

[2022] PBRA 39

Application for Reconsideration by the Secretary of State for Justice in the case of Johnson

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 14 February 2022. The decision of the panel was to direct release of Johnson (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.
3. I have considered the application on the papers. These are the dossier consisting of 493 pages, the Application for Reconsideration by the Applicant dated 7 March 2022 and a response by solicitors on behalf of the Respondent (undated).

Background

4. The Respondent was sentenced to an Extended Determinate Sentence totalling 10 years and 4 months. The custodial term was set at 6 years and 4 months. The extended period was set at 4 years. The offences were Sexual Assault of a Child under 13 (five offences) and Sexual Assault (two offences). Lifetime Sexual Harm Prevention orders were imposed.
5. The offences took place between April 2011 and September 2014. The victims were two young males, who were aged between 10 and 14 years at the time of the offences. The victims were distantly related to the Respondent. The offences took place in the victim's home environment and when they went swimming together with the Respondent. The Respondent was aged 52 at the time of sentencing. He is now 58 years old.
6. The Respondent pleaded guilty to the offences but told the panel that he only did so due to concerns about the quality of his legal team and the impact of his previous sexual convictions.



Request for Reconsideration

7. The grounds for seeking a reconsideration are as follows:

- Ground 1 – Irrationality – The Panel failed to fully apply the test for release and failed to consider all evidence relating to risk;
- Ground 2 – Irrationality – The Panel have failed to fully explain their reasoning for going against the recommendation of report writers; and
- Ground 3 – General irrationality in that the reasoning was contrary to the Parole Board findings or evidence before them.

Current parole review

8. The case was referred by the Secretary of State to the Parole Board to consider whether to direct the release of the Respondent. The Respondent's Parole eligibility date (PED) was 11 October 2020. The Respondent's Conditional Release date (CRD) is 21 November 2022. The Respondent's sentence expires on 21 November 2026. The risk period under consideration by the panel was therefore nine months.

9. The panel consisted of three Parole Board members, an independent Chair, a psychiatrist member and a judicial member. Evidence was received at the panel hearing from a Prison Offender Manager (POM), a Community Offender Manager (COM), and a prison psychologist. The Respondent was legally represented. The Secretary of State was not represented.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release.

11. Pursuant to 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.

12. Such a decision is eligible for reconsideration if made by an oral hearing panel after an oral hearing (Rule 25(1)).

Irrationality

13. 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."

14. 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

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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.

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

Procedural unfairness

16. Procedural unfairness is not argued in this case.

17. 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.*"

Failure to give Reasons

18. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed, and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

19. The reason for requiring adequate reasons had been explained in a number of decisions including:

- a) **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
- b) **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
- c) **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
- d) **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

20. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

The reply on behalf of the prisoner

21. The Respondent's solicitors argued that:

- The correct test had been applied to the correct at risk period;
- That the panel explained its reasoning adequately; and
- That in general terms the Panel's decision was rational and evidenced.

Discussion

22. This was an application by the Applicant based upon three grounds as set out above. In brief the Applicant argued that the decision was irrational because the Panel failed to fully apply the test for release and failed to adequately explain their reasons for not following the recommendations of both the prison psychologist and the Community Offender Manager.

23. This was an extended sentence case. The panel were therefore obliged to consider risk within a defined time frame, namely between any proposed release date and the Conditional Release Date (CRD) The grounds argued by the Applicant are set out below:

Ground 1 – Irrationality – The Panel have failed to fully apply the test for release and have failed to consider all evidence relating to risk

24. In its submissions the Applicant indicates that the panel have "*inappropriately applied an entirely different release test which only looks at the immediacy of further offending or considers that public protection after a certain period does not count as part of the test*".

25. This ground is argued on the basis that the panel had come to a conclusion that the likelihood of further offending would "*mirror his previous sexual offending and that his victims would be children known to him in the context of an intimate relationship and involve a period of grooming*".

26. As noted above in cases of extended sentences, the Parole Board's considerations of risk are circumscribed. Where an oral hearing panel are requested to consider release during the period of parole eligibility (between PED and CRD), the Panel are empowered only to consider risk as it applies between any potential release by the Panel and the CRD. The panel in this case correctly identified this requirement and the decision was based upon the consideration of risk during this prescribed period.

