

[2020] PBRA 75

## Application for Reconsideration in the case of Benson

### Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a paper decision by a single member panel of the Board (the Panel) on 29 April 2020 to direct the Respondent's release. In November 2012, Benson (the Respondent) who is 44 years old, was sentenced to an extended determinate sentence of six years imprisonment together with an additional licence period of three years for an offence of rape. The sentence and licence expiry date is 8 August 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 are the Dossier, the Decision itself and representations made on behalf of the Applicant and on behalf of the Respondent.

### Background

4. The Respondent had been released and recalled on three occasions during his sentence. He was released for the first time on 13 August 2015 and was recalled on 10 October 2015. He was then released on 23 May 2018 (following an oral hearing in April 2018 at which evidence was heard) and was recalled on 1 November 2018. He was released on 5 November 2019 for the third time (following an oral hearing in July 2019 at which evidence was heard and which was concluded on the papers). He was recalled on 12 March 2020.
5. By the time the Respondent was recalled on 12 March 2020 his response to being on licence had been somewhat mixed. He had complied with probation and other appointments and with the general rules of his accommodation, but there were serious concerns regarding his engagement with professionals which was said to be superficial. Importantly, he remained unwilling to share information regarding his personal relationships. His relationship with his probation officer was not good. His recall to prison was triggered by information which came to light which strongly suggested that he had failed to disclose an intimate relationship with a female (Ms A) which he was required to do by reason of a specific condition of his licence. When asked about this relationship, the Respondent denied it was sexual claiming the woman concerned was his cousin. This did not square with the way in which the



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woman herself had described their relationship nor did it accord with the way the Respondent himself described it in his own written submissions to the Panel. It is on the evidence relating to these matters in particular that this application focuses and to which I must in due course return.

## Request for Reconsideration

6. The application for reconsideration is dated 21 May 2020.
7. The grounds for seeking a reconsideration are set out in some detail in the Applicant's written grounds dated 21 May 2020. In essence, it is submitted that by not holding an oral hearing the Panel acted irrationally in that there was an inadequate examination and assessment of important parts of the evidence and a failure to explore sufficiently the evidence relating to risk.

## The Relevant Law

### *The Test*

8. The Panel in its decision correctly sets out the test for release.

### *Parole Board Rules 2019*

9. 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)).

### *Irrationality*

10. 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."*

11. 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.
12. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: see **Preston [2019] PBRA 1** and others.



## Oral Hearings

13. In the case of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner required one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

## The reply on behalf of the Respondent

14. Solicitors acting on behalf of the Respondent have submitted a helpful and thorough response in writing dealing with virtually every assertion and submission made on behalf of the Applicant. Without going into their submissions in any detail, it is submitted that the Applicant has failed to establish that its application has any sound evidential basis. They submit that the Panel had sufficient material before it to make the decision without recourse to an oral hearing and so they submit that the decision made by the Panel followed the evidence, was justified and was correct.

## Discussion

15. Lord Reed in **Osborn** made clear that what is fair in any case is fact specific. All relevant facts have to be considered when deciding whether it would be unfair to decide a case on the papers. He went on to give examples of cases where the circumstances will make an oral hearing necessary. They included cases where there are issues of fact to be resolved and cases where it is necessary to test the views of those who have dealt with the prisoner.
16. The decision in **R (ex parte Wells) v The Parole Board [2019] EWHC 2710 (Admin)** contains helpful guidance on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational. It is a decision that I am obliged to follow.
17. It is suggested in **Wells** that rather than ask the simple question 'was the decision being considered irrational', a better approach is to test a panel's ultimate conclusions against the evidence before it and to ask whether the conclusions can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.
18. Panels of the Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed. They would be failing in their duty to protect the public from serious harm (while



also protecting the prisoner from unnecessary incarceration) if they failed to do just that.

19. If, however, a panel is going to depart from the recommendation of an experienced professional it is important it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions.

20. Therefore, the questions I must resolve are:

- (i) Should the Panel have directed an oral hearing?
- (ii) Do the conclusions of the Panel follow from the evidence? and
- (iii) Are there any unexplained evidential gaps which fail to justify the conclusion?

21. As for question (i) above, there is no material in the Dossier or elsewhere that assists me in relation to the decision not to proceed to an oral hearing. As for questions (ii) and (iii), I have of course examined closely the reasons expressed by the Panel for directing the release of the Respondent on licence for the fourth time during the duration of this sentence.

