

[2021] PBRA 12

## Application for Reconsideration by Storey

### Application

1. This is an application by Storey (the Applicant) for reconsideration of a decision of a Panel made on 28 December 2020 after an oral hearing held on 16 December 2020. The decision was not to direct the release of the Applicant.
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, which comprise the Oral Hearing Decision Letter dated 28 December 2020, the representations of the Applicant's solicitor dated 19 January 2021, the statement of the Secretary of State explaining that no representations will be made on his behalf and the dossier comprising 483 pages.

### Background

4. On 20 May 2004, the Applicant, who was then 24 years of age, was sentenced to life imprisonment with a recommendation that he should serve a minimum term of 4 years, 4 months and 7 days in custody after he had been convicted of offences of indecently assaulting and attempting to rape a female under 16. He is now 41 years old.
5. The Applicant had three previous convictions for indecent assault of females under the age of 16 and two previous convictions for indecent exposure.
6. The Applicant also disclosed other sexual offending which did not lead to convictions.
7. The Panel noted that in the early part of his sentence the Applicant showed little interest in working on his offending behaviour and he was transferred from one prison to another after he indecently assaulted a female staff member by pinching her bottom. After this transfer, the Applicant was seen to expose himself and to masturbate when a female officer walked past his cell. He subsequently engaged with interventions to address and reduce his risks as well as undertaking several overnight temporary releases to designated accommodation.
8. The Applicant was released on licence to designated accommodation on 13 May 2019 and his licence was revoked on 3 October 2019 with his recall being on the



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following day because the probation service considered that his disclosures to them *"indicated a level of sexual preoccupation which means that [his] risk was not currently manageable"*.

9. He received warnings *"after two incidents of concern"* when on licence. First, on 21 July 2019, he had oral and vaginal sex in a toilet in a supermarket with a woman who he had met six days earlier. The Applicant initially failed to comply with his duty to disclose this relationship to his Offender Manager and when he did disclose it, the Applicant did not disclose the incident of having sex in the supermarket toilet. He realised later that *"there were offence paralleling elements to this incident in that it involved impulsive and risk-taking sexual behaviour in a public place"*.
10. His second warning came after he had been seen by staff in a public library looking at a computer image of a woman urinating in a sexual position and information about this incident was passed on to the probation service via the police on 1 August 2019. The Applicant told the Panel that he had come across the image inadvertently after disabling the search function in order to search for "weird videos" and the Applicant *"accept[s] that [he] lingered over the image"*.
11. Details of this incident like the supermarket toilet incident should have been included (but were not included) in the Applicant's *"sexual thoughts diary"* or disclosed by the Applicant to his Offender Manager. He said that he did not disclose them because he panicked and thought that disclosing these incidents might have resulted in his recall.
12. The Applicant received a formal Assistant Chief Officer warning in August 2019.
13. The Applicant had a supervision meeting on 1 October 2019 when he told his Offender Manager that he had had sexual thoughts about his previous Offender Manager and that he had been fantasising about her that morning. He then said that he had had sexual thoughts about his current Offender Manager earlier in the meeting when he had been able to see up her skirt. She said that she believed that the length of her skirt made this impossible
14. The Applicant was recalled on 3<sup>rd</sup> October 2019 as the probation services considered that his *"disclosures indicated a level of sexual preoccupation which meant that [his] risk was not currently manageable"*.
15. The panel considered that the Applicant's recall:

*"in all the circumstances ... [to be] reasonable and justified. This was not simply a matter of promptly disclosing sexual thoughts which you were struggling to manage and seeking help from this. Your disclosures indicated that you had concealed these thoughts from your supervising officers for a considerable period of time. Following on from [his] earlier failure to disclose the incidents in the library and in the supermarket toilet, this indicated that [he] could not be trusted to be consistently open and fully honest by promptly disclosing matters of central relevance to the management of [his] risk"*.

## Request for Reconsideration

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16.The application for reconsideration is dated 19 January 2021.

17.The grounds for seeking a reconsideration included the following grounds:

- a) the Decision of the Panel was procedurally flawed and irrational as it failed to follow and adhere to the Board’s own guidance on how to consider;
- b) further allegations of offending set out in security reports of 27 and 30 November 2020;
- c) over familiar remarks by deviating from the Board’s Guidance on Allegations March 2019 ( “the Guidance”) which required the Panel when dealing with an allegation to assess the relevance and weight of the allegation and then either to choose to disregard it, make a finding of fact in relation to it or make an assessment of the allegation to decide whether and how to take the allegation into account as part on the parole review. I will refer to these matters as “the assessment functions”; and
- d) the Panel “*appeared to place great significance to the fact that the Applicant’s childhood history has not been corroborated in the oral hearing*” and “*as a result the matter was addressed in closing submissions [but] the decision letter does not outline the panel’s views on this issue and closing submissions on that issue [were] not addressed*”.

