

[2021] PBRA 141

Application for Reconsideration by Mather

Application

1. This is an application by Mather (the Applicant) for reconsideration of a decision of an oral hearing panel dated 9 September 2021 not to direct his release on his application for a recommendation for transfer to open conditions.
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:
 - a) The Decision Letter dated 9 September 2021;
 - b) The application for reconsideration made on the appropriate form dated 27 September 2021; and
 - c) The Dossier, numbered to page 346, which is the same as the Oral Hearing Panel (OHP) had when it made its decision.

Background

4. The Applicant is now 42 years old. On 25 September 2009, when he was 30, he received a sentence of Imprisonment for Public Protection, with a Tariff Expiry Date of 31 January 2016, for 2 offences of sexual assault by penetration. An offence of assault occasioning actual bodily harm and three other sexual offences were taken into account when setting the tariff, but no separate penalty was passed in respect of them.

Request for Reconsideration

5. The application for reconsideration is dated 27 September 2021.
6. The grounds for seeking a reconsideration are as follows (paragraphs lettered and names redacted for the purpose of this decision):

The Applicant would ask that the Parole Board re-consider their decision on the basis that the hearing was procedurally unfair.

- a) The Applicant only received a copy of his dossier on the day of the hearing. The Applicant will say that whilst he has had the opportunity to discuss the contents



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with his lawyer he did not have sight of the psychology report.

- b) The Applicant will say that when he met the psychologist on 29 June 2021 to discuss the contents of the report he was not given a copy.
- c) The Applicant does not agree with the contents of the report and will say he was not given the opportunity to challenge this during the Oral Hearing. At 2.12 in the decision letter, it is confirmed that the psychologist told the panel that in the hearing he gave a different account about the breakdown of his relationship with C in 2001 than he had reported previously. She also states that the Applicant gave a different account of how he met A. At the time of the evidence being given, the Applicant will state that he raised objections to this with his Prison Offender Manager (who was in the room with him). As they were on mute nobody else was aware of this. The Applicant will state that he was told to write it down and would have the opportunity to address this later in the hearing. The Applicant will say that he was never given an opportunity to address this. The Applicant will say that this has played a significant part in the decision reached by the panel. In the conclusion at 4.2 the Panel have stated that *'there would need to be increased reliance on the Applicant being open and honest with professionals in order to manage risk. After considering the evidence, the panel have doubts about this. The psychologist highlighted inconsistencies in the Applicant's evidence and the panel note a pattern of his differing account of events from around the time of the index offences. This leads to the Panel lacking confidence in his honesty with professionals.'* The Applicant will say if he was given the opportunity to confirm the evidence with the Parole Board then they would not have come to this conclusion.
- d) The Applicant will therefore say that as he was not allowed to do this due to the way the hearing was conducted then it was procedurally unfair.

7. There is no complaint of irrationality.

Current Parole Review

- 8. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release, or, if release was not directed, for consideration of a recommendation for open conditions.
- 9. A panel consisting of three independent members of the Parole Board heard the case remotely on 25 August 2021. At the end of the hearing the Community Offender Manager was asked to supply a copy of the trial indictment which the Applicant had read out at the hearing. This was provided on 1 September 2021. The Oral Hearing Panel invited legal representations at that stage but none were received.
- 10. The following witnesses gave evidence: the Community Offender Manager (COM), the Prison Offender Manager (POM), the prison psychologist, and the Applicant. The Applicant was legally represented throughout. The Applicant did not request release: he asked for a recommendation that he be transferred to open conditions. None of the professional witnesses supported release.

11. In the light of the complaint of procedural unfairness it is important to set out some of the information contained in the Decision Letter.

"At the start of the hearing the Applicant said he had only just seen his dossier. His solicitor confirmed that he had seen and discussed the dossier with the Applicant and was content to continue. The Applicant was given the opportunity to speak in private with his legal representative, during the hearing".

The Relevant Law

12. The panel correctly sets out in its decision letter 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

13. 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)).

14. 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**.

Procedural unfairness

15. 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 focuses on the actual decision.

16. 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.

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

The reply on behalf of the Secretary of State


18. The Secretary of State has asked the Prison Offender Manager to comment. She says *"On the afternoon of the oral hearing [the Applicant] attended an hour before the hearing was due to start for a telephone consultation with his solicitor.*

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Following this, I spoke with him and asked him if he had a copy of his dossier – he said he did not and that he had not received it. I offered to print off another copy of the dossier for him, and stated that he could share my copy of the dossier in the hearing. [The Applicant] said he would share my copy in the hearing if he needed to refer to it.” She mentions that the dossier did contain the psychological report, including the disclosure section. She makes no comment on the suggestion that the Applicant asked for and did not receive an opportunity to challenge a part of the psychologist’s evidence.

Discussion

19. The decision in issue is a decision not to recommend transfer to open conditions, which is not subject to the reconsideration process: see Paragraphs 12 and 13 above.
20. However, in order to consider the question of open conditions the Oral Hearing Panel had first to decide not to direct release. It is therefore right that I consider the complaint, which in summary is that the Applicant was deprived of the opportunity to put his case forward.
21. I note what appears at Paragraph 10 above, which does not appear to be disputed. Rule 24(9) of the **Parole Board Rules 2019** requires the prisoner to be given an opportunity to address the panel after all the evidence has been given. There is no suggestion that this opportunity was not given in this case. The Applicant was represented throughout the hearing. His legal representative supplied written submissions. The panel asked for further submissions from his legal representative, if the representative wished to make them, after the oral hearing had finished and before their decision was made. The legal representative did not make any submissions at that stage. The Applicant had the opportunity to speak to his legal representative during and after the oral hearing. If there was any substance in the Applicant’s complaint that he did not have an opportunity to challenge important evidence, the complaint could have been raised with the panel before the decision was made. It was not. I conclude that there is no substance in the complaint.
22. Furthermore, given that the application was for a recommendation for open conditions, even if there was a procedural unfairness such as the Applicant complains of, it could not have affected the OHP’s decision not to direct release.

Decision

23. For the reasons I have given, I do not consider that the decision not to release was procedurally unfair and accordingly the application for reconsideration is refused.

Patrick Thomas
27 October 2021