

[2022] PBRA 72

Application for Reconsideration by Davies

Application

1. This is an application by Davies (the Applicant) for reconsideration of a decision of an oral hearing dated the 3 May 2022 not to direct release or to recommend progression to open conditions.
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 including the decision letter amounting to 562 pages and the grounds in support of the application dated the 23 May 2022.

Background

4. The Applicant is aged 56 and is serving a sentence of imprisonment for public protection for an offence of wounding with intent contrary to section 18 of the Offences against the Person Act 1861. The sentence was imposed on the 4 October 2007 when the Applicant was aged 42. His minimum term tariff was set at two years four months less the time which he had spent in custody on remand before sentence. The tariff expired on the 16 November 2009.
5. The Applicant was released on licence on the 6 October 2017. On the 14 July 2018, he was arrested for masturbating in a public place and recalled that day. He was subsequently sentenced to 26 weeks imprisonment for the offence of outraging public decency.

Request for Reconsideration

6. The grounds for seeking a reconsideration are based on irrationality and procedural unfairness and are as follows:

Irrationality

1. The panel based its decision on a misunderstanding of the Applicant's motives for the index offence. In particular, the panel reported that the Applicant had



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wanted to have sex with his wife on the morning of the index offence but she had refused because she had to go to work.

2. The panel failed to provide sufficient reasons for disagreeing with the opinion of the psychologists that there was no sexual motive for the offence.

Procedural unfairness

3. The panel did not allow the Applicant to make further representations after the panel had received further written evidence from the community offender manager (COM) following the conclusion of the oral hearing.

Current parole review

7. The Secretary of State's referral, dated the 18 December 2019, required the panel to consider the Applicant's release or, in the alternative, to make a recommendation for a move to open conditions.
8. The Prison Offender Manager (POM) in a report dated the 4 March 2021 expressed the opinion that the Applicant had to complete the Healthy Sex Programme (HSP) before his risk could be managed safely in the community. On receipt of the report, a Panel Chair Direction dated the 19 April 2021 invited the Applicant's legal representative to reconsider whether an oral hearing was warranted. The legal representative then sought and obtained an adjournment for an independent psychologist to be instructed.
9. The oral hearing took place on the 23 February 2022. The panel consisted of an independent chair and a psychologist member and heard from the Applicant and also from the POM, the prison psychologist, the independent psychologist and the Community Offender Manager (COM).

The Relevant Law

10. The panel correctly sets out in its decision letter 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

11. 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)).

12. 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**.

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 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 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 to the issue of irrationality which focusses on the actual decision.

17. 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.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

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

19. 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

20. The Secretary of State has not chosen to make any representations in respect of the Application.

Discussion

Ground 1: Mistake of Fact

21. The Applicant's previous convictions and cautions revealed that he has been arrested twice for carrying a knife at night. On one occasion he removed female underwear from a washing line but denied there was any sexual motive. He was also convicted of masturbating late at night in a car park and more recently indecently exposing himself on his front doorstep. His house was about 20 to 30 metres from a school. In May 2007, he stole a woman's handbag from a local public house.

22. He committed the index offence on the 14 July 2007 when he attacked a woman who was a complete stranger to him but who was showing signs of having drunk alcohol. He stabbed her repeatedly. His expressed motive was that she appeared to be happy and he was not. The attack was not accompanied by any overt sexual behaviour nor was anything stolen.

23. The Applicant was sentenced on the 4 October 2007 but released on licence on the 6 October 2017. On the 31 July 2018, he was arrested at 4:00 pm sitting on a riverbank masturbating. There were children in the area. He was recalled on that day.

