

Application for Reconsideration by Goffe

The Application

1. This is an application by Goffe (the Applicant) for reconsideration of a decision made by a panel of the Parole Board (the OHP) dated 23 October 2020 not to direct his release, which followed an oral hearing held remotely on 15 September 2020.
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. This is an eligible case.
3. I have considered the application on the papers which I received on 9 November 2020. They consisted of the dossier containing 765 pages, the Panel's decision and detailed representations made on behalf of the Applicant.

Background

4. The Applicant is now 30 years of age. He has a long criminal history having first been convicted at the age of 10. At the point of being sentenced for the index offence he had 8 convictions for offences of violence. On 8 June 2011, having been convicted by a jury of manslaughter, he was sentenced to a term of imprisonment for public protection. The minimum term set by the judge was 5 years and 6 months, less time on remand. The tariff expiry date is stated as 21 September 2015. The index offence was committed in March of 2010 when the Applicant was 18 years of age.
5. In October 2019 the Applicant's case had been referred to the Parole Board to consider if it would be appropriate to direct his re-release on licence. The referral was twice adjourned before it was heard on 15 September 2020 before a two member OHP comprising a Judicial Member and an Independent Chair. The Applicant was represented by Solicitors throughout, who continue to represent him in respect of this application.
6. The OHP identified a number of risk factors which increased the Applicant's risk of re-offending and causing serious harm.
7. Following an earlier parole review, the Applicant had been transferred to open conditions in March 2016 from where he absconded in August of that year. Released by a panel of the Parole Board in August 2017 he was sent to accommodation away from his hometown, where the index offence had occurred. As a specific condition of his licence he was excluded from entering an identified exclusion zone. The Applicant cooperated relatively well with supervision requirements but there were a number of concerns on the part of those



responsible for his supervision regarding his conduct, general compliance and his relationship with his partner who in due course gave birth to their son on 4 April 2019.

8. Despite the fact that the Applicant was, in the opinion of the OHP, making some progress while on licence, it noted that the dossier contained extracts from police intelligence which painted a concerning picture. While placing no reliance on some of this intelligence material the Panel reached the conclusion that the Applicant had "*wilfully and repeatedly*" breached the exclusion zone restricting him from entering his hometown. In addition, further concerns were being raised regarding the Applicant's relationship with his partner. The Applicant accepted during his evidence that there were arguments between them during the early months of 2019 regarding financial difficulties and pressures associated with his partner's pregnancy, which arguments had led to police visits to their home.

9. It was against this background that the Applicant's partner's cousin hosted a house party at an address in the Applicant's hometown on 6 April 2019 ("the April event"). What occurred played an important part in the decision to recall the Applicant back to prison, and indeed plays a central part in this application. It is in my judgment necessary to set out the following matters regarding the April event all of which were in evidence before the Panel and which were developed in varying degrees of detail in the Decision Letter:

i. The Police received a 999 call from an anonymous caller from an address within the Applicant's exclusion zone. The caller reported a disturbance and that there were children present.

ii. The Police arrived to find a very large number of people in the house. Many were complaining of being assaulted. Most of the adults present were drunk.

iii. Allegations were made that the Applicant had been at the party and had assaulted a number of people.

iv. One guest, according to police, was completely sober and gave a coherent account of an assault by the Applicant on the homeowner's partner.

v. It was alleged that the Applicant had threatened to set fire to the house and kill everybody there. A police 'threat to life warning' was issued and a marked police vehicle was positioned outside the house. Safeguarding reports and referrals were made regarding the children who were present.

vi. The Applicant had allegedly left the house before the police arrived.

vii. CCTV footage had captured the Applicant's partner's car, containing the Applicant, at 6.30pm that evening on the edge of the exclusion zone. Other CCTV footage captured the car parked in a street adjacent to the house party at 7.23 pm and at 11.07 pm. The Applicant gave evidence that he was at home all evening (outside the exclusion zone) and that his partner who had given birth two days before had parked her car at that location for the purpose of visiting her mother. The Applicant told the Panel that his partner's mother lived approximately two miles away from the house where the event took place. A receipt from a shop near to his partner's mother's address which was timed at 11.23 pm had been recovered.

viii. The Panel recorded in their Decision Letter that no formal police action was taken after the Applicant's arrest as all the statements taken by the police were either amended or withdrawn.