27. The Applicant in the argument under this ground contends that the panel looked only at the "immediacy" of further offending. The evidence within the decision does not indicate that that is the case. The panel appropriately considered the likelihood of offending during the period at risk namely from potential release to the CRD.

28. The Applicant argues further for a duty on the part of the oral hearing panel, to consider '*public protection*' beyond the CRD. In my view this submission inaccurately reflects the position. The panel are not empowered or under a duty to consider public protection beyond the CRD. Legislation imposes a licence period by statute which addresses public

protection beyond the CRD date. For that reason, the panel correctly and appropriately were only empowered to consider risk as between any release date and the CRD.

29. As indicated above the Applicant, in its submissions, uses the words "immediacy of further offending" and argues that the panel applied a test which "only looks at the immediacy of further offending". The more common language in the realm of risk assessment in relation to parole and licence matters is the use of the word "imminent". In this case the assessment by the prison psychologist using an appropriate assessment tool was that the risk of sexual offending was assessed as "medium". The risk was not therefore assessed as imminent.
30. In my determination the panel decision indicates that the panel had considered the appropriate period of risk. The panel had also considered whether the risk was imminent during that period. Had they concluded that the risk of serious harm was imminent the argument by the Respondent relating to "immediacy" may have been relevant. However, neither of the professional witnesses commenting upon risk assessed the risk of serious harm to be imminent.
31. The panel were also entitled to consider the historical risk factors, in this case those factors seem to indicate that previous sexual offending by the Respondent was in circumstances where children were known to him in the context of family or relationships. The panel were entitled to consider that there would be a high likelihood of a period of grooming prior to any violent or sexual offence being committed. The panel appropriately explained the basis of their decision which took account of these historical factors.
32. The Applicant indicates that the panel did not take account of the risk related evidence presented in both written and verbal format. In the panel decision the views of the prison psychologist and the COM are set out. The panel appeared to fully acknowledge that both professionals were not recommending release.
33. The fundamental concerns of both professionals were that the Respondent had not undertaken a form of therapeutic intervention which would help and support the interventions to control his behaviour. The Respondent had in fact completed intervention work in relation to sexual behaviour, however it was the view of the professionals that the Respondent's ability to use the learning was hampered by the need for therapeutic work in relation to trauma.
34. The role of the Parole Board panel is to focus upon risk and not the desirability or otherwise of completing various interventions whether behavioural or counselling. In this case, the panel made clear that they understood the advantages of the Respondent undertaking counselling work, they did not necessarily make an assumption that all behavioural work had been completed and was effective, however they applied (as they were required to do) the public protection test to the evidence, as it was on the day of the hearing.
35. The panel therefore were required to make a judgement of risk, applying the public protection test, over the relevant period before CRD. Applying that judgement could not be scientific but requires the panel to weigh with care the various considerations in relation to this particular Respondent.

36. Having considered the decision of the panel and the representations of the Applicant I am satisfied that the panel applied the appropriate test. I am also satisfied that they understood the distinction between imminent risk of sexual offending and a medium risk of sexual offending. They also fully understood that if sexual offending occurred, the harm caused would be likely to be high.
37. The panel also took account of the risk management plan, which meant that for a period of time the Respondent would be monitored in supervised accommodation which would be likely to be a highly protective environment in terms of this mode of offending. The panel took account of other external factors in the shape of licence conditions which would protect the public for the period up to CRD.
38. For these reasons I am satisfied that the panel applied the appropriate test, that the panel did not amend the test in any way, and that the panel fully considered all the evidence relating to risk.
39. It should also be noted that neither of the professionals appeared to focus directly upon the risk period appropriate to this review. In the report the prison psychologist commented as follows "*[the Respondent] is not considered to be at imminent risk of sexually offending if he were to be released into the community. This is primarily due to [the Respondent's] motivation for treatment and current demonstration of stable behaviour. Additionally, the constraints placed on [the Respondent] by his licence conditions will prevent him from having access to his preferred victim pool*".
40. Despite this the prison psychologist concluded "*It is my opinion that [The Respondent] is not able to be managed within the community at present; he has developed some control over his emotions but still evidences poor reactions when met with difficulty*".
41. The psychologist was clearly conflicted in the recommendation provided to the panel. The panel were obliged to consider the representations of this professional alongside the entirety of the evidence.
42. The recommendation of the COM followed that of the prison psychologist. The COM took the view that "*At this time it is evident that [The Respondent] needs to focus on trauma therapy in order to prevent this becoming a barrier when engaging in other offending behaviour work*". It is understandable that the Respondent's COM had a preference for the completion of trauma-based counselling in custody. However, the issue for the Panel was again focused on the management of risk for the pre CRD period. The recommendation of the COM failed to focus on the question of managing risk for the relevant (relatively short) 'at risk' period.

