[2021] PBRA 106

the Parole Board
working with others to protect the public

**Application for Reconsideration by Golightly**

## Application

1. This is an application by Golightly (the Applicant) for reconsideration of a decision of an oral hearing panel of the Parole Board (the Panel) dated 14 June 2021 not to direct re-release on licence.

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 now at 474 pages (including the decision letter), the application and the written representations from the Secretary of State. In addition, due to the grounds advanced by the Applicant, I requested and was provided with the recording of the oral hearing.

## Background

4. The Applicant is aged 44. On 1 February 2010, when he was 33, he was sentenced to imprisonment for public protection for attempting to cause grievous bodily harm with intent. The victim was a police officer. At the same time, he was sentenced for other offences including criminal damage, possession of offensive weapons, affray, making a false representation and possession of drugs for which he received either concurrent determinate sentences or no separate penalty.

5. The minimum term was set at 4 years less time served on remand and expired on 9 May 2013.

6. The Applicant has been released and recalled on three occasions: firstly in 2015 and then twice in 2016. On his most recent recall he was released on 16 November 2016 and recalled just over a week later on 24 November 2016.

7. Following a Parole Board review in 2017 by way of an oral hearing, the Applicant was recommended for transfer to open conditions and transferred there in May 2018. He was returned to closed conditions in August 2018 as a result of adverse developments.

## Request for Reconsideration

8. The application for reconsideration is dated 30 June 2021 and was submitted by the Applicant's legal representative.

9. The grounds for seeking a reconsideration are as follows:

   Ground 1: That the decision was procedurally unfair as documents were requested but not obtained and considered.

   Ground 2: That the decision was procedurally unfair because the hearing *"effectively went part-heard"* and the Applicant was not given the opportunity to respond to the evidence from two of the witnesses and to have the *"final say"* as promised by the Panel Chair.

   Ground 3: That the decision was irrational as it was based on factual inaccuracies and an incorrect assessment which led to the Panel relying on the version of events from witnesses about the recall and prison behaviour.

   Ground 4: That the decision was irrational as the Panel did not have sufficient regard to the Applicant's evidence, did not give him the opportunity to complete his evidence and was based on a lack of objectivity and independence raising concerns there was *"institutional prejudice at work".*

**Current parole review**

10. The Secretary of State referred the case to the Parole board in April 2020 for it to consider whether it was appropriate to direct the Applicant's release or, if not, to consider whether a recommendation should be made for his transfer to open conditions.

11. The matter came before an experienced member of the Board for Member Case Assessment on 24 September 2020 and was directed to an oral hearing.

12. The oral hearing was convened on 2 June 2021 and on that date the panel heard evidence from the Applicant, his Prison Offender Manager (POM), a Psychologist employed by the Prison Service and his Community Offender Manager (COM). At the close of the oral hearing, it was agreed that written submissions would be sent to the Panel by the legal representative. Those were sent in and are dated 8 June 2021.

**The Relevant Law**

13. The panel correctly sets out in its decision letter dated 14 June 2021 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*

14. 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. 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*

15. 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."*

16. 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. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **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. Secretary of State representations were received on 13 July 2021 and the following points were raised:

    a) The Parole Board Decision from 2016 was in the dossier;

b) The Part A recall report was missing from the dossier due to an administrative dossier; and
c) The Applicant was deemed to be unlawfully at large following an earlier recall as he had been recalled but not returned to custody. Being at a family member's, rather than custody means by virtue of the rules in Prison Service Instruction 13/2013 he was deemed to be unlawfully at large. There was not a suggestion he evaded arrest.

**Discussion**

21. There is some cross-over between the grounds. I have taken the opportunity to listen to the hearing which was recorded in full and lasted some 3.5 hours. I will therefore set out my findings from listening to that recording and from the information in the dossier before dealing with each ground.

22. The Applicant was represented at the hearing by his legal representative who confirmed at the start of the hearing that he had held a conference with his client and had sight of the same version of the dossier. During the introduction, the legal representative submitted that the facts upon which the psychologist and the probation service had used to come to their conclusions were incorrect and referenced previous written legal representations from September 2020 which were in the dossier. The Panel Chair at that point asked the legal representative directly if they did not wish to proceed today and the response was clear in that they did wish to proceed and that they were just asking for the Applicant to give his evidence first so as to set out his version of events so that the other witnesses heard them. The Panel Chair indicated that it may assist if the POM gave evidence first to get a full update regarding custodial behaviour and progress, and then the Applicant could give his evidence, followed by the Psychologist and COM as the thrust of the submission was that it was the other two witnesses who had based their assessments on factual inaccuracies. The legal representative agreed.

