

[2021] PBRA 152

## Application for Reconsideration by Browning

### Application

1. This is an application by Browning (the Applicant) for reconsideration of a decision by a single member panel of the Parole Board (the Panel) dated 30 September 2021 not to direct his release (the Decision) following a hearing held remotely on 27 September 2021.
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. These include the dossier which runs to over 200 pages, and the application for reconsideration itself submitted by the Applicant's solicitors.

### The Background

4. The Applicant is now 32 years of age. He is currently serving an extended sentence of 5 years comprising 4 years' custody and 1-year extended licence following his late plea of guilty to an offence of Actual Bodily Harm. The offence took place in the home of the victim (A), a woman known to him. The evidence was that he told her he wanted to return to prison and that he wanted to hurt her. She was seriously assaulted and lost consciousness. The sentencing judge heard evidence to the effect that in the days and weeks leading up to the offence the Applicant was controlling and threatening the victim who was in the opinion of the court particularly vulnerable. Following the assault, the Applicant committed two offences of witness intimidation in an attempt to frighten the victim into dropping the charges against him.
5. In passing sentence, the judge observed that the index offences were very similar to the offences of violence committed against a former partner in 2010. The licence expiry and the sentence expiry dates of the index offences are recorded as being in September 2022.



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## The Recall

6. To fully appreciate the grounds of this application it is necessary to go into a little detail regarding the facts of and the circumstances leading up to the Applicant's recall during the current sentence. He was first released in February 2020 and recalled in March 2020 for failing to comply with rules at his designated accommodation. He was re-released in August 2020 and was again required to live at specified premises. He was recalled for the second time in February 2021. He was waiting for a placement elsewhere and had been temporarily rehoused in designated accommodation. Unfortunately, both his mental health and his behaviour deteriorated to the extent that he had been drinking and taking drugs and had told a former partner (with whom he was not supposed to be in contact) that he was contemplating suicide. To disguise the fact that he had been in contact with this former partner he had changed her name in his phone. The Panel was satisfied that the fact he had deliberately breached his licence conditions, had contact with someone he should not, was misusing alcohol and drugs, was suffering from a consequential decline in his mental health, was struggling to cope in the community and was on his own admission trying to get himself recalled, meant that those responsible for his management had no option but to recall him for the second time on the basis that his risk could no longer be managed in the community.

## The application for reconsideration in outline

7. Essentially, the Applicant submits that the proceedings were procedurally unfair because the Panel failed to adjourn the hearing to seek further information in light of what is said to have been a late change in the recommendation made by one of the professional witnesses and the resultant inadequacy of the proposed risk management plan.

## The Relevant Law

### *Parole Board Rules 2019*

8. 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)).

### *Procedural unfairness*

9. 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.

10. 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.

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

### **The reply on behalf of the Secretary of State**

12. The Secretary of State has indicated that he does not intend to make any representations with regard to this application.

### **The application in more detail**

13. The Applicant's Community Offender Manager (COM), the professional responsible for his management in the community, had recommended release into the community to reside in premises which would provide him with specialist psychological support. That recommendation had been made in a report two months before the hearing and was said to be preferable to the Applicant remaining in custody and waiting to join a similar specialist unit within the prison system. It is submitted that the recommendation changed very late in the day leaving insufficient time for the matter to be further explored and for a different "*and more tailored*" proposal to be put forward and for those reasons was procedurally unfair because important evidence was not gathered or shared.

### **Analysis and Discussion**

14. The Panel recorded that the Applicant's own evidence as to whether he believed he was being adequately supported in the community was "changeable". It reached the conclusion based on all of the evidence that in fact he had a high level of support. The Panel expressed itself to have been concerned that he was not making the required progress, that he was associating with a former partner in breach of his licence and was continuing to misuse substances. It reached the conclusion that

his second recall was not only appropriate but essential given the unmanageable escalation in his risk of causing serious harm. It assessed that risk to the public and known adults (former partners) to be at least high and potentially very high. Further, the Panel found no persuasive evidence that the Applicant's risk had reduced since his recall to prison.

15. In evaluating the plans put before it to manage the Applicant's risk were he to be released, the Panel focused in some detail upon the matters that are now in effect put forward in support of this application for the release decision to be reconsidered. In so doing the Panel noted the following matters in particular:

a) The recommendation for release by the COM and the reasons given for it in her earlier report.

b) That since the report from the COM had been written the Applicant had been deemed unsuitable for the type of specialist premises recommended and that no referral had been made to determine what support might be available for him.

c) That the COM made what is described in the Decision as "a current recommendation" that the Applicant could reside for three months in premises that did not provide psychological support and thereafter be referred elsewhere and at the same time indicated that she was not confident that the Applicant's risk could be managed safely at that point and thereafter.

d) Finally, that the COM continued before the Panel to support release despite the fact that in the judgment of the Panel the proposed risk management plan was significantly less robust than the plan in being when the Applicant was previously released and recalled.

16. It is important to record in the light of the complaints now made that no application for an adjournment for any other information or material to be put before the Panel was made either at the hearing itself or subsequently until this application. This case was heard by a highly experienced Panel which I am confident would have considered without being asked whether it was necessary to seek further evidence or direct that further enquiries be made before reaching a final decision.

17. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed by the decision in the case of **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 adjourning the case to another hearing where further 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. When making the decision the Panel considered all the evidence that was before them. I have not had placed before me anything to



indicate that further evidence was either available or necessary. In my judgment there was nothing to indicate that there was in the conduct of this case any procedural unfairness.

18. The Panel expressed in clear and cogent terms why it could not support the application before it for release. In my judgment I found the Decision to be a thorough, balanced and fair minded analysis of the Applicant's case. I am entirely satisfied that it set out its reasons for refusing release which in my judgement were fully justified by the totality of the evidence.

### **Decision**

19. For the reasons set out above I am not persuaded that any of the matters set out in Rule 28 (see paragraph 11) have been established. I find without hesitation that this case was dealt with justly and that procedural unfairness has not been established. The application for a reconsideration is therefore refused.

**HH Michael Topolski QC**  
**28 October 2021**