

[2022] PBRA 99

Application for Reconsideration by Cornford

Application

1. This is an application by Cornford ("the Applicant") for reconsideration of a decision of the Parole Board dated 7 July 2022 following an oral hearing on 14 June 2022. The decision was not to direct release.
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 (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are (1) the dossier (now running to 785 pages including the decision under reconsideration), (2) the application for reconsideration which includes some emails which followed the oral hearing. I have also caused enquiries to be made concerning an attachment sent by the Applicant's representative to the Parole Board with one of those emails: I will return to this below.

Background

4. The Applicant was sentenced on 8 January 2007 to a sentence of imprisonment for public protection ("IPP") with a minimum term of 2½ years less time on remand. The tariff part of this sentence expired on 8 July 2009. He was released on 27 April 2012. He was recalled on 11 November 2019. A determinate sentence of 18 months was imposed on him on 17 April 2020. That sentence having been served, he is eligible for release.
5. The Applicant first came before the courts in March 2022 when he was sentenced to 9 months imprisonment for offences of downloading indecent images of children.
6. The index offences were committed in 2006. He pleaded guilty to attempting to meet a child following sexual grooming, attempting to cause a child to watch a sexual act (x2) and offences relating to indecent images of children. He had downloaded some 20,000 images of children aged from 9 months to 14 years. In the belief that he was conversing with a child and believing her to be 12 or 13 years of age he encouraged her to send him indecent photographs of herself and to meet him in a London park for sexual purposes. Unbeknown to him he had been communicating with the police.

7. After some 7 years in the community the Applicant was recalled for further offences of downloading indecent images of children. He was discovered to have some 427 images in category A, some relating to children under 5 years of age and some relating to children blindfolded or bound, and a further 116 at level B and 281 at level C. Most of this activity took place in the period between November and December 2018, but there was also activity in April 2017, June 2018 and March 2019.
8. The Applicant was arrested in April 2019; but he did not make admissions at that time and the probation service was not aware of the full scale of his downloading until November 2019 when he was recalled. During the period when he remained in the community the Applicant underwent some 21 sessions of therapy with a counsellor and psychosexual therapist ("the therapist"). It was part of the Applicant's case at the oral hearing that he would resume therapy with her if he was released.

Request for Reconsideration

9. The application for reconsideration is dated 20 July 2022 and was filed on the Applicant's behalf by his representative.
10. Five grounds for reconsideration are put forward, and they are then followed by more detailed submissions. For the purpose of this decision I have taken grounds 2-5 first; ground 1 is rather general and I find it more convenient to address the specific grounds first.
11. Ground 2 is that the decision not to direct release was made contrary to the advice of the Prison Offender Manager ("the POM"), the Community Offender Manager ("the COM"), the Prison Psychologist and the Independent Forensic Psychologist all of whom recommended release. The ground is said to be all the more compelling since two psychologists reached the same conclusion.
12. Ground 3 is that the decision was unnecessarily pre-occupied with the issue whether the Applicant would fund his own treatment and whether the proposed therapist was sufficiently qualified to do the work. It is said that the recommendation of all the professionals was that he should be released regardless of whether he engaged in self-funded work in the community.
13. Ground 4 is that the decision is procedurally unfair because the panel did not take into account (and may not have seen) a letter from the therapist which was forwarded to the Parole Board after the hearing; given the concerns of the panel that the therapist was insufficiently qualified to treat the Applicant it was not fair to proceed without taking the letter into account.
14. Ground 5 is that, given the panel's concerns concerning the therapist's expertise and experience, the hearing should have been adjourned for further reports or for her to give evidence.
15. Ground 1 is that there were various instances in the decision where the panel showed a "*demonstrable lack of understanding of the facts*". Individually or cumulatively the failure to understand the facts could and did lead to an irrational decision.

16. Grounds 2, 3 and 1 appear to me to rely on irrationality; grounds 4 and 5 on procedural unfairness.

Current parole review

17. Following his recall the Applicant's first parole review was dealt with on the papers; release was not directed. The case was referred again on 20 November 2020. During 2021 directions were given and reports prepared.

18. By January 2022 there were reports from two psychologists. The Independent Forensic Psychologist instructed on behalf of the Applicant recommended release with a robust risk management plan and recommended further treatment in the community – her preference being for this to be conducted by the therapist, although she discussed possible alternatives. The Prison Psychologist (if I read her reports correctly) had not made a recommendation by this point. The COM was recommending release – again with further treatment in the community which he did not regard as core risk reduction work.

19. A hearing fixed for 12 January 2022 had to be adjourned, principally owing to the non-availability of a witness. It is important to note two directions then given. Firstly, the panel called for a programme needs assessment to address, among other options, whether the Applicant was suitable for the Healthy Sex Programme ("HSP"). Secondly, the panel called for a report from the therapist dealing with her credentials as a therapist, the nature of her past and proposed work with the Applicant, its funding, the nature of the charity with which she was connected and its expertise if any in risk assessment.

20. A programme needs assessment was completed and found that the Applicant would benefit from and was suitable for HSP. A report dated April 2022 included the following:

The PNA findings seemed to identify a high treatment need in the area of Healthy Sex, suggesting that [the Applicant] would benefit from additional high intensity intervention work that focuses on these areas of risk. Engagement with HSP could offer such treatment opportunity.

21. By the time of the hearing the Applicant had been offered a place on the HSP at another prison. It would, however, not have started by the hearing date if he had accepted it. The Applicant declined the place, saying he preferred to seek release at the oral hearing. He made it clear, however, that if the Parole Board considered that he ought to undertake the course he would do so.