Ground 2 – Irrationality – The Panel have failed to fully explain their reasoning for going against the recommendation of report writers

43. As noted above, in **Wells** the court pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.
44. This was clearly a case where the view of the experts was being rejected. It is incumbent upon a Panel of the Parole Board in these circumstances to engage with the relevant expert opinion and to state clearly why that view is rejected. In this case the

Panel set out in bullet point order its reasons for rejecting the expert evidence. In summary the bullet points indicated that the panel:

- Took the view that the risk of serious harm was not imminent and would be unlikely to occur within the at risk period;
- That if the Respondent destabilised there would be warning signs;
- That the Respondent appeared to be more open with professionals which indicated a likelihood that he would disclose appropriately during his supervision by probation under licence; and
- That the Respondent's conduct in prison indicated a genuine intention to engage with support and controls in the hostel and thereafter.

45. The fundamental issue in this reference was the period at risk and the likelihood of offending during that period. The panel addressed the issue of potential destabilisation (possibly leading to reoffending). The panel determined that any destabilisation would (in their view) be detected by warning signs allowing for intervention. The panel also concluded, on the basis of their assessment of the Respondent's evidence that he had demonstrated a commitment to be open and honest and to engage with the hostel regime and with management by his probation officer thereafter.

46. I am satisfied therefore that, as set out above, the panel, as they were required to do, adequately explained why they did not follow the professional recommendations in this case.

Ground 3 – General irrationality in that the reasoning was contrary to the Parole Board findings or evidence before them.

47. The general representations in this ground appear to repeat those in grounds 1 and 2.

48. However, the Applicant submits " *The Panel fail to clearly explain their conclusion that his trauma and emotional instability are not linked to his risk of further sexual offending.*"

49. This point was addressed within the prison psychologist's report. The psychologist indicated in her report the following.

50. "*[The Respondent's] 'treatment needs link back to trauma; [The Respondent] struggles with emotional management and violent ideation as well as non-intimate relationships: areas linked to trauma.'.... ..the report writer is in agreement, that [The Respondent] has learnt the skills required to change but he is unable to use them due to the trauma he has experienced which remains unresolved.*"

51. The view, of the professionals, which was accepted by the Panel, was that the Respondent had learnt the skills required to change but required trauma therapy to enable him to use and apply those skills.

52. The panel took the view that “*emotional instability was not directly linked*” to offending behaviour. Whilst this conclusion could have been expressed with more clarity, the panel were adopting the conclusion of the prison psychologist; namely that the Respondent’s pre-existing trauma was likely to hinder the opportunity for the Respondent to use skills learnt in behavioural work, but that trauma and emotional instability were not directly linked with offending. In essence the prison psychologist distinguished between the psychological difficulties arising from childhood trauma, and the motivators and triggers behind offending.
53. I am satisfied that it was not irrational for the Panel to address the distinction set out by the prison psychologist and to determine that on the basis of the entirety of the evidence the absence of completed trauma therapy was not fatal to a decision that the Respondent’s risk could be safely managed in the community.
54. Violent behaviour in prison - In a further representation the Applicant cited three prison adjudications for violent behaviour as having not been adequately and fully considered by the Panel.
55. This matter can be dealt with shortly - Within the assessments of risk by the probation officer the Respondent is assessed as having a low risk of violent offending. Although not addressing these issues directly, it was clear from the content of the dossier and the evidence received at the oral hearing that all professionals relied upon the risk of serious harm to children consequent upon sexual offending. The risk of violence to adults was not assessed by the professionals as being an issue sufficiently concerning to justify continuing detention.

Decision

56. For the reasons I have given, I do not consider that the decision was irrational accordingly the application for reconsideration is refused.

HH S Dawson
16 March 2022