### **Current parole review**

18.On 19 November 2019, the Secretary of State referred the Applicant’s case to the Parole Board to consider whether to direct his release and if release was not directed, it was asked to consider whether the Applicant was ready to be moved to open conditions.

19.The Applicant’s case was considered by a Panel comprising two independent members and one psychologist member at an oral hearing on 12 August 2020 and following two adjournments on 16 December 2020.

20.The Panel considered a dossier of 460 numbered pages and written closing submissions from his representative dated 16 December 2020. All the documents considered by the Panel were available to the Applicant and his solicitors.

21.The Panel heard oral evidence from the Applicant’s Prison Offender Manager, the Applicant’s Community Offender Manager, a forensic psychologist and the Applicant. The Secretary of State was not represented and did not adduce evidence or make any submissions. The Applicant was legally represented and asked the Panel to direct his release.

22.The forensic psychologist recommended that the Applicant should remain in closed conditions explaining that:

*"[the Applicant's risk] was unmanageable in the community at present. [He] had been recalled for a number of risk-related behaviours [and he] had failed to disclose vital incidents to your offender manager and your specific sexual thinking around these."*

23. The Prison offender manager concluded *"that the recommended psychological work needed to be completed in custody [and] without this work she considered that [the Applicant] could not be safely released into the community"*. The community offender manager recommended that the Applicant should remain in closed conditions to complete the work which the psychologist *"had originally identified as an appropriate starting point and for consideration to be given to the possibility of a move to a unit designed and supported by psychologists"*.
24. The Panel observed that the Applicant was assessed on a sexual offending risk matrix as *"presenting a very high risk of sexual reoffending"* while a Risk of Serious Sexual Violence Recidivism by the psychologist in 2020 assessed the Applicant's future risk of sexual violence as *"moderate to high"*. The psychologist told the Panel that she considered the Applicant's future risk of sexual violence to be *"nearer high than medium"* and his *"risk of serious harm is assessed as high to the public and children and medium to known adults and staff. The Panel concurs with these assessments"*.
25. The Panel noted that the Applicant had not accrued any adjudications or Incentives and Earned Privileges warnings since his recall as well as that he had progressed to holding the trusted position of Number One cleaning orderly as well as completing numerous in cell packs and receiving many positive entries for good quality work, assisting and engaging positively with staff, mentoring students and supporting prisoners in crisis. It took account of the counselling which the Applicant:
- "[had] competed since [his] recall, the positive attitude which [he has] shown towards employment, [his] work with substance misuse services, [his] management of frustrations arising from the parole process and [his positive] engagement with [his] current prison and community offender managers"*
26. To the Panel, the effective management of the Applicant's risk depended on three factors of which one was *"the implementation of a strong set of external controls and monitoring arrangements which can identify any indications that [his] risk is increasing"*. It considered that *"there remain gaps in [his] understanding or acknowledgment of the way [his] risks can potentially escalate. This was of concern to the Panel in view of his past difficulty at key times in consistently managing [his] risk in the community"*. After having taken a number of positive factors relating to the Applicant as well as factors indicating that parole should be refused, the Panel concluded that it remained necessary for the Applicant to be confined in custody to protect the community and so his application for parole had to be refused.



## The Relevant Law

27. The Panel correctly sets out in its decision letter dated 28 December 2020 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*

28. 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*

29. 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

*"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."*

30. 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.

31. 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."* In **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which



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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.

32. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

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

33. The Secretary of State has stated that he did not want to make representations and no representations have been made on his behalf.

### Discussion

34. The Applicant's grounds of appeal seek to challenge the Panel's assessment of the risk posed by him on release because of errors of fact and to obtain an order for reconsideration.

35. Many of the complaints of the Applicant relate to the obligations imposed on the Panel by the Guidance when faced with an allegation as it has the obligation:

(a) to assess the relevance and weight and either "*A. choose to disregard it; or B. make a finding of fact; or C make an assessment of the allegation to decide whether and how to take into account as part of the parole review*" (Parole Board Guidance on Allegations March 2019 v1 Section6); and also

(b) to ensure that "*the decision letter should include reference to an allegation made, explain whether the allegation has been disregarded or taken account of, and if taken account of an outline of the panel's analysis and how the allegation has impacted on decision-making. If the allegation has been disregarded, the decision letter should explain why it has been disregarded. The decision letter should also set out, in respect of any finding of fact, how and why they were made (namely upon the balance of probabilities and in order to assist the panel considering risk)*" (Parole Board Guidance on Allegations March 2019 v1 Section25).

