

Application for Reconsideration by Pemberton

Application

1. This is an application by Pemberton ("the Applicant") for reconsideration of a decision by a Panel of the Parole Board dated 16 March 2020 not to direct his 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 comprising 498 pages, the Decision Letter dated 16 March 2020 and the Reconsideration Application. The Secretary of State did not make any formal representations in response to the application.

Background

4. The Applicant was sentenced in March 2016 to an extended determinate sentence of four years imprisonment and five years extended licence for serious offences of threats to kill and assault occasioning actual bodily harm, where the victim was his wife. He received a concurrent 12 months sentence for an offence of child cruelty relating to his son. He had no prior convictions save for a conviction in 2011 for breaching a Non-Molestation Order relating to a former partner, for which he was conditionally discharged.
5. In 2017 the Applicant was considered for early release at his Parole Eligibility Date but, following an oral hearing, a three-member panel of the Parole Board, which included a psychologist, rejected the recommendations for release from the Offender Manager, Offender Supervisor and Prison Psychologist and concluded that his risk of causing serious harm was too high to be safely managed in the community at that time. Accordingly, the Applicant remained in custody until his automatic release at his conditional release date of 5 January 2018, when he was released on licence which runs until his Sentence Expiry Date of 6 January 2023.
6. After just five weeks in the community, on 9 February 2018, the Applicant was recalled to custody for breaching his licence conditions to (a) be of good behaviour and (b) disclose developing intimate relationships with women. In particular, it was alleged that he had failed to disclose a new relationship with



a female he had contacted via an on-line dating forum and had been evasive and dishonest when challenged about this.

7. In the subsequent Parole Board review, culminating in an oral hearing before a single-member panel on 11 March 2020, the Applicant disputed the appropriateness of his recall. There were factual issues in dispute as to whether the relationship he had formed was indeed a developing intimate relationship, what he had been informed about what constituted such a relationship such that it had to be disclosed, and whether he had lied to his Offender Manager when challenged about the relationship.
8. At the oral hearing on 11 March 2020 evidence was heard from seven witnesses, including the Applicant. These included the Prison Offender Supervisor, the Offender Manager at the time of recall, the current Offender Manager, a witness from a veteran's charity who was providing support to the Applicant, and two Psychologists – one instructed by the prison and the other instructed by the Applicant's solicitors. The Panel also had the benefit of a full and recent psychiatric report.
9. The Psychologists differed in their findings and their conclusions but both accepted the complexity of the Applicant's case. The Prison Psychologist reported that his offending behaviour was complex and in turn difficult to unpick, and that this was exacerbated further by an incongruent presentation, desire to impression manage and secondary gains in maintaining focus on his symptoms rather than his violent behaviour. Her recommendation was that he needed to complete further work in custody and engage in services that have experience and understanding of complex diagnosis. The Psychologist commissioned by the Applicant's solicitors also referred to the complexity of the case and noted that, despite numerous professional assessments, it remained difficult to differentiate between Complex PTSD (and the role of this in his offending) and certain Personality Disorders. However, and in contrast to the Prison Psychologist, he rated risk of violent offending as low and recommended further work that could be safely undertaken in the community, and concluded with a recommendation for release.
10. During the 26 month period from date of recall to the final oral hearing, reports and recommendations had also been submitted by a number of different Offender Managers who had also disagreed in their recommendations as to the Applicant's suitability for re-release. There was still no consensus of opinion with the passage of time. So, by October 2019, a Senior Probation Officer ("SPO") who had supervised all of the Applicant's Offender Managers since sentence (and had also given evidence at the 2017 oral hearing) was recommending that the Applicant be released but a subsequently appointed Offender Manager recommended in a report in March 2020, just before the oral hearing, that he remain in custody, despite there being no material change since the SPO's report.
11. It is clear from the foregoing that there was a wide divergence of views between professionals, save for the consensus that this was a complex case.

Request for Reconsideration



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12. The application for reconsideration is dated 31 March 2020 and has been submitted by the Applicant's solicitors.
13. It is made on the basis that the Panel's decision not to release the Applicant was procedurally unfair because the decision was made by a single member panel when the circumstances of the case required a three-member panel including a specialist member.
14. They submit that the particular features of this case which support this proposition include:
- (a) The large number of witnesses called to give evidence;
 - (b) Potential findings of fact with regards to the circumstances surrounding the recall;
 - (c) The presence of psychiatrist evidence (in written, not oral, evidence);
 - (d) Previous psychological evidence (given to the 2017 oral hearing panel) supporting release;
 - (e) The conflicting opinions of the Psychologists (the Independent Psychologist supporting release and the Prison Psychologist not supporting release);
 - (f) The conflicting opinions of various Offender Managers as to the Applicant's suitability for release;
 - (g) Potential findings of fact regarding previous alleged offending (the reason why this case had been adjourned by the previous panel); and
 - (h) The case was finely balanced and the Panel needed the benefit of views from other panel members to assist in a fair decision making process for the Applicant.
15. The Applicant's solicitors also point to previous compositions of oral hearing panels in the Applicant's case, which all comprised three-member panels including a specialist member.