10. Following the Applicant's recall to prison the OHP noted a number of incidents of concern regarding the Applicant's conduct in prison between May and November 2019, to which I shall return.

Request for Reconsideration

11. The grounds for seeking a reconsideration on the basis of irrationality and procedural unfairness are set out in some detail by the Applicant's solicitors in an amended document headed "*Reconsideration Mechanism Submissions*" dated 3 November 2020. In short, it is submitted that the OHP acted irrationally in placing any reliance upon the events of the April event and were procedurally unfair when declining to seek further information/evidence regarding it.

The Relevant Law

Parole Board Rules 2019

12. 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)).

13. 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

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."

15. 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.

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

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 to the issue of irrationality which focusses on the actual decision.

18. 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.

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

The reply on behalf of the Secretary of State

20. No submissions have been made on behalf of the Secretary of State.

Discussion

21. I propose to set out briefly my approach to the determination of this application.

22. First, the case of **R (ex - parte Wells) v The Parole Board [2019] EWHC 2710 Admin** provides helpful guidance on my approach. It is guidance I am bound to follow. Rather than ask the simple question was the decision being considered irrational, **Wells** suggests that the better approach is to test the panel's ultimate conclusions against the evidence before it and ask whether its conclusions can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

23. Secondly, a panel, whether it be an oral hearing panel or a reconsideration panel, is required to explain clearly its reasons and ensure as best it can that its stated reasons are sufficient to justify its conclusions. Where an oral hearing panel arrives at conclusions based on the evidence it has considered and having regard to the fact it saw and heard the witnesses, it would be inappropriate to direct a reconsideration unless it is manifestly obvious that there are compelling reasons for interfering with the panel's decision.

24. Thirdly, the reconsideration mechanism is not a process where I am required to indicate whether or not I would have reached the same or a different conclusion from that of the OHP.

25. Fourthly, it follows from the foregoing that the question that lies at the heart of my determination of this application is whether I am satisfied that the conclusions reached by the OHP are (a) adequately explained and (b) justified by the evidence they considered.

26. Fifthly, guidance is also provided in my determination of this application by another decision of the High Court in the case of **Morris v The Parole Board [2020] EWHC 711 (Admin)** in which the court dealt with how the Board should treat allegations of misconduct or criminal offending which have not been proved either to the civil or the criminal standard of proof. In that case the court drew a distinction between "a mere allegation", that is, an allegation which has no evidential basis whatsoever, and an allegation with "some basis to it" into which a panel decides to carry out an investigation regarding the conduct of an offender which allows it to decide whether the allegation that has been made has "some" basis in fact.

27. Finally, I have taken into account the Parole Board's own "**Guidance on Allegations**" dated March 2019 and published on 11 April 2019. In summary, the Guidance states that allegations made should be disregarded only where they are not relevant. If relevant, a panel should go on to make a finding of fact. If they cannot make a finding of fact, it is encouraged to consider the "level of concern" raised by the allegation. The guidance provides:

"19. To make an assessment of concerns arising from an allegation , panels will need to decide:

- a. What ,if any, relevance the allegation has to the parole review; and*
- b. The weight to attach to the concerns rising from the allegation;*
and then form a judgment as to the relevance and weight, if any, to be attached to these concerns, and the impact this has on the panel's overall judgment"

28. With these matters in mind, I turn to deal with the submissions made in support of the Applicant's case for reconsideration.

Irrationality

29. It is submitted that:

i) The OHP placed disproportionate and unfair weight on the allegations made to the police at the April event regarding the Applicant's conduct, which enabled the OHP to determine that the Applicant's recall to prison was appropriate and which, in turn, led to the decision not to recommend his re- release.

ii) There was no independent evidence that the Applicant was ever at the party.

iii) There was no evidence to indicate why several complainants subsequently withdrew their allegations.

iv) The OHP's failure to ascertain why the Applicant was never arrested for assault, renders the April event a "mere allegation" and therefore unworthy of any investigation or consideration by the OHP.

