

[2021] PBRA 96

Application for Reconsideration in the case of Pitchfork

The Application

1. This is an application by The Secretary of State (the Applicant) for reconsideration of a decision made by a panel of the Parole Board (the Panel) dated 25 May 2021 following an adjourned oral hearing directing release of Pitchfork (the Respondent).
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. It is agreed that this is an eligible case.
3. I have considered this case on the papers. These include the application for reconsideration itself which was received on 28 June 2021, detailed written submissions, the Decision Letter and the dossier which runs to 1154 pages.

The Sentence and the subsequent consideration of the appropriate tariff

4. On 22 January 1988 the Respondent, then known as Pitchfork, pleaded guilty to the rape and murder of two young girls, conspiracy to pervert the course of justice, and two further separate offences of indecent assault. He was sentenced to life imprisonment for murder, 10 years imprisonment on each count of rape, 3 years imprisonment for conspiracy to pervert the course of justice and 3 years' imprisonment for the offences of indecent assault, all sentences to run concurrently.
5. The trial judge recommended a minimum term of 20 years' imprisonment. In 1988 a judge sentencing a defendant for murder was not obliged by statute to make a recommendation regarding a minimum term of imprisonment to be served. In passing sentence on the Respondent, the trial judge observed that "*the rapes and murders were of a particularly sadistic kind*". He said it would be inappropriate to make a recommendation as to the minimum term because "*it was perfectly clear that [the Respondent] will only be released when the psycho pathology has ceased to exist*". The Lord Chief Justice recommended a minimum term of 25 years. In 1994 the Secretary of State set the minimum tariff at 30 years. In February 2009 the Court of Appeal Criminal Division presided over by the then Lord Chief Justice reduced the Respondent's



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minimum term from 30 to 28 years on the ground that in the judgment of that court he had made exceptional progress. In so doing the LCJ made the following observation:

"The Appellant's progress goes far beyond general good behaviour and positive response to his custodial sentence but reflects very creditable assistance to disabled individuals outside the prison system. On the evidence before us he has sought to address the reasons behind the commission of these offences....using the opportunities he has taken to educate himself in prison to the benefit of others"

Background – Brief Summary of the Facts

6. The Respondent was born in 1960. His convictions in 1988 followed his pleas of guilty to a series of serious sexual offences, two of which culminated in murder. A number of statements in the dossier bear moving testimony to the lifelong grief of the families of the two murdered girls. As the Court of Appeal commented in 2009, their suffering is heartrending.
7. Prior to these offences the Respondent had been convicted on four occasions between 1977 (aged 17), and 1982 of non-contact sexual offending. Subsequently he admitted to an extensive history of similar offending probably starting when below the age of criminal responsibility.
8. The facts of his offending are set out in all its disturbing detail in the Decision Letter and in the various decisions of the High Court. As briefly as is necessary for present purposes they are as follows. In February 1979, a 16 year old girl walking home was attacked by the Respondent. Forcing her into a nearby field he began his attack but desisted when he thought someone was approaching and might discover him. Nearly four years later, in November 1983, a girl under the age of 16, walking near a footpath was exposed to by the Respondent who then raped her and strangled her. His car was parked nearby, his baby son asleep in the back. In October 1985, another 16 year old girl was walking home alone when the Respondent held a weapon to her throat and raped her. The fourth incident took place in July 1986 when another girl under the age of 16 was violently raped and murdered. Her concealed body was found two days later.
9. Police inquiries into these offences led the police to seek blood samples from men living in vicinity. In early 1987 the Respondent persuaded a friend, who lived away from the district, to impersonate him and to provide the police with a blood sample in his place. This was described as a very elaborate conspiracy, involving the replacement of the photograph of the Respondent in his passport with a photograph of the other man and with that man learning details of the Respondent's domestic life. A bogus blood sample was later provided to the police. However, the Respondent was indiscreet in a pub, the police were informed and the other man admitted his involvement. DNA techniques were used for the first time in connection with a serious criminal investigation. When his samples connected him to all four offences the Respondent made a detailed confession admitting all the offences and a conspiracy to pervert the course of justice. It is for these purposes relevant to note that the police at the time and later did not accept all the details of the Respondent's account he provided in what was described as a "sanitised" version of the events. He claimed he used no violence towards either

of the murder victims (disproved by medical evidence) and further that the only reason for killing was the risk of identification (which was not the prosecution's case).

Proceedings before the Parole Board

10. The Respondent's first review by the Parole Board took place in April 2016. Following a hearing it was recommended that he should progress to open conditions and he did so in August 2016. The second review took place in May 2018 following an application by the Respondent's legal representatives that the proceedings should be adjourned to allow the Respondent to test his compliance through the temporary release process.
11. The current review was scheduled to be heard before the Panel in November 2020 but had to be postponed. An oral hearing took place on 22 March 2021. At its conclusion following evidence from five professional witnesses and others, the Panel adjourned so that it could receive further evidence regarding the availability of polygraph testing in the proposed release area and to receive confirmation from senior management in the Probation Service that they agreed to polygraph testing. That further evidence was received and considered by the Panel on 21 May 2021. Its decision dated 25 May 2021 was released to the parties on 7 June 2021. This Application was received by the Board on 28 June 2021.

