

[2022] PBRA 181

Application for Reconsideration by Cooper

Application

1. This is an Application by Cooper (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 18 November 2022 not to direct his release. The decision was made following an oral hearing which took place by video-link on 11 November 2022. This was the second review conducted following the expiry of his IPP custodial tariff.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022 (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the basis that the decision either (a) contains an error of law (b) is irrational or (c) is procedurally unfair.
3. I have considered the Application on the papers. These are: the Application for Reconsideration with representations; the Decision document (the Decision); the Case Dossier; and the email on behalf of the Secretary of State confirming that no representations were made on his behalf.

Background

4. On 15 June 2012, at the age of 64, the Applicant was sentenced in respect of two counts of sexual assault and one count of trespass with intent to commit a sexual offence, to concurrent indeterminate periods of Imprisonment for Public Protection (IPP). The minimum custodial term was set at 7 years 83 days and the Applicant's tariff expired on 8 September 2019. Concurrent determinate sentences of imprisonment for 10 years were imposed in respect of two counts of rape and those terms have now expired. The Applicant had pleaded guilty to all offences.
5. The two rapes were committed between 31 December 1995 and 31 August 2001 and the victim was the Applicant's first wife. He subjected her to anal intercourse on several occasions without her consent and had disregarded her entreaties for him to stop. They were divorced in 2001 as a result of the Applicant's affair with the woman who he went on to marry. It was when the later offences came to light that the Applicant's first wife decided to report the offences committed against her. The sentencing judge referred to a campaign of rape where, when under the influence of alcohol, the Applicant had forced her against her will into having anal sex against her will, and only stopping when she screamed out in pain.



6. The offences for which the IPP was imposed were all committed in 2011. Between 30 June and 1 September that year, the Applicant intentionally touched an 85 year old woman on several occasions in circumstance where the touching was sexual. He went to her house 3 or 4 times and in spite of not being invited he would push his way in, sometimes being nice to her and sometimes being nasty. He would put his hands on her breasts in a sexual manner and during one incident he grabbed her breasts and sprayed perfume in her face.
7. The trespassing with intent offence was committed on 27 December 2011 when the Applicant went to the same woman's house with a vibrator late at night, banged on the door and tried to force his way in. He left only when a neighbour told him to go away.
8. Having been denied entry, the Applicant went on to sexually assault a 77 year old woman in the street. Having spoken to her and followed her as she walked home with her dog, he grabbed her from behind, told her to hold still as she struggled, dragged her across the road, attempted to pull her coat up from behind, placed his hands on her back, pushed her into a gate and fell on top of her. Local residents heard the victim's cries for help, detained him and heard him say "*I've had a drink and was trying to rape her*". He explained to the arresting police officer that he was just looking for sex and had his wife's vibrator in his pocket.
9. The Applicant had no previous convictions and there has been no evidence of other anti-social behaviour or of a propensity to break rules.
10. The sentencing judge described the 2011 offences as most worrying in that the Applicant had twice targeted women who were vulnerable because of their age and whom he would have proceeded to rape or subject to some form of penetrative contact had circumstances permitted.
11. The Parole Board Panel which conducted the Applicant's first post-tariff review on 4 December 2021, after directing a psychological risk assessment, declined to direct his release. It took into account the extent to which the completion of accredited programmes, including the Core Sex Offender Treatment Programme, had addressed his risk factors. It was not satisfied that the Applicant would be able, if released, to manage his risks in the community on the basis of the resettlement plans then proposed. However, it recommended a transfer to open prison conditions with a view to the further development of his internal risk management skills and resettlement plans.
12. The Secretary of State accepted that recommendation and the Applicant was transferred to an open prison on 22 March 2021.

Request for Reconsideration

13. The Application for Reconsideration is dated 28 November 2022 and contains detailed representations on the Applicant's behalf.
14. The grounds for seeking reconsideration are that the decision making process was procedurally unfair in that the Panel refused the application to adjourn.



15. It is not submitted that the Decision contained an error of law or that it was irrational.
16. It has been confirmed on the Secretary of State's behalf that he does not wish to make any representations in response to the Application.