23. It must be noted that the psychologist was left with no alternative but to make her assessment without an interview with the Applicant because he refused to engage. The Psychologist made this known and referenced the limitations to her report both within the written report and her evidence to the Panel. The legal representative accepted this on the Applicant's behalf during his questioning of the Psychologist where he said, *"He has created this situation because he will not speak to you"*.

24. Other reports in the dossier and evidence taken during the hearing confirm, as appears to be accepted by the Applicant, that he would not engage with any further assessments for offending behaviour programmes and has refused to discuss some aspects of his case and progression with professionals. These issues are referenced by the Panel in the decision letter at section 5.

25. At the hearing, the Panel Chair also asked the legal representative if he had any other preliminary matters to raise before the Panel started to take evidence. The legal representative raised the fact that the dossier did not contain all of the previous Parole Board decisions regarding the past recalls. He said that he had liaised with the prison case administrator who was endeavouring to locate them but that the Applicant had his own copies of them all with him and *"when he gives his evidence, we can deal with that".*

26. The Panel Chair did say at the outset that due to the Applicant giving his evidence before two other witnesses she would ask him at the end if he had any other comments to make.

27. During the hearing there were discussions between the Panel Chair and the legal representative about the previous recalls. The Panel Chair quite rightly pointed out the legal position regarding recalls that, even if a panel was to conclude that a recall was unlawful, the duty of that panel is to still go on to make a risk assessment and to consider that against the test for release. The legal representative accepted that. The Panel Chair went on to clarify that this was the fourth review since the 2016 recall and that the position was the Panel would not be making a re-determination about whether his recall was lawful or not. The legal representative stated clearly that he accepted that.

28. The Panel Chair further stated that the Applicant would be given a full opportunity to go through his recalls and how they have affected him. The Applicant went on to give evidence for 1 hour and 25 minutes. The Panel asked questions first. At the end of the Panel's questions, the Panel Chair specifically asked the Applicant if there was *"anything else he would like to share"* and he talked through some points which he had in fact already mentioned but seemingly wanted to emphasise. The legal representative then had an opportunity to ask questions of his own client and did so for some time.

29. The Applicant's legal representative was given full opportunity in the hearing to ask questions on his client's behalf and he did so. During the questioning of the psychologist, the Applicant asked to speak to his legal representative, and this was accommodated by the Panel Chair without hesitation.

30. Just before the evidence from the COM, the Panel was made aware that the hearing might have to conclude shortly (by 5pm) due to the Probation Office having to close at that time. It was also noted that the prison would not be able to accommodate a hearing past 5:25pm. The Panel Chair raised this with the legal representative but stated clearly that this would mean an adjournment and did not suggest it meant rushing through the remainder of the evidence. Enquiries were made and the COM indicated that they could carry on for longer. The hearing lasted a further 30 minutes during which the COM gave evidence and was questioned by the Applicant's legal representative. He was not curtailed at all with questioning and stated that he had asked all of his questions.

31. Due to the time the evidence finished, the Panel Chair acknowledged the time constraints and asked the legal representative if he would rather put written final submissions in so that he could consult with the Applicant before making them. Whilst it was not expressly referred to, I take this as the Panel Chair ensuring that the Applicant did get a final say rather than rushing oral submissions without consultation. Upon the Panel Chair offering this, there was discussion between her, the legal representative and the Applicant. The legal representative submitted that his client was *"eager to ensure the hearing concluded today"* but did not think that written submissions have got the *"force of submissions at a hearing".* The Panel Chair then offered an adjournment for the panel to return to hear any further submissions. The legal representative asked that his client get the opportunity to

indicate his preference and the Applicant declined the adjournment. The Panel Chair then allowed plenty of time after consultation with the legal representative to ensure that written submissions could be sent to the Panel after a full consultation with the Applicant.

32. The legal representative submitted 6 pages of detailed final submissions following the hearing. The Panel referenced these within its decision letter.

Ground 1

33. The Applicant submits that the decision was procedurally unfair as documents were requested but not obtained and considered. The 'documents' the submission refers to are not listed. Given the points raised at the hearing and during the application, this appears to mean the previous decisions of the Parole Board following the recalls.

34. The Panel did have sight of the Parole Board decisions from October 2016, 2017 and 2019 and they are mentioned specifically during the decision letter. The Panel noted that the recalls were discussed in the 2017 hearing. Presumably the Applicant is referencing earlier decisions than those from late 2016 and after. Whilst the Applicant did not specifically mention the Part A recall report, the Secretary of State has conceded that this was not in the dossier.