The Relevant Law

16. Under Rule 28(1) of the 2019 Parole Board Rules the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release. 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)).
17. Rule 28(1) of the 2019 Rules provides that one of the grounds for reconsideration is procedural unfairness. Procedural unfairness means that there has been some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and, therefore, producing a manifestly unfair, flawed or unjust result.
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.

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

Current parole review

19. The current review began in or around February 2018 following the Applicant's recall to custody and the referral of his case to the Parole Board by the Secretary of State for Justice. Following consideration on the papers at Member Case Assessment ("MCA") on 24 April 2018, the MCA Member directed that the case be considered at an oral hearing and that the oral hearing panel should comprise three members, including a psychologist. The MCA Member also directed that a full psychological risk assessment be prepared.
20. The case first came before an oral hearing panel on 12 October 2018, comprising the Chair, a Psychologist and an Independent Member. The hearing was unable to proceed due to the non-attendance of a witness and the Chair therefore deferred the hearing to the same Panel.
21. The Panel reconvened on 21 January 2019 but by now, for reasons that are not clear, the Psychologist had been replaced by another specialist member, this time a Psychiatrist. Again, however, the Panel was unable to proceed as one of the witnesses had not been notified of the hearing date. The matter was therefore deferred, the Chair confirming that the panel logistics required a three-member panel, including the current Psychiatrist Member and in addition directing that an independent psychiatric report be prepared. The Chair also noted that the hearing was unsuitable for videolink due to "[t]he complexity of the case".
22. The same Panel, including the Psychiatrist Member, reconvened on 18 October 2019. Again, the hearing was deferred on the day, but this time after the Panel had started taking oral evidence, when it became clear that further information was needed about serious allegations against the Applicant which he disputed, and which had never resulted in his arrest and/or charge. In deferring the case to a new panel, it was directed that that panel should comprise three members, including a Psychiatrist.
23. The hearing was eventually listed for hearing before a new panel on 11 March 2020. In the period since the last hearing the only significant developments were:
 - (a) The Offender Manager had changed again and the previous recommendation for release (from the SPO who was listed to give evidence before the October 2019 Panel) was withdrawn; and
 - (b) The Independent Psychologist was now added as a witness, having prepared a report dated 31 January 2020 recommending release. This



meant the new panel now had conflicting expert opinion from Psychologists to consider.

24. It would appear, therefore, that the case before the new panel was no less complex than the case as it appeared before the previous panel, which had decided that a three-member panel, including a psychiatrist, was required to determine the case.

25. On 25 January 2020 the Applicant's solicitors submitted a formal request for directions regarding the further evidence directed by the previous panel and, in addition, said this,

"We also note that the deferral directions indicated that the case should be listed before a 3 panel Board but that only two panel members appear on the timetable. We ask that a third panel member be added."

26. At the date of that application, the timetable identified the Panel as comprising the Chair and a named Psychiatrist Member. In a formal response dated 3 February 2020, the new Chair stated,

"Panel composition is a matter for the Parole Board. The case is now listed for a single member hearing, as per listing guidance. I am not persuaded that the case necessitates a larger panel."

No reasons were given as to why this Panel was taking a different view from previous panels or why he considered the case suitable for a single member (who was not a specialist member). There is no evidence before me that the Chair consulted with his specialist co-panellist before making this decision to stand him down. However, the Chair's reasoning can probably be inferred from his subsequent Panel Chair Directions, dated 21 February 2020, when he stated,

"Much is made in reports about what is seen as the complex nature of this case. However, at first glance it would appear that the fundamental issues are the circumstances leading to recall and, regardless of whether PTSD or possible traits of personality are linked to offending, there is yet to be any accredited work completed to address offending behaviour. There is a difference of opinion as to whether such work can or should be completed in custody or whether it can be safely completed in the community"

27. The oral hearing proceeded on 11 March 2020 before the Chair, sitting alone, who found that the revocation of licence was appropriate and that it was necessary for the protection of the public that the Applicant continued to be detained.

Discussion

28. The composition of Parole Board panels is dealt with concisely in Rule 5 of Parole Board Rules 2019, which states simply that where a case is to be considered at oral hearing then the Board "must appoint one or more members of the Board to constitute a panel to hear that case".