22. Further documents were prepared by the therapist dated 25 May 2022 and 9 June 2022. These dealt with her qualifications and experience in general terms; as regards future work she said that in view of the lapse of time it would have to include reassessment and agreement of future goals, how he would apply the goals into his life, and how he would put into practice his safety plan/risk assessment.

23. The document dated 9 June 2022 was pages 735-736 in the dossier. It stated that there was also provided a letter dated 15 December 2019 which she had written "for the purpose of [the Applicant's] sentencing hearing" setting out her views as to his progress. The letter dated 15 December 2019 was, however, not in the dossier.

24. At the oral hearing on 14 June 2022 the panel consisted of an independent chair and a psychologist member. The dossier then contained 736 pages. The panel heard from the POM, the COM, both psychologists and the Applicant himself. Written submissions were provided by his representative following the hearing.

25. In its decision letter the panel set out the views of the four report writers in reasonable detail, and specifically noted that all four report writers recommended release. The panel, however, did not agree. Its decision needs to be read as a whole, but there are passages at paragraphs 3.11 to 3.15 and paragraphs 4.4 to 4.9 which set out key elements of the panel's reasoning. In short summary, the panel considered that completion of the HSP was core risk reduction work for the Applicant, and it was not satisfied that work with the therapist would suffice. These passages are too long to quote conveniently, but the following paragraphs give an indication of the reasoning.

3.11. The panel noted that the Risk Management Plan (RMP) provided was reasonably robust, however, in the panel's assessment [the Applicant] has important core risk reduction work to do before release can be directed. The panel noted that [the Applicant] has been assessed as suitable for the HSP Programme and in the panel's assessment this is core risk reduction work which should be completed in the closed estate. It is not available in either open conditions or in the community.

3.12. Although professionals suggest that core work can be completed in the community with [the charity and the therapist] the panel had serious reservations about this proposal. Firstly, the work is entirely voluntary, secondly it is self funded and thirdly the panel was unclear whether [the therapist and the charity] have the requisite training/experience to complete this specific and intensive core work, especially for a high risk offender like [the Applicant] who seemingly has an entrenched interest in children.

26. Following the oral hearing the Applicant's representative sent the letter dated 15 December 2019 as an attachment to an email to a case manager and asked for it to be added to the dossier. It was added as page 737. It does not appear, however, that this was drawn to the panel's attention. The panel records the dossier it considered as having 736 pages and mentions only that closing submissions were received following the hearing. The chair has confirmed that she has no recollection of receiving any other document after the hearing; and she records that her co-panellist has no such recollection. I therefore conclude that the panel did not see the letter dated 15 December 2019.

27. It is convenient here to record the following further matters relating to the letter dated 15 December 2019.

28. The letter may be summarised as follows. (1) It confirmed that the therapist had undertaken 21 sessions of counselling with the Applicant. (2) It set out under ten bullet points the issues explored "through therapeutic engagement". (3) It expressed the opinion that the Applicant had engaged well and showed understanding. (4) It concluded by saying that as a private counsellor she did not comment on risk, and any impact of the counselling on risk should be independently assessed by a professional qualified to make such an assessment.

29. Although the letter was not in the dossier it was specifically mentioned and quoted at length by the Independent Forensic Psychologist: see page 570 of the dossier. She recorded that the letter confirmed 21 sessions of therapy; set out the ten bullet points verbatim; spoke to the therapist herself; and confirmed that the therapist considered that she and the Applicant were making good progress. She did not mention point (4); but it is of course very well known to all professionals and to the Parole Board that the processes of therapeutic intervention and risk assessment are kept apart.

Relevant Law

30. The panel correctly set out the test for release: the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

31. The Applicant was serving an IPP sentence. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28(2)(a) of the Parole Board Rules 2019. For the avoidance of doubt, the panel's decision as to a recommendation for open conditions is not eligible for the reconsideration process.

32. The concept of irrationality is derived from public law. The test is whether the 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*". See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.

33. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where a party was not given a fair hearing or allowed to put their case properly.

34. A decision reached on a mistaken basis of fact may sometimes fall within the ambit of reconsideration under rule 28, on the basis of irrationality or procedural unfairness. Generally speaking the preconditions are as follows: (1) there must have been a mistake as to an existing fact, including the availability of evidence on a particular matter; (2) the fact or evidence must have been "established" in the sense that it was uncontested and objectively verifiable; (3) the applicant or his advisers must not have been responsible for the mistake; and (4) the mistake must have played a material (though not necessarily decisive) part in the panel's reasoning. These principles are derived from **E v Secretary of State for the Home Department** [2004] QB 1044 at paragraph 66.

The reply on behalf of the Secretary of State

35. The Secretary of State has not made any representations concerning this application for reconsideration.

Discussion

36. Ground 2. I accept that the panel reached a conclusion different to that of the four professionals from whom it received evidence; but I have no doubt that there was a rational basis for its conclusion, which was fully and carefully explained in its reasons.
37. The Applicant had been assessed as posing a high risk of re-offending by the downloading of further images and as posing a medium risk of contact re-offending. He was assessed as posing a high risk of serious harm to children in the community. All these assessments were justified. Against this background it was reasonable for the panel to consider carefully in the light of his re-offending and recall whether there was further risk reduction work to be completed before re-release; and HSP was an obvious programme for professionals and the panel to consider. It is perhaps surprising that there was not more discussion of core risk reduction work, including HSP, in reports produced during 2021. To my mind the panel had been correct to call for a programme needs assessment which, as noted above, found that the Applicant was suitable for HSP. The panel noted that HSP was a high intensity programme appropