

[2021] PBRA 123

## Application for Reconsideration by Johnson

### Application

1. This is an application by Johnson ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel'). On 16 July 2021, after oral hearings on 17 June 2020 and 27 May 2021, the panel issued its decision not to direct the Applicant's release on licence and not to recommend a transfer to an open prison.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

### Background

3. The Applicant is now aged 73. He has a long criminal record which includes convictions for a number of offences of violence as well as rape, living on immoral earnings and substantial involvement in the supply of drugs.
4. On 29 March 2010, at the age of 61, he received a sentence of imprisonment for public protection for causing grievous bodily harm with intent. His minimum term was set at 2 years less time served on remand.
5. The Applicant has been released on licence twice and recalled to custody twice during this sentence. His most recall was on 11 April 2019 and was the result of an allegation that he had threatened to kill a sex worker (X).
6. It appears that this allegation had been made by X to her key worker (from an agency concerned with the welfare of street sex workers) who had reported it to the police who in turn reported it to probation. The Applicant was never arrested for or questioned about the allegation, which he has (since being made aware of it) consistently and robustly denied. After investigation, the police decided on 21 October 2019 that no further action should be taken against him. X had apparently refused to support a prosecution. There are of course a variety of possible reasons for her non-cooperation with the police. Fear of the Applicant is only one of those.
7. Following the Applicant's recall the Secretary of State referred his case to the Board to decide whether to direct his re-release on licence.
8. On 28 May 2019 the case was considered on paper by a single member of the Board. At that stage the police investigation into X's allegation was of course still ongoing, and the single member did not direct re-release on licence.



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9. On 6 August 2019 the Secretary of State again referred the case to the Board to decide whether to direct the Applicant's re-release on licence. On 28 November 2019, by which time it was clear that there was to be no prosecution, another member directed that the case should proceed to an oral hearing. In due course the case was allocated to the panel, and the hearing was listed to take place on 17 June 2020.
10. The panel convened for a hearing on that date, and took evidence from the Applicant, from the official responsible for his supervision in prison (A) and from the official prospectively responsible for his supervision in the community (B). The hearing took place remotely by video link.
11. Having considered the evidence, the panel adjourned the hearing for a psychological assessment of the Applicant's risk to be carried out. It was duly carried out in September 2020 by a Chartered and Registered Forensic Psychologist ('the psychologist') whose opinion was that the Applicant should remain in custody to complete further risk reduction work before re-release on licence.
12. It is perhaps worth mentioning that the psychologist's report included a cognitive assessment which demonstrated that the Applicant's cognitive functioning falls within the borderline range and highlighted some weaknesses that contributed to his difficulty in learning and retaining information provided to him.
13. The hearing resumed on 27 May 2021 by which time, for reasons which remain unexplained, the Applicant had been transferred to another prison.
14. At the adjourned hearing the panel took oral evidence from the Applicant, from the psychologist, from B and from another official (C) who was by then responsible for the Applicant's supervision at the prison to which he had been transferred.
15. The psychologist and B were of the view that the Applicant should remain in prison to complete further risk reduction work. C did not feel she knew the Applicant well enough to make a firm recommendation but appears to have been inclined to believe that with a robust risk management plan in place his risk could be managed safely on licence in the community.
16. The panel was informed that the Applicant was facing a pending adjudication, and the case was adjourned to await the outcome of that process. The outcome of the adjudication was a finding that the Applicant had broken prison rules by giving another prisoner two codeine tablets which he had been prescribed. He has apparently concealed them in a crisp packet which he passed to the other prisoner. For this breach of the rules he received a caution but no penalty. The matter was clearly not regarded by the prison authorities as being particularly serious and would appear to have little relevance to the Applicant's risk of serious harm to the public in the community.
17. On 16 July 2021, as mentioned above, the panel issued its decision not to direct the Applicant's re-release on licence and not to recommend a move to an open prison.



18. On 6 August 2021 the Applicant's solicitor submitted this application for reconsideration of the panel's decision.

## The Relevant Law

### *The test for re-release on licence*

19. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel in the introductory section of its decision.

### *The rules relating to reconsideration of decisions*

20. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

21. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- (a) a paper panel (Rule 19(1)(a) or (b)) or
- (b) an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- (c) an oral hearing panel which makes the decision on the papers (Rule 21(7)).

22. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

23. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. The decision not to recommend a move to an open prison is not.

### *The test for irrationality*

24. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated 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."*

25. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

26. 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.

27. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts



shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

### *The test for procedural unfairness*

28. 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 from the issue of irrationality which focusses on the actual decision.
29. It has been established that the things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
  - (b) A failure to conduct the hearing fairly;
  - (c) A failure to allow one party to put its case properly;
  - (d) A failure properly to inform the prisoner of the case against him or her; and/or
  - (e) Lack of impartiality.
30. This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

### *Failure to give adequate reasons for a decision*

31. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.
32. The reason for requiring adequate reasons had been explained in a number of decisions by the courts, including:
- a) **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
  - b) **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
  - c) **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
  - d) **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**
33. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one.
34. In a number of decisions on reconsideration applications the same approach has been adopted, for the same reasons, to a panel's failure to give adequate reasons for its decision.