29. Further guidance on the constitution of panels is contained in the Parole Board's Member Case Assessment Guidance, June 2018 v.19.2, page 29 of which states:

"When considering whether or not it is appropriate to direct a single member, you might consider:

- a. Is it likely to be a finely balanced decision.....?*
- b. Is there going to be a large number of witnesses to question?*
- c. How complex are the risk assessments in the case?*
- d. Is it likely that the panel will need to make findings of fact... for which more than one member may be helpfully deployed?*
- e. Is the case so finely balanced on the evidence of the dossier and your experience that one panel member will find it difficult to determine alone or (on contrary) where a two-member panel might conceivably be split in its decision making?*

This is not an exhaustive list.....In general when considering panel composition, the greater the number of witnesses or issues to be addressed, or their complexity, the more likely it is that a second (or in compelling cases a third) panel member would assist in conducting a fair, effective and time-efficient hearing."

30. Annex 13 of the guidance, at page 120, deals with the need for a specialist member, and confirms:

"It is appropriate to request a psychologist for cases when:

- There is current psychological evidence... which needs specialist interpretation*
- There are two or more differing psychological opinions e.g. a Prison Service psychological report and an external psychological report*
- In cases where there are questions with regards to an offender's response to interventions due to issues such as motivation to change, levels of psychopathy, personality disorder or learning difficulties*

.....

It is appropriate to request a psychiatrist for cases when:

- There are issues relating to the offender's major mental disorder...*
- Where there is current.... psychiatric evidence about the offender... which requires interpretation*

.....

It is appropriate to request either a psychologist or psychiatrist for cases when:

- There are less serious mental health concerns or evidence of psychological distress with an identified or suggested link to the offender's risk of reoffending or harm*
- Personality disorder or psychopathy has been identified or suggested.....*
- The case has complex or serious risk issues."*

31. The guidance above is provided specifically to MCA members who make the first decision in sending a case to oral hearing as to what is appropriate by way of



panel composition to ensure a thorough, robust and fair decision making process where the protection of the public and the liberty of the prisoner is at stake. There is no reason to argue that these principles do not remain pertinent for so long as the case is proceeding to a final hearing. Indeed, I find support for that proposition in the very recent Guidance issued by the Parole Board on 3 April 2020 in the context of the current Coronavirus pandemic, which reiterates that a Panel Chair (when considering the issue of panel composition in the context of concluding on the papers a case which had been sent to oral hearing) should bear in mind:

- *"What were the reasons for the panel logistics set out at the time of the MCA and do those reasons still apply now?"*
- *Does a panel contain a specialist member/is specialist knowledge required?*
-
- *Whether the case is particularly complex*
- *Whether there is considerable divergence of recommendations from professionals."*

This guidance goes on to state that *"if any of the above apply, it may be more appropriate to have a decision by the full panel assigned to hear the case, but this is at the discretion of the panel chair...who may wish to consult with co-panellists before making a final decision on how the case will proceed."*

32. In the Applicant's case, numerous professional and expert witnesses referred to the complexity of his case, not only in relation to differential diagnoses but also the extent to which these impacted upon risk of serious harm, relevant treatment, and where such treatment should be undertaken. Of like view were previous panels of the Parole Board (at Oral Hearing in 2017, MCA in 2018 and at aborted hearings in 2019 where the Panel – including the Psychiatric Member – considered that the new panel should comprise three members including a psychiatrist). Furthermore, this was a case with disputed issues of fact and a prisoner who was described by some as unreliable and manipulative and skilled at impression management and therefore close examination and robust scrutiny was undoubtedly required. It was also a case which would have benefitted from the range of expertise and experience that a full panel would be able to apply to a contentious risk assessment. I am also mindful that this case did not appear to be without complexity, or that the issues were as narrow or as clear as implied in the Panel Chair Directions of 21 February 2020. I have had regard, in particular, to the guidance of Lord Reed in **Osborne, Booth & Reilly v The Parole Board [2013] UKSC 61** that Parole Board decisions are not limited to deciding whether or not to release a particular prisoner but also include *"any other aspects of its decisions [such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required] which will in practice have a significant impact on his management in prison or on future reviews"*.

33. The Chair who conducted the oral hearing, alone, on 11 March 2020 certainly had the power to do so. However, given the history and context set out above, it was unfair for him to have done so. The perception of fairness is also important. All other Parole Board members who had involvement in the



Applicant's case, going back to 2017, had accepted the need for a panel of three, including a specialist member. The issues had not simplified nor crystallised over time. Indeed, complexity had arguably increased following the aborted oral hearing in October 2019, with the subsequent addition of an independent psychology report and a changed Offender Manager recommendation. In the circumstances, the procedure adopted by the chair for the oral hearing conducted by him on 11 March 2020 was unfair. Adopting the dicta of Gross LJ in **DM v Secretary of State for Justice [2011] EWCA Civ 522 at para 28**, it is for me to exercise my judgment in making that decision.

Decision

34. For the reasons set out above there was procedural unfairness, requiring reconsideration of the Panel's decision. Therefore, I have decided that this application must be granted.

Elaine Moloney
20 April 2020