Procedural Unfairness

30. It is submitted that:

i) The OHP acted unfairly in refusing a pre-hearing application for disclosure of material.

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ii) In reaching its ultimate decision the OHP failed to take into account statements from two witnesses both of whom said that the Applicant was not present at the event.

iii) But for these instances of procedural unfairness the outcome might have been different and therefore they can be described as procedurally unfair.

31. I shall consider first the claim of **Procedural Unfairness.**

32. It was submitted on behalf of the Applicant in support of his request for disclosure, that in its absence the Applicant could not receive a fair hearing because he was never arrested in respect of the allegations of assault.

33. The disclosure sought included the previous convictions of all those who made complaints of assault; a full list of all police call-outs over the previous two years to the address where the event was held; the notebook entries of officers who attended the scene; all witness statements taken by the police and an explanation from "a senior officer" why the Applicant was not arrested.

34. The Panel Chair responded declining all but two of the five requests. In doing so it was made clear that the view that had at that stage been taken by the OHP was that the information contained in the dossier was sufficient for the OHP's purposes bearing in mind that the Applicant was denying ever being present at the event. It was noted that in the OHP's view a letter from a senior officer regarding the lack of an arrest would not assist an experienced panel in its understanding of the April event. The response went on to direct the provision of witness statements and pocket notebook entries to the Applicant's solicitors. In my judgment, the response of the Chair was appropriate and fair. It is important to recall that the Applicant's case was that he was not present. I am unable to find that this ground meets the test for procedural unfairness.

35. The two statements, referred to in the Applicant's solicitors written submissions, which they submit ought to have been referred to specifically by the OHP, were in the dossier along with a third statement. The two statements referred to in the Applicant's submissions were from family members. Neither statement gave the appearance of having been made to the police. As I read them, in the case of one it says nothing about the event itself and in the case of the other the witness simply says that the Applicant was not, as far as the witness could see, present in the house for the party. It is submitted that the OHP failed to give these statements any consideration. That is an inappropriate and unsubstantiated assumption to make. The statements were in the dossier and it must be assumed that they were read and considered. The fact they were not specifically referred to in the Decision Letter is not to the point. There is, I find, no merit in this ground.

36. Given my findings in relation to the first two grounds, it follows that I am quite simply unable to find that but for these matters the outcome might have been different.

37. I turn to deal with the claim of **Irrationality.**

38. The OHP were required to examine the evidence as a whole in order to decide whether the Applicant met the statutory test for release, and as part of their considerations, decide whether the Applicant's conduct justified his recall to prison. It is submitted on the Applicant's behalf that the evidence regarding the April event was so deficient and

defective that no reasonable panel could have concluded that recall was justified. If I have understood the Applicant's submissions correctly, they are to the effect that if the recall was not justified there was an absence of other evidence that could have justified a decision to refuse re-release.

39. The OHP were satisfied that the Applicant attended the April event in contravention of his licence conditions and while there became involved in a physical altercation with one or more people. Based on those findings the OHP concluded that the Applicant's risk of serious harm had increased and consequently that his risk had become unmanageable in the community and therefore his recall to prison was justified. In effect, it is submitted on the Applicant's behalf that that finding, by itself, led the OHP to refuse his application for re-release. In reaching its ultimate decision the OHP set out in considerable detail the evidence it had considered. It applied the available guidance. Importantly, it noted that there was no support for the Applicant's release from any of the professional witnesses and that significant doubts had been raised regarding the Applicant's ability and willingness to comply with key licence conditions such as the exclusion zone.

40. Leaving aside for the moment the evidence regarding the April event itself, I should briefly summarise some of the other evidence referred to by the OHP in their Decision Letter which as I read it demonstrates that the OHP's conclusions reached in relation to the April event was by no means solely determinative of their ultimate decision not to direct re-release and is better seen as but one of a number of significant factors which they took into account.

41. To begin with there were the matters I refer to by way of "**Background**" in paragraphs 7 and 8 above.

42. There was in addition evidence of what are described by the OHP as "*incidents of concern*" regarding the conduct of the Applicant in prison between May and November 2019 which were said to reveal controlling behaviours towards his partner and aggression and violence toward other prisoners and prison officers. The OHP described the Applicant's account of one of the violent incidents which was caught on CCTV as lacking in all credibility.