24. The panel in the decision letter described the stressors leading to the attack as fourfold: concerns about his sexual relationship with his wife, his inability to talk to her about this, depression because he had lost his job and alcohol abuse.
25. The decision letter reads as if the above summary had been taken from the Applicant's oral evidence to the panel. The panel also observed that he had wanted sex with his wife that morning but she had to go to work; the panel noted he had denied feeling frustrated. He was also worried that his wife was spending money unnecessarily.
26. On behalf of the Applicant, it is suggested that the panel confused the occasion when he wanted sex with his wife but she had to go to work with the conviction in 2005 when he exposed himself on his front doorstep. Certainly it is recorded that on that earlier occasion he had wanted sex with his wife in the morning but she had to go to work.
27. The Applicant has always denied a sexual motive in respect of the index offence and both psychologists concluded that there had been no sexual motivation to the index offence.
28. Not everyone had been persuaded there was no sexual motive to the index offence. The sentencing judge remarked *"you armed yourself with a knife and followed a woman, who appeared to you to be drunk and therefore vulnerable, to a secluded pathway where, for no reason other than possibly your own sexual arousal, you launched a frenzied attack on her with the knife"*.
29. The prison psychologist in her report dated the 28 February 2019 recorded, *"during interview [the Applicant] discussed the factors leading up to his most recent sexual offence. He reported that he had been feeling inadequate due to problems having sexual intercourse with his wife as well as being unable to find employment."*
30. Other professionals who had dealings with the Applicant were worried about the risk he posed to women.
31. The author of the pre-sentence report said, *"[The Applicant's] previous convictions are for offences which are either sexually motivated or display worrying behaviour. On two previous occasions he was arrested in the early hours of the morning, walking around alone, carrying a knife, which he cannot explain. He has been arrested previously for masturbating in a public place and removing ladies underwear from a washing line. In my opinion, [the Applicant] profiles as an individual who poses a very high risk of serious harm to women"*.
32. The psychiatrist who prepared a psychiatric report in September 2007 prior to the sentencing, said, *"in view of [the Applicant's] previous forensic history, nature of*

previous convictions, use of alcohol with intoxication, strong sexual urges and carrying of weapons, he must now be considered a high risk to the community and women in particular. He denies sexual motive for the current offence but it is impossible to disentangle this potential cause from general feelings of anger and intoxication at the time”.

33. The panel in the decision letter quoted the psychologist who had completed work with the Applicant at the open prison he resided at and who had said there remained *“outstanding questions in regards to the motive for The Applicant’s index offence. There are a number of features of his index offence i.e. a female victim, isolated location, found to be naked from the waist up on arrest that, when considered in the context of his previous sexual offending, suggests that the possibility that there may have been a sexual motive behind his offence cannot be ruled out”.* This accorded with the panel's independently formed observations also set out in the decision letter.
34. At the oral hearing, both the POM and the COM recommended that the Applicant remained in closed conditions and completed the Healthy Sex Programme. Until he completed that successfully, his risk would not be manageable in the community. The opinion of the prison psychologist was the Applicant’s risk of violent and sexual offending was not currently at a level that could be managed in the community and he needed to complete an intervention such as the Healthy Sex Programme.
35. The independent psychologist took a different view. In his opinion the current recommendation for the Healthy Sex Programme repeated the earlier mistake of focussing unnecessarily on relatively minor sexual offending and there was the further concern as to whether the programme will be effective in managing the Applicant’s sexual offending in view of his diverse sexual interests and the extent of his sexual preoccupation.
36. The independent psychologist thought it was highly unlikely that the recall offence would have occurred if the Applicant’s sex drive had been reduced by medication and he recommended that the Applicant’s risk should be managed in the community by anti-libidinal medication and that he be released on that basis.
37. The panel noted that the prescription and taking of anti-libidinal medication is not something that can be imposed by way of licence conditions and the panel noted the other disadvantages that are set out in paragraph 45 of this decision.
38. In its conclusion, the panel set out very clearly the factors that it had considered important and they were, insufficient insight into his risk factors; a reluctance to allow contact to his principle support, namely his family; his wife was not aware of the range and nature of his risk and as such could not be regarded as protective; all the professionals recommended the Applicant should remain in closed conditions

and complete outstanding core risk reduction work. Of course, the independent psychologist had not made that recommendation. The panel took the view the Applicant had not reduced his risk sufficiently for progression to Category D.

39. There was sufficient evidence in the case that the Applicant's frustrations (which may have precipitated the index offence) included his anger at his wife's spending and his resentment that the victim was having fun, as pleaded in the Grounds. However, in my opinion, it goes further than that. There was considerable evidence that the Applicant's frustrations included sexual frustration. I have tried to indicate in this decision some of the evidence that supports that view. In addition the panel did record that the Applicant had told the 2019 panel and confirmed to this panel that there had been frustration in his sexual relationship with his wife as he had been finding it difficult to ejaculate with her, and also with at least one of the prostitutes he had visited.

40. The panel has not been approached to see if it accepts it made a factual mistake and I have not listened to the recording of the hearing. However, accepting for the purposes of this application that the panel did make a mistake, the question is was the mistaken about a particular sexual frustration on the morning of the index offence material to the panel's decision within the meaning of **E v Secretary of State for the Home Department [2004] QB 1044**.

41. First, the Applicant appears to have denied that he was frustrated as a result of his wife declining to have sex. Second, if one looks at the analysis of the manageability of risk and the panel's conclusions, the fact that the panel said the Applicant had failed to have sex with his wife that morning or that it found the index offence to be a sexual offence in the making does not appear in the reasoning that led the panel to refuse both applications to direct release or recommend transfer to open.