22. It is submitted by the Applicant that the failure to direct this review to an oral hearing resulted in an inadequate examination of the available evidence. Therefore, it is convenient to consider the nature of the material that was in the Dossier before the single panel member. It included:

- (i) The two earlier decisions of Parole Board Panels which sat in April 2018 and July 2019;
- (ii) A report, not prepared by the Offender Manager, but by another Probation Officer, making the application for the recall of the Respondent on 12 March 2020;
- (iii) An assessment and a report from the Offender Manager dated January and March 2020 respectively. In the report, she stressed that due to the onset of COVID-19 outbreak, she had not by that point been able to speak to the Respondent about his recall and she awaited an update from another Probation Officer responsible for the Respondent in the prison. She confirmed notwithstanding that she could not support release referring to her serious concerns over the inconsistent accounts given by the Respondent and Ms A and the Respondent's non-compliance with licence conditions as evidenced by the pattern of successive recalls. She expressed the view that her concerns impacted on the Respondent's risk in the community which she assessed as high and imminent.
- (iv) Statements from the Police which revealed that they had obtained telephone records which showed considerable contact between the Respondent and Ms A during the months of January and February 2020 and which had prompted the concerns of the Probation Service that the Respondent may have yet again failed to disclose the existence of an intimate relationship. An Officer in another statement referred to his conversations with Ms A in which she gave a description of her relationship with the Respondent which differed from that given by him



- and on one possible interpretation of which suggested that their relationship had been intimate.
- (v) A separate statement from Ms A, in the form only of a short email from her to the Respondent's solicitors regarding her relationship with the Respondent, which described it differently from the way she had described it to the Police and differently from that provided by the Respondent following his recall. In addition, her statement offered a short explanation/justification for the telephone and text communications between them that indicated the contact was about something else altogether.
  - (vi) A long and detailed handwritten submission from the Respondent himself dated 29 March 2020 in which he referred to Ms A as a former girlfriend with whom he had had a child several years before but now thought of her "*as like a cousin*".
  - (vii) The remainder of the Dossier comprised of material routinely seen by panels, with perhaps the exception of a detailed written complaint dated 6 December 2019 by the Respondent regarding his Offender Manager and in reply, the detailed written findings of an internal enquiry by the Probation Service into those complaints.
  - (viii) It should, for completeness, be noted that the Dossier contained no information at all about the Respondent's behaviour in custody since recall, and no other reports from any professional beyond that to which I have referred.

23. It was then upon this material that the Panel reached its conclusions and decisions. In accepting, correctly in my judgment, that the decision to recall was on balance appropriate, the Panel, having noted the risk management plan and the fact that the Respondent had a difficult relationship with his Offender Manager, briefly set out its reasons in the following terms:

*"(i) Given subsequent information, namely the email from [Ms A], coupled with the witness statements in the dossier, the [Panel] considered that on the balance of probabilities the relationship with [Ms A] was not sexual....as it appears to have been in the past...*

*(ii)... The Panel considers that the risk of sexual harm is not imminent....and [Ms A] was sufficiently aware of your history and background to take steps to protect herself in her relationship with you...*

*(iii)...There is no other significant indication of risk of offending...the panel noted a failed drug test...*

*(iv)...The Panel did not consider your risk of further offending...increased in the community...*

*(v)...Given the detailed investigation of the case, including an oral hearing, leading to ...the decision of September 2019...this Panel was satisfied the risk could again be managed in the community."*

24. I recognise that it is unusual in Reconsideration Decisions to quote from Panel Decisions but it is essential for a proper understanding of my decision on this application to appreciate the extent to which and how the Panel expressed itself.