43. There was evidence from one of the professional witnesses of a meeting with the Applicant just two days after the April event and his recall when it was noted that the Applicant made no mention whatsoever of the incident and the allegations that had been made against him. As a result, the witness concluded that the Applicant was not being honest with those responsible for his supervision. In addition, there was other evidence of poor levels of openness and engagement since the Applicant had been recalled to prison. It was particularly noted that less than a month after recall the Applicant was declining to answer questions about the alleged breaches of the exclusion zone while on licence and was declining to make available itemised telephone billing records for the mobile telephone he shared with his partner while he was on licence.

44. An Independent psychological assessment in August 2019 and another in August 2020 saw a change of recommendation from release into the community in 2019, to a possible progressive move in the 2020 report. The prison psychologist was in the end clear that what was required was that the Applicant should undertake further behaviour work in closed conditions.

45. It is submitted that the OHP should have placed no weight at all on the April event given all the attendant evidential difficulties. A panel is not confined to material which would be admissible in criminal proceedings, provided that a panel should only attach weight to it if it can be satisfied it is fair to do so (see **Sim v Parole Board 2003 EWCA Civ 1845** and **Brooks v Parole Board 2004 EWCA Civ 80**) In parole proceedings hearsay evidence can be taken into account even when it relates to matters that are in dispute. It is not necessarily unfair to admit hearsay evidence. A panel is required in such circumstances to bear in mind that the evidence is hearsay and reflect that fact in the weight they attach to it. In making its assessment a panel is bound to have regard to all the information placed before it – including hearsay – provided the prisoner is able to respond. The duty of a panel is to evaluate the allegations made in the context of the rest of the information before it.

46. The OHP in my judgment did exactly that, weighed the evidence carefully and fairly, and followed the guidance set out in the High Court Authorities to which I have referred and in the Parole Board’s guidance on the treatment of allegations. In the end, the experienced OHP found first, it more likely that not that the Applicant was present at the April event (an inference it was entitled to draw) and, secondly, that while present he had been involved in a physical altercation with one or more people. It did not find any specific allegation of assault proved. It found that on the totality of the evidence the Applicant’s denial of being present was not credible and that impacted on risk and compliance. As a fact finder, the OHP were entitled to draw inferences based upon evidence it assessed as convincing. Even if it could be said that the quality of the evidence provided by those attending the party itself was not of the strongest, that is a matter going to the weight which the OHP was entitled to place upon it. As the High Court observed in the case of **Morris [2020] EWHC 711(Admin)** so long as there was a sufficient factual basis, however limited, on which to take allegations into account, an OHP would not be acting unfairly.

47. In my judgment, the Applicant’s submissions regarding the absence of (a) independent evidence of the presence of the Applicant at the April event, (b) evidence as to why complainants withdrew their allegations and (c) an explanation as to why the Applicant was not arrested for alleged assault, are not for present purposes of any assistance. They are submissions which I have no doubt were made forcefully on the Applicant’s behalf at the conclusion of the evidence and taken into account by the OHP. I am not at all sure that it is correct to submit that there was no independent evidence of the Applicant’s attendance at the party. To do so, ignores the inferences that can properly be drawn from the CCTV evidence regarding the movements of the Applicant and his partner’s car, and his own explanations on matters of significance, which professional witnesses and the OHP itself found lacked credibility.

48. It is clear from a reading of the Decision Letter as a whole, that the OHP considered in detail all of the evidence in reaching the clear conclusions that the Applicant’s recall to prison was fully justified and that his behaviour and treatment needs were better met in closed conditions before re-release could be considered.

49. I am satisfied that, in applying the test set out in the case of **Wells**, the conclusions reached by the OHP are more than adequately explained and were logically based on the evidence they considered and accepted.

Decision

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50. For the reasons I have given, I find that the decision not to recommend release was neither irrational and/or procedurally unfair and accordingly this application for reconsideration is refused.

Michael Topolski QC
1 December 2020