36. In performing those obligations, the Panel is not required to adopt any particular wording because, as has already been explained, Lord Bingham observed in **Oyston** (supra), that "*it would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*" A decision letter will, for example, be compliant with the Guidance if a reasonable reading of it shows that the allegation has been disregarded with

the inevitable result that the matter did not have any effect on the decision arrived at.

37. To ascertain if an allegation was accepted or disregarded, it is necessary to consider the Panel's reasoning and to understand the reasons why the Panel found *"it currently remains necessary for [the Applicant] to be confined in custody in order to protect the public"*. Those significant reasons for that decision were set out in the Panel's conclusion which referred expressly to:

- (a) the Applicant's *"index offence of serious sexual violence which had a devastating impact on the victim"*;
- (b) the index offence, which *"was the culmination of a history of sexual assaults linked to, and driven by, your interest in coercive and violent sex"*.
- (c) the incident (described in paragraph 9 above) when on licence in 2019, the Applicant engaged in sex in a supermarket toilet with a woman he had recently met;
- (d) his conduct in 2019 (described in paragraph 10 above) while on licence when he disabled a safe search mechanism on a library computer which enabled him to access pornographic images in a public place which he then lingered over.
- (e) his inappropriate sexual thoughts described in paragraph 13 above about two female offender managers linked in one case *"with a wholly inappropriate view of the relationship as a friendship"*
- (f) his repeated failure to disclose those incidents to his offender manager until they were reported from other sources or (in the case of sexual thoughts about a previous offender manager) until some time after they had occurred;
- (g) the Panel's conclusion that the Applicant's evidence that during these incidents he was no closer to offending than when he was released *"displays a worrying failure to acknowledge the risk that such thoughts and actions could escalate and make a further sexual offence more likely"*;
- (h) the fact that the effective management of an offender with the Applicant's personality traits was likely to depend on among other matters *"the implementation of a strong set of external controls and monitoring arrangements which can identify any indications that your risk is increasing"*;
- (i) its conclusion that *"there remain gaps in [the Applicant's] understanding or acknowledgment of the way in which his risks can potentially escalate [and] this is of concern in view of [his] past difficulty at key times in consistently managing risky thoughts and behaviour"*; and that
- (j) even after taking account of the Applicant's positive conduct and attitude in custody and other factors in his favour, the Panel considered it necessary for him to be confined in custody in order to protect the public.

38. The Applicant contends that the Panel erred by not stating if they accepted (i) *"the recent security entries relating to the Applicant referred to on page 11 of the Decision Letter"*, (ii) the matters in the security report of 27 November 2020 that the Applicant was frequently asking when and where female staff were working and he seemed to fixate on female staff (iii) the matters in the security report of 30 November 2020 relating to "over familiar" communications and (iv) the Applicant's accounts of his traumatic childhood.

39. The Panel did state what factors they took into account in deciding whether it was necessary for the Applicant to be confined in custody and his parole application refused. Those factors have been listed in paragraph 37 above.

40. In contrast, the matters relied on in the reconsideration grounds set out in paragraph 17 are not referred to among those factors justifying the decision as to why in the Panel's words "*it currently remains necessary for [the Applicant] to be confined in custody in order to protect the public*". This was a clear indication that the Panel did not accept those factors as being of value in determining the Applicant's claim for parole and that these matters did not have any impact on its decision that it was necessary for the Applicant to be confined in custody in order to protect the public. There is nothing irrational or procedurally unfair about that decision or that approach particularly as in Lord Bingham's words set out in paragraph 38 "*it would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship*".

41. Further or alternative reasons why this application for reconsideration must be refused is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

42. There are further or alternative reasons why reconsideration must be refused and they are that:

(a) the Applicant cannot identify an error made by the Panel in its reasoning especially as it is not suggested that any of the reasons given by the Panel for refusing the Applicant parole set out in paragraph 39 above are errors of fact let alone errors of an egregious nature and/or reasons which can be shown to have directly contributed to the conclusion of the Panel that it was necessary for the Applicant to be confined in custody in order to protect the public; and/or

(b) In any event, the decision of the Panel refusing the Applicant parole were decisions which the Panel was entitled to arrive at and there is nothing irrational or procedurally unfair about the decision under challenge.

## Decision

43. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

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**Sir Stephen Silber**  
**10 February 2021**

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