The Application for Reconsideration in outline

12. The single ground upon which the Applicant seeks a reconsideration is that the Panel failed to provide sufficient reasons why it agreed with the assessments of the professional witnesses that the statutory test for release had been met.
13. The Applicant cites five examples from the Panel's treatment of the evidence in support of the submission that the Secretary of State is not clear as to whether any error has been made. Accordingly, it is submitted that the Decision is irrational and should be reconsidered.

The Relevant Law

Parole Board Rules 2019

14. 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

15. 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."

16. 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.

17. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28. See for example the decision in the case of **Preston [2019] PBRA 1**.

The reply on behalf of the Respondent

18. I have carefully considered the submissions made on behalf of the Respondent by his legal representatives which I have taken into account in reaching my decision.

Discussion

Giving Reasons

19. There are classes of cases in which there is a duty on the decision maker to give reasons. One such group is where the subject matter is highly regarded by the law such as one that engages personal liberty.

20. The importance of giving adequate reasons in decisions made by the Parole Board has been made clear in two High Court cases both of which contain helpful guidance which I am bound to follow on the correct approach where a panel decides either to accept or reject evidence presented to it. The two cases are those relied upon on behalf of the Applicant and are referred to in paragraphs 8 to 11 of the Applicant's submissions of 28 June 2021.

21. In **Wells [2019] EWHC 2710 (Admin)** it is suggested that rather than ask "*was the decision being considered irrational*" the better approach is to test the decision maker's ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence while giving due deference to the panel's experience and expertise.

22. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. The panel's duty is clear and it is to

make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

23. Once that stage has been reached, following the guidance provided by cases such as **Wells** and **Stokes [2020] EWHC 1885 (Admin)** a panel should explain its reasons whether or not they are going to follow or depart from the recommendations of professional witnesses.

24. It follows that in reaching my decision on this application I am required to decide first, whether I am satisfied that the conclusions reached by the Panel were justified by the evidence and secondly, whether I am satisfied that the conclusions are adequately and sufficiently explained.

The Grounds for Reconsideration in more detail

25. The primary submission made on behalf of the Applicant is in effect that a decision that fails to provide reasons justifying its conclusions is an unreasonable one and therefore irrational.

26. It is submitted that the Panel, while accurately recording the Respondent's risk factors, in effect offered little or no comment on the evidence and provided no evaluation of it and neither did it offer any of its own reasoning as to why it considered the professionals' conclusions to be correct. It is further submitted that providing reasons for supporting release were all the more important because some of the evidence given and the conclusions reached by professionals were subject to important caveats and raised a number of serious concerns that required not only careful scrutiny, but also reasoned treatment by the Panel in order that it could be understood why and on what basis it was satisfied that the statutory test had been made out.

27. In support of these submissions the Applicant relies in particular on the following five matters arising from the evidence:

- (a) The consistently expressed view of the professional witnesses was that the Respondent had the capacity to manipulate and deceive professionals with whom he worked.
- (b) A security report of 3 November 2020 relating to an allegation made by another prisoner that an incident had taken place involving the Respondent.
- (c) The Respondent's request from his probation officer for a smart phone.
- (d) A verbal exchange between the Respondent and a female shop assistant which took place in a shop while the Respondent was on temporary release.
- (e) The absence in the Decision of any consideration as to whether or not the Respondent showed appropriate and genuine remorse.

Analysis

28.I shall deal each matter referred to in paragraph 27 (a) to (e) in turn.

29.(a): The Panel dealt with the Respondent's capacity to manipulate and deceive on pages 6, 8 and 10 of the Decision when considering the evidence of three of the professional witnesses. None of the witnesses believed that the Respondent's capacity to manipulate and deceive made him unsuitable for release. All agreed that the detailed and comprehensive risk management plan would be effective in managing his risk in the community. For example, on page 10 the Panel refer to the evidence of a Senior Forensic Psychologist in the following way:

"[The Senior Forensic Psychologist] confirmed that she was still concerned about [the Respondent] being fully open and honest regarding [his] future sexual interests; this linked to [his] manipulative personality trait. She was in no doubt that polygraph testing was essential otherwise professionals would have to rely on [the Respondent's] self-reporting and there was some evidence of [him] saying different things to different people".

30.It will be remembered that the Panel at the conclusion of the Oral Hearing adjourned for further information regarding polygraph testing which in its opinion would be a vitally important part of the risk management plan. This was the unanimous view of the professional witnesses and probably explains the inclusion in the 38 proposed licence conditions of provisions designed to address the particular concern regarding this aspect of the Respondent's personality.

31.(b): The incident recorded in a security report dated 3 November 2020 was dealt with at page 7 of the Decision. As is submitted on the Respondent's behalf, the nature of prisoner on prisoner reports of misconduct or worse are well known and require careful assessment. There was evidence that went some way to support the credibility of the complainant and other evidence that tended to support the Respondent - most notably that of a senior member of the probation team responsible for the Respondent within the prison. The Panel clearly preferred that professional witness's evidence which was to the effect that little or no weight should be attached to the complaint not least because there were grounds for believing it was malicious.