35. The Applicant had access to his own decision letters and brought them all to the hearing. The legal representative stated he would have them to refer to in the hearing. He had an abundance of time to do so. There was not any application to adjourn to obtain copies of the letters for the Panel or any other documents, in fact the Applicant positively refused that opportunity at the start of the hearing via his legal representative. Cases where an Applicant has been represented by a lawyer are highly unlikely to generate a successful appeal if there had been no challenge made to the alleged irregularity by the Applicant and this would include a failure to request an adjournment.

36. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that these letters were necessary: the Applicant had them in any event; the Applicant had opportunity during the hearing and in final submissions to discuss the content of those and the recalls; and, with the legal representative's consent, the panel was focussed on more recent events and making its risk assessment rather than the appropriateness of past recalls.

37. Thus, there was nothing to indicate that there was any procedural unfairness, and this ground fails.

Ground 2

38. The Applicant submits that the decision was procedurally unfair because the hearing *"effectively went part-heard"* and the Applicant was not given the opportunity to respond to the evidence from two of the witnesses and to have the *"final say"* as promised by the Panel Chair.

39. This submission is entirely misleading. As detailed above, the hearing did not go part heard. All witnesses gave evidence and the Applicant's legal representative was given an opportunity to ask all of the questions he wished to. The Applicant told the panel himself that he did not wish to return for a further hearing to say anything more and that it could all be done via written submissions. After consideration of the recording, I am bound to say that the Panel Chair was exceptionally fair throughout this hearing, taking time to clarify that the hearing could proceed, allowing all requests for conferences, allowing full questioning despite the repetitive nature at times and ensuring that the Applicant was not rushed into having his "final say".

40. The written submissions are very detailed and do not at any point ask for a further opportunity to give live evidence or ask any further questions of witnesses. The Applicant argues that further evidence cannot be introduced during these submissions and so it is unfair. However, here the final submissions do provide further written 'evidence' from the Applicant and in fact, from his own legal representative (despite this being inappropriate). The Panel took full account of the points raised as explained during the first paragraph of section 8 of its letter.

41. Accordingly, this ground fails.

Ground 3

42. The Applicant submits that the decision was irrational as it was based on factual inaccuracies and an incorrect assessment which led to the Panel relying on the version of events from witnesses about the recall and prison behaviour. The Applicant makes mention of facts relating to the recalls as being the main source of inaccuracies.

43. As detailed above, the Panel made it clear where its focus was, and the legal representative agreed. Despite this, the Panel heard lengthy evidence from the Applicant and received detailed submissions about the recalls.

44. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**,

which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

45. I have difficulty in establishing that the mistakes pointed out are in fact mistakes. For example, the point raised about whether the Applicant threw a brick or a pasty at a ticket inspector is an issue where there are various versions given over the years with the October 2016 panel stating that the Applicant had been drunk, did not know what he had thrown and suggested that CCTV had shown it to be a stone. Another example would be whether the Applicant was unlawfully at large during his 2015 recall where he argues in his submissions that he was at a family member's home which does not change the fact that he would be considered unlawfully at large for the purposes of records as he had been recalled but not located. The Secretary of State provided submissions about this as set out above.

46. In any event, there is no suggestion that any of these apparent mistakes are fundamental to the decision. The Panel simply summarised the history but made it clear in both the hearings and its letter that the focus was on more recent events, in particular the incident at open conditions which the Applicant accepted happened. Reconsideration, like Judicial Review, is a discretionary remedy and, if I am satisfied (as I am here) that the incorrect fact did not affect the decision then the application is likely to be refused.

47. Accordingly, this ground fails.

Ground 4

48. Finally, the Applicant submits that the decision was irrational as the Panel did not have sufficient regard to the Applicant's evidence, did not give him the opportunity to complete his evidence and was based on a lack of objectivity and independence raising concerns there was *"institutional prejudice at work".*

49. I repeat the points raised during the first ground. The Applicant was given every opportunity to give full and frank evidence both orally and in writing. His evidence was concluded. The Applicant accepted he had chosen not to engage with assessments despite every opportunity to do so. If he now regrets that choice, that is a matter for his future reviews and does not lead to reconsideration of this decision.

50. The panel had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant. The Applicant was also legally represented throughout. It was plainly a matter for the panel to determine what it did or did not accept from the Applicant's evidence, provided the reasons given for its decision are soundly based on evidence, as well as rational and reasonable. It would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. There are no such reasons here and accordingly, the ground fails.

**Decision**

51. 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.

**Cassie Williams**
**22 July 2021**