25. In approaching my task, I recognise and understand that the reconsideration mechanism is not a process whereby the judgment of a Panel can be lightly interfered with. Nor is it a process in which I can, or should, substitute my own view for that of the Panel. The approach that I must adopt is to test the conclusions the Panel reached against the evidence before it and ask whether those conclusions can be safely justified on the basis of that evidence.
26. I must begin by expressing my real doubts whether this was a case that should have been decided on paper. It is clear from its decision that the Panel placed a good deal of reliance upon what it described as a "*detailed investigation*" of the case carried out by a differently constituted Panel which sat in July 2019 and concluded the matter on the papers in September 2019. It is relevant to note that it was the same Offender Manager in 2019 who was acting in that capacity at the time of the Respondent's recall. In the 2019 review she did not support release, assessing the Responding as being a high risk of non-compliance and displaying a lack of openness, adding that in her opinion his warning signs might be difficult to notice.
27. Given the fact that his victim in the index offence was someone with whom the Respondent had at one time been in a relationship, and the fact that he had been previously recalled for similar reasons, the issues of crucial importance in this review were the nature of the Respondent's relationship with Ms A and the Respondent's willingness and capacity to comply with supervision generally and the conditions of his licence in particular. The question is whether there was sufficient material before the Panel to fairly decide the issues and to make a finding of future risk, or was this one of those cases identified by Lord Reed in **Osborn**, where there were issues of fact to be resolved and where there was a necessity to test the views of a witness who had dealings with the Respondent and with whom there had been difficulties (i.e. the then Offender Manager).
28. There are therefore two elements of this decision to be considered. The first is whether this case should have been directed to an oral hearing. I should make clear that when the Panel in this case made its decision on paper the COVID-19 outbreak had happened, and the prison service ceased all face to face oral hearings. Because there was likely to be a substantial delay before face to face parole hearings would recommence, panels were requested to consider whether an oral hearing could take place remotely. The second element is whether the Panel's conclusions followed from the evidence and/or whether there are any unexplained gaps or leaps in its reasoning which failed to justify its conclusions.
29. As for the first element, the material provided by the Police which triggered the investigation into the relationship between the Respondent and Ms A; the email statement from her; the conversations she had with the Police and the Respondent's assertions, both written and oral, taken together, justify in my judgment a finding that an oral hearing was necessary as the reliability and credibility of both the Respondent and Ms A were very much in issue. It was, in my judgment, also necessary to carefully explore the circumstances surrounding the recall and how the Offender Manager's concerns regarding compliance impacted upon the Respondent's risks in the community. An oral hearing would have afforded an opportunity to explore whether the Respondent's risk of serious harm was properly assessed as being high and imminent; it would have enabled a more careful examination of the position and circumstances of Ms A focusing upon her capacity





to protect herself; it would have enabled there to be a more rigorous examination of the relationship between the Respondent's risk of re-offending and his drug misuse (if any) and finally, it would have enabled the Offender Manager and any other relevant professionals to place further information before the Panel, for example regarding the Respondent's behaviour in prison following recall.

30. I turn next to deal with the second element which requires me to test the conclusions reached by the Panel against the evidence it considered. This part of my analysis is connected to the duty that is imposed on decision-makers in this context to give reasons for their decisions. As was observed by the High Court in **Wells**, an unreasonable decision is often one which fails to provide reasons justifying the conclusions.

31. I have set out in paragraph 24 (i) to (v) above the reasons given by the Panel. I regret to say that in my judgment, they do not arguably follow the evidence presented in the Dossier and do reveal gaps that are not, or not sufficiently, explained. In particular:

- (i) The Decision does not explain the basis upon which it finds that the relationship between the Respondent and Ms A was not a sexual one;
- (ii) It does not explain on what basis it could find that Ms A was capable of taking steps to protect herself;
- (iii) The Panel did not provide any reasons for its finding that the risk of harm was not imminent; and
- (iv) Neither did it explain how it had reached the conclusion that the Respondent's risk had not increased.

## Decision

32. After careful and anxious consideration, I have concluded that in this case:

- (i) The Panel fell into error in not directing an oral hearing and as a result there was an inadequate examination and assessment of the evidence, and
- (ii) That the conclusions reached and expressed by the Panel did not logically follow from the evidence that was before it in the Dossier and the Decision failed to provide adequate or sufficient reasons to justify the conclusions the Panel reached.

33. Therefore, this application for reconsideration is granted.

## Directions

34. While I have no doubt that the original panel would be more than capable of approaching a fresh consideration of this case conscientiously and fairly, the question of justice being seen to be done arises. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be it would be preferable to avoid it by directing (as I now do) that the case should be heard by a fresh panel.



## Further Directions

35. I make the following further directions:

- (i) The re-hearing should be expedited. I appreciate this may in the present circumstances be very difficult but I am confident every effort will be made;
- (ii) The original decision must be removed from the Dossier and must not be seen by the new panel;
- (iii) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered;
- (iv) The new panel should also be told that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing; and
- (v) The panel chair may wish to consider whether any further evidence or information by way of update is required.

**Michael Topolski**  
**10 June 2020**