32.(c): The Panel heard evidence that the Respondent had made a request of a probation officer for a smart phone while away from the prison on temporary licence. This was dealt with by a witness who also had raised concerns in relation to the Respondent's negative attitude towards a number of Probation Officers and his levels of deception during the period of his offending behaviour. It is submitted that the Panel did not provide any evaluation of the weight that should be given to the evidence regarding the smart phone in assessing risk. I accept that it may have been preferable if they had done so, but that said, it is clear that the witness did not consider it something that affected her recommendation that the Respondent should be released into the community. This in my judgement is a clear indication that this part of the evidence

was considered very carefully, albeit not specifically referred to by the Panel. It is important to note that a licence condition relating to ownership, possession and management of a mobile phone or SIM card is to be found within the licence conditions.

33.(d): This incident dealt with by a professional witness was referred to by the Panel on page 7 of the Decision and concerned something the Respondent had self-reported while he had been on temporary release in the community. The Respondent had told a lie to a female shop worker to whom he had given chocolates to thank her for fixing his phone when in exchanges with her in the shop he pretended that he was married. He was not. A professional witness told the panel that the incident was another reason why polygraph testing as a licence condition was required. The Respondent's representatives submit that the issue here was whether this was an attempt at humour, albeit in bad taste, or whether it was an example as the Applicant submits of a concerning grandiose lie providing evidence of how the Respondent might behave if released. The Panel did not express a view about this incident nor make any finding about it. Again, I accept it is arguable that it might have been preferable if they had done so. However, the fact is that the Panel were clearly satisfied by the approach to this incident taken by the professional witness which is further evidenced by the inclusion of polygraph testing in the licence conditions.

34.(e): The Applicant submits that remorse should have been a relevant consideration in deciding whether the work done by the Respondent while in prison had led to genuine progress and a lowering of risk. It is right that the Panel did not make specific reference to remorse in the Decision. It is noteworthy that there are references to his changed attitudes, insight into his offending, accepting of responsibility and motivation not to re-offend. It is clear from the Decision that the absence of remorse did not significantly impact upon the Panel's ultimate conclusion and did not appear therefore to be as significant as the Applicant submits that it should have been.

Conclusions

35. This was and remains a case of considerable seriousness, complexity and notoriety. The terrible consequences of the brutal rapes and murders of two innocent girls will forever darken the lives of the families concerned.

36. A highly experienced and expert panel comprising of two judicial and one psychologist member had in essence two questions to decide. First, did the Respondent need to remain in prison to complete any further offending work and secondly, could his risk be safely managed in the community? The Panel and all the professional witnesses approached the case on the same basis. It was not suggested by any witness, and neither is it submitted in support of this application, that any further offending work is necessary. All the professional witnesses took into account and placed before the Panel all the relevant evidence some of which pointed away from a decision to release. All the professional witnesses agreed on the ultimate issue - that the statutory test for

release had in the opinion of each of them been met. They were satisfied that with an extremely robust risk management plan the Respondent's risk could be safely managed in the community notwithstanding that there was evidence pointing in another direction. It was with those unanimous fully reasoned conclusions that the Panel agreed.

37. The two issues I must decide, as I have already indicated, are first whether I am satisfied that the conclusion reached by the Panel was justified by the evidence they considered and secondly was that conclusion adequately and sufficiently explained.

38. As far as the first issue is concerned, I can take that shortly. I am satisfied that the decision to release was justified on the totality of the evidence placed before the Panel.

39. The second issue is one to which I have given the most anxious consideration. That is whether the Panel failed to provide any or sufficient reasons explaining why it agreed with the unanimous recommendations of the professional witnesses that the Respondent satisfied the test for release.

40. The giving of reasons by a decision maker is "*One of the fundamentals of good administration*" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account; hence their importance. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither can it be necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

41. The way in which a panel fulfils its duty to give reasons will inevitably vary depending upon the facts and circumstances revealed by the evidence in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. If on the other hand a panel is accepting the evidence of one, or more than one professional witness but at the same time not accepting the evidence of another or others, then again reasons will be required. However, where a panel accepts the evidence of all the professional witnesses, it would in my judgement be consistent with the guidance in **Wells** and **Stokes** for it to set out the reasoning and conclusions of the witnesses and then to make it clear that it agreed. That much, as I read it, is implicitly recognised by the judgement in *Wells paragraph 40*:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting"

42. Taking a step back and considering the Decision as a whole, I conclude that by adopting the approach that I have described of setting out in very considerable detail the findings, assessments, operative reasoning and conclusions of each of the professional witnesses and indicating its agreement therewith, the Panel has satisfied the public law

duty to provide evidence based reasons that adequately and sufficiently explain the conclusion that was reached to direct release.

Decision

43. For the reasons I have given, I do not consider that the decision was irrational and accordingly, with my thanks to the parties for their submissions, the application for reconsideration is refused.

HH Michael Topolski QC
8 July 2021