### **The Application for Reconsideration in this case**



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35. The principal submissions made by the Applicant's solicitors in support of this application involved criticisms of the panel's decision to attach weight to X's allegations. These submissions will be discussed in detail below. Other submissions made by the solicitors will also be discussed, but more briefly.

## Documents considered

36. I have considered the following documents which have been provided for the purpose of this application:

- (a) The 485-page dossier provided by the Secretary of State (which includes the panel's decision letter);
- (b) The representations submitted by the Applicant's solicitors in support of the application for reconsideration; and
- (c) An e-mail from PPCS dated 19 August 2021 stating that on behalf of the Secretary of State they offer no representations in response to the application.

37. Since there was evidently a successful non-disclosure application in this case, I have also caused enquiries to be made as to whether the panel issued a 'closed' decision as well as the 'open' one which has been added to the dossier (a 'closed' decision might have contained further reasons for the panel's decision in addition to those contained in the 'open' one). Those enquiries revealed that there was no 'closed' decision and the only reasons given by the panel were those contained in the 'open' one.

## Discussion

### ***The solicitors' criticisms of the panel's decision to attach weight to X's allegations***

38. In order to address these criticisms it is necessary to outline the evidence which was before the panel insofar as it related to X's allegations, and then to examine the way in which the panel dealt with those allegations.

#### *The evidence before the panel*

39. X's account, as reported by her key worker, was that the Applicant had 'abused her' since she was aged 18 and that she was aware that he had recently been released from prison. On the afternoon of 30 March 2019, she said, he had approached her in the street and they had exchanged telephone numbers. Since then, she alleged, the Applicant had contacted her by telephone and said that 'he would find her, she's not getting away' and he had threatened to kidnap her. She believed, she said, that if he found her, he would make her work for him as he had done before and that she would 'be gone'. She also alleged that since his release he had asked her to recruit other girls to work for him.

40. The Applicant's account, as recorded in the panel's decision letter, was that he was on his way to deposit a cheque when X came up to him: he recognised her as someone he knew as a crack cocaine user. She offered, he said, to deposit his cheque into her account but he would not trust her to do so. He allowed her to put



her number into his phone and he took her number. She wanted money and he gave her £10. He later phoned her, and she phoned back. Their conversations were *'friendly, even flirtatious'*. He never threatened her in any way.

41. The police analysis of the Applicant's and X's telephone numbers apparently showed that there had been telephone calls both ways between them after their meeting (a fact which is relied upon by the Applicant's solicitor as affording some support for his account).
42. The Applicant was insistent that the authorities should examine the CCTV covering the area where he and X had met, which he said would confirm his account of events, but this does not appear ever to have been done.
43. He also wanted the authorities to check the records to show that he was in prison at the time when X would have been 18 and was allegedly 'abused' by him. I have seen no evidence that that check was ever made.
44. When the Applicant's room at the designated accommodation where he was required to live was searched, some papers were recovered which included details of the name, address and telephone number of another sex worker (Y) known to the agency referred to above. The Applicant has said that that note was made a long time ago, before the start of his present sentence. There does not appear to have been any attempt by the authorities to find out from Y whether she had had any recent contact with the Applicant.
45. On 14 January 2021, a letter from the Applicant to a friend of his (Z) was intercepted by the prison. It appeared from the letter that the Applicant wanted Z to get X to write to his Solicitor and to tell the truth.
46. A block on contact between the Applicant and Z was requested while the matter was looked into by the authorities. On 27 January 2021 B spoke to the Applicant at some length. He said that Z had told him that X had approached him asking about the Applicant's whereabouts and that she had provided her phone number and asked him to pass it to the Applicant. The Applicant decided against adding her number to his list of approved contacts but saw an opportunity to prove his innocence and decided to ask Z to pass his solicitors' details on to X if he saw her again.
47. B acknowledged in her report that the Applicant did not appear to be angry about his letter being intercepted or contact with his friend being blocked temporarily, and indeed he readily agreed that she should speak to Z to verify the content of his conversations with X and the Applicant. On 5 February she tried to speak to Z but he was unavailable and instead she spoke to his daughter.
48. Z's daughter was already aware of the issue as she had received a call from the Applicant's solicitor. She did not want B to speak to her father because she was worried about his becoming involved in the Applicant's problems, which she had advised him not to do. She confirmed, however, that a female (evidently X) had sought out the Applicant via her father as he had stated, but no further communication had occurred to her knowledge. She was happy to have contact between her father and the Applicant restored as they were old friends and she was



confident that her father (who is the proprietor of a garage) would not become involved in anything improper.

- 49.B reported all of that to the prison and the decision was made for contact between Z and the Applicant to be re-instated. Telephone monitoring was approved for a period of 3 months to continue to maintain checks on the Applicant's contact with others. Nothing of any significance for present purposes appears to have been overheard.
- 50.B stated that she had no information from the Police or any other source to suggest that X had, since the Applicant's recall, reported any form of witness intimidation.
- 51.According to the Applicant's solicitors, B stated in her evidence to the panel that she was prepared to give the Applicant '*the benefit of the doubt*' about his letter to Z and that it '*did not raise any major issues for her.*'
- 52.Finally, in this summary of the evidence, it is pertinent to mention that one of the grounds for the Applicant's first recall is stated to have been that he had been associating with sex workers. It is hardly surprising, given his record of living off immoral earnings, that that was a matter of concern to probation. The Applicant has always insisted that the sex workers were his friends and he could have what friends he liked.

*The way in which the panel dealt with X's allegations*

53. In the concluding section of its decision the panel stated:

*'The panel considered all the evidence available from the time of your recall, including your own account of the events and the documented reports within the dossier. In a situation such as this the panel has three options: to disregard the allegation entirely, to make a finding of fact (using the civil standard of proof) or to make an assessment of the allegation to decide whether and how to take it into account as part of the parole review. The panel is not disregarding the allegation. The panel also did not feel it necessary to make a finding of fact. However, it is giving it some weight in relation to your risk of reoffending, given that your past associations with vulnerable sex workers have been linked to your offending, including the index offence.'*

54. The panel thus correctly identified the three options specified in the Board's Guidance on Allegations.
- 55.The panel was of course fully entitled to attach some weight to the agreed fact that the Applicant had been having contact with a sex worker, which was relevant to his risk. However, the actual allegation which the panel had to consider under the Guidance was the serious and disputed allegation that he had made threats to X in order to try to force her into working for him as a sex worker.
- 56.There was a good deal of evidence (summarised above) which needed to be carefully analysed and assessed in order to reach a conclusion as to whether it would be fair to attach any weight to that allegation. There is no indication in the



decision letter that the panel conducted that exercise, and it did not give any reasons for its decision to attach weight to the allegation.

57. It had recorded earlier in its decision letter that the police - although deciding that there was insufficient evidence to charge the Applicant with the alleged offence against X - had been of the view that the allegation was '*robust and credible*' (which means no more than that they did not find her account unbelievable and that she stuck to it when questioned). The view of the police was clearly not a substitute for a careful analysis and assessment of all the evidence by the panel itself.
58. In these circumstances I am driven to the conclusion that the panel's failure to give adequate reasons for a significant part of its conclusions must be regarded as amounting (in accordance with the principle discussed in paragraphs 31-34 above) to irrationality or procedural unfairness. I would myself prefer to categorise it as the former.
59. This conclusion is sufficient to establish that this is a case which should be reconsidered. I am not, of course, expressing any view about what the outcome of the next hearing should be.

### Other submissions

60. Since I have already decided on the solicitors' principal submissions that this case must be reconsidered, I can deal with the other submissions quite briefly. They are as follows.
61. ***That the psychologist based her evidence on significantly incomplete information.*** The solicitors point out that when she gave her oral evidence to the panel the psychologist had only seen pages 1-220 of the dossier and not pages 221-463 which had been added since she carried out her assessment. This was regrettable but I have carefully examined pages 221-463 and I cannot believe that the psychologist's opinion and recommendation would have been any different if she had seen them.
62. ***That the psychologist unreasonably and inappropriately criticised previous decisions of the Parole Board to recommend a move to open conditions and to direct his release on licence.*** The solicitors point out that those decisions were made by Parole Board members who were trained in risk assessment and had carefully considered the evidence presented to them. It is perhaps unfortunate that the psychologist saw fit to criticise their decisions but I cannot regard that as a ground for directing reconsideration of the panel's decision. The panel was entitled to place reliance on the psychologist's own reasoning and conclusions.
63. ***That insufficient weight was given to C's evidence supporting re-release on licence.*** C's evidence was not unqualified (see paragraph 15 above) and the panel was fully entitled to prefer the views of B and the psychologist.
64. ***That B did not make an independent assessment of the Applicant's risk but simply adopted the psychologist's.*** The solicitors state (and of course I accept) that B said in evidence that she felt she should follow the psychologist's recommendation. They submit that there should have been an independent risk



assessment by probation. There is some force in this submission but B was entitled to take the psychologist's report and opinions into account and I am afraid I am not persuaded that this would be a ground for establishing irrationality or procedural unfairness

65. ***That the panel was unduly influenced by the recent adjudication.*** The panel stated in its conclusions that '*the recent adjudication suggests old patterns of offending endure.*' There is some force in the solicitors' submission that when the whole of the evidence is considered this was a conclusion of doubtful validity but in view of my firm conclusion on the solicitors' principal submissions it is unnecessary for me to make any decision about this one. I doubt, though, whether the panel's decision would have been any different without this particular point.

## Decision

66. For the reasons explained above this application for reconsideration must succeed.

**Jeremy Roberts**  
**4 September 2021**