Current parole review

17. The Applicant's case was referred to the Parole Board by the Secretary of State on 27 July 2021 to consider whether or not it would be appropriate to direct his release. The terms of reference included an invitation, in the event of release not being directed, to advise the Secretary of State on the Applicant's continued suitability for open conditions. Such advice is not within the remit of the Reconsideration Application.
18. The case was set down for an oral hearing to take place on 11 July 2022 before a two member Panel of the Board (the Panel). However, by a request dated 26 June 2022 the Applicant's legal representative sought an adjournment for 3 months to enable the Applicant to undertake further periods of resettlement overnight release and to resolve outstanding issues in respect of the proposed resettlement plan, in particular relating to move on accommodation following a period in Probation Approved Premises (AP).
19. Taking note of the inability of professionals at that time to explore and assess whether or not the Applicant was appropriately managing his sexual thoughts and interests, the Panel Chair granted the application. He noted that the Applicant had been reluctant to complete a sexual thoughts diary. It was apparent that the previously identified need for the Applicant's skills to be developed and tested in conditions of lesser security had not been fully addressed. In the Adjournment Notice, the Applicant's Community Offender Manager (COM) and Prison Offender Manager (POM) were asked to make every effort to ensure that the Applicant completed a reasonable number of periods of resettlement overnight release (ROR) upon which they could base their recommendations at the relisted hearing.
20. At the relisted hearing on 11 November 2022, a Panel of the Board (the Panel) considered a dossier running to 466 pages and took oral evidence from the POM and COM and from the Applicant himself. By that date, the Applicant had undertaken only one period of ROR, following a period of reluctance to apply on his part. He had engaged in 17 resettlement day releases.
21. The Panel was satisfied that risks associated with alcohol consumption had been addressed and were being appropriately managed. Both the POM and the COM expressed the view that the Applicant still lacked understanding of, and insight into, his current risks involving sexual interests and thoughts. Neither of them was confident that he had the ability to safely manage these.
22. At the close of the evidence, the Applicant's legal representative applied for an adjournment for six months or a lesser period as the panel might see fit. The purpose of such adjournment would be to allow time to ascertain whether a place would be available at particular approved premises and for an adult social care assessment to be undertaken. The latter would assist in the preparation of suitable move on arrangements.



23. The legal representative asked the Panel to take into account the Applicant's age, the type of sentence he was serving, his post tariff status, his health, the delays in accessing RORs, the time he had already spent in the open estate, and the interests of justice.
24. The Panel refused the application and the Applicant's legal representative declined the invitation to make any further submissions. The Panel went on to determine the review on the basis of the evidence it had read and heard. The Decision not to direct the Applicant's release was issued on 18 November 2022.

The Relevant Law

25. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions as adopted by the Panel in this case.

Parole Board Rules 2019

26. Under Rule 28(1) of the Parole Board Rules 2019, the only types of decision which are eligible for reconsideration are those concerning whether 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)).
27. 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.

28. 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 from the issue of irrationality which focuses on the actual decision.
29. 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.
30. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Discussion



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31. There was no evidence that the Applicant needed to undertake any further core risk reduction work in custody whether in open or closed conditions save for the maintenance of sexual thoughts diaries. It was accepted by the Panel that his custodial behaviour had been consistently good throughout his sentence and that he had been generally compliant with the prison regime.
32. The Applicant is 74 years old and there is no dispute that since he moved to the open prison his mobility has declined. The offences against his now deceased first wife were committed over 20 years ago and the other offences a decade ago.
33. In her oral evidence to the Panel, the COM confirmed that the AP where the Applicant had undertaken his one ROR had withdrawn its offer of a bedspace as a result of his impaired mobility. She had referred his case to another AP which had a stairlift but that a meeting was to be held within the week following the hearing to establish whether or not it was to be permanently closed. If this were to be the case, an Adult Social Care Assessment would need to be made.
34. The COM further stated that the Applicant would benefit from completing work with her during RORs, such as working through scenarios to address sexual thinking and reviewing sexual thoughts diaries. He had so far struggled to know what to write as he maintained that he no longer has regular sexual thoughts. The Applicant had been required to keep sexual thoughts diaries since 2018 but until about 6 weeks prior to the hearing he had not submitted any diary entries. The POM's evidence was that the entries completed in September 2022 were completed grudgingly and were not yet of the required standard as they did not adequately reflect his thoughts, feelings and behaviour.

Decision

35. The Panel clearly took into account all the evidence it read and heard. It concluded that all core risk reduction work had been completed and that the focus was now on consolidation. It considered that, although a further adjournment would be outside the applicable guidelines because of the earlier 4 month adjournment it still had a discretion to consider the application.
36. The reasons for refusing the application were that the Panel already had sufficient evidence on which to make a decision based on the test to be applied and that if release were directed the Panel could then adjourn to obtain details of the exact AP placement and if it were not then probation would need to identify suitable approved premises.
37. The first adjournment was granted on the basis that it would allow time for the outstanding issues to be addressed in preparation for the relisted hearing. In the event there was insufficient time for those issues to be fully addressed. A second adjournment was likely to have gone a considerable way to resolving the availability of a suitable release address, additional RORs with the opportunity for engagement in one to one sessions with the COM and testing in the community.
38. On the basis of the evidence before it and the submissions put forward at the hearing, I do find that the Panel's decision to refuse an adjournment was unfair. It was not



argued on the Applicant's behalf that any express procedures required by law were not followed, or that he was not properly informed of the case against him or that the Panel was not impartial. There was no evidence that any of these criteria applied.

39. However, the refusal of an adjournment at the end of the oral evidence denied the Applicant the opportunity to have resolved the issues identified by the Panel Chair at the time of the pre-hearing adjournment. This was unfair and means that the case had not been dealt with justly.

40. The Application for Reconsideration is accordingly granted.

HH Judge Graham White
23 December 2022



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