42. It is plain that the panel which included a psychologist had been impressed by the fact that the POM, the prison psychologist and the COM all said there was core risk reduction work outstanding, that this had to be done in closed conditions and that currently the Applicant's risk was not manageable in the community. The lone voice came from the independent psychologist who believed the risk was manageable in the community provided the Applicant was prescribed anti libidinal medication. The panel explained why it thought that approach was inadequate.

43. In those circumstances I find that if the mistake was made, it did not play a material part in the final decision of the panel. I cannot therefore uphold this ground.

Ground 2: Sufficient reasons

44. I am a little unclear as to the scope of this ground. It seems to be saying that insufficient reasons were given for the decision that (i) the offence was a sexual



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offence in the making, (ii) to refuse the applications and (iii) for not following the recommendation of the independent psychologist. As to (i), the panel's view on the motive for the index offence has a basis in the papers but does not seem to have been a determining factor in their deliberations and as such has received sufficient attention in the decision letter.

45. As to (ii) and (iii), the decision letter is plainly in error when it says all the professional witnesses recommended remaining in closed conditions. However, I have summarised somewhat simplistically the panel's approach to the case in paragraphs 38 and 42. Three professional witnesses were agreed and the fourth witness made a recommendation the panel did not find attractive because anti libidinal medication would be voluntary, it needed further consideration after the completion of the Healthy Sex Programme, it could have a side effect that might increase the Applicant's sense of frustration and in the past he had not taken the medication because he had wanted to resume sexual relations with his wife and he was not taking the medication currently. All these factors have been set out in the decision letter.

46. The letter summarises the considerations which have in fact led to the final decision and again, I cannot uphold this ground.

Ground 3: Opportunity to make final submissions

47. Having heard the oral evidence, the panel decided the proposed risk management plan was inchoate. This is an all too common feature of reviews where both managers are not recommending release or progression to open conditions. However, the panel has a duty to scrutinise the proposed plan even if release is not going to be the outcome of the review.

48. The panel wanted further information about release addresses and the accessibilities of the Horizon programme in the community for Category D prisoners and information about the support the Applicant had in the community. These were matters the panel would have expected to have been in the dossier for the oral hearing.

49. The panel directed the further information be obtained and also directed that closing submission should be in writing. There seems to have been no objection to this.

50. When the information came in, the legal representative for the Applicant by way of a Shareholder Response Form (SHRF) asked for a resumed hearing in order to explore the information further. The SHRF is not in the dossier nor is it attached to the Grounds but the panel stated that by then it had sufficient evidence to make a decision and it wanted to avoid unnecessary delay and refused the application in the decision letter.

51.It would seem that nothing revealed by the COM in respect of addresses or programmes affected their decision making.

52.However, the COM produced more information about the Applicant's wife. This information is set out in paragraphs 3.5 and 3.6 of the decision letter. The Applicant's legal representative makes the point he was deprived of the opportunity of questioning the COM about this information.

53.As I read the decision letter, the information before the panel prior to the conclusion of the oral hearing is set out at paragraphs 2.8 and 2.9. In brief, the wife did not know the Applicant had used sex workers in the community and the Applicant thought if she did know that could be the end of the marriage. She did not know about his late night wanderings prior to the commission of the index offence nor his habitual carrying of knives and there was some concern about her ability to report adverse matters to Probation. In other words there was evidence before the adjournment upon which the panel could have found that the Applicant's wife was not protective.

54.I have read the grounds carefully and cannot see any indication of how the Applicant's case was prejudiced by the panel's refusal to adjourn the hearing. In other words, there is no indication of what if anything was challenged or needed adding to and in those circumstances it is difficult to see how the complaint is made out.

55.There is a separate point namely that the Applicant was deprived of making further or final written representations. I accept that the refusal of an adjournment should have been made in the SHRF rather than the decision letter. My difficulty is seeing how the Applicant was prejudiced by that error. The oral hearing was adjourned and the notice of adjournment was issued on the day and it provided for the COM to provide information including information relating to the Applicant's wife and other members of his family by the 13 April 2022 and that the legal representative for the Applicant was invited to make final written submissions by the 20 April 2022. I am assuming as it is not pleaded that the SHRF did not ask for an extension of the date by which the written submission should be filed and so they should have been filed by the 20 April 2022 regardless of the outcome of the application for an adjournment.

56.In the absence of a clear and specific example of prejudice to the Applicant's case I am also unable to uphold this ground.

Decision

57.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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