the time and had not claimed to have suffered psychological harm. It is also recorded that on the second occasion they spoke to the dentist, but he had not noticed anything.
24. It seems to me that the very succinct summaries given in the decision letter were accurate and come very much within the ambit of the test in **Oyston**.
25. The reconsideration process follows, as far as is possible, the practice of Judicial Review. Courts dealing with Judicial Review applications do not normally interfere with a decision maker's assessment of the evidence, although they will reverse a finding which has no justifiable basis or which flies in the face of the evidence. Usually, there are at least two interpretations to be put on any set of facts. Provided there is a justifiable basis for the finding, arguing that there is an alternative explanation which the panel might have preferred is almost always going to fail.
26. In this case, there was ample evidence to support the panel's findings.
27. However, the two incidents have to be put into a somewhat wider context. The panel noted that there had been concerns about the Applicant's sexualised behaviour throughout his custodial history. I have counted 15 occasions of sexualised behaviour referred to in the decision letter for the period 1998 to 2019. This seems to tally with the Offender Supervisor's report dated November 2019 which refers to 15 complaints or allegations having been made against him.
28. The second incident took place during the afternoon following a meeting between the Applicant and his probation officer and the Governor in charge of security at which the Applicant's concerning behaviour was discussed. This did not prevent the incident taking place during the afternoon.
29. The incidents were considered by the prison authorities and formed part of the basis for the decision to return the Applicant to closed conditions.
30. The professional witnesses, namely the prison psychologist, the Offender Supervisor and the Offender Manager all recommended that the Applicant remained in closed conditions with the possibility of moving to a specialist unit where his sexualised behaviour could be monitored and treated.
31. It follows that, even without considering either alleged incident, the evidence was strongly against release.
32. Turning to the second ground, the psychologist assessed the Applicant's risks of future violence as moderate but said they could increase to high if his previous risk factors reappeared.
33. The Offender Manager assessed the Applicant's risk to women as imminent and high if released. She accepted there had been no recent incidents of sexual violence but remained concerned about the continuing sexualised behaviour and said more serious incidents could occur without being detected if the Applicant was in the community.

34. The Offender Manager's view was that the Applicant's risk of future violence remained high.
35. The risk a person poses will always be dynamic, and one panel is not bound by the assessment of an earlier panel. The question is not whether the reconsideration panel would have come to the same view but whether there was evidence to justify the assessment made by the oral hearing panel.
36. The same consideration applies to the third ground. It is an insufficient basis for a challenge to a panel's decision simply to put forward a reasonable, alternative conclusion consistent with the evidence, because as Lord Hailsham remarked in **Re W (An Infant) [1971] AC 682** "*Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right to be regarded as reasonable.*"
37. I do not regard the summary of the incidents with the dental nurses as inaccurate and, in any event, a mistake by a panel would not amount to procedural unfairness.

## Decision

38. 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.

**James Orrell**  
**29<sup>th</sup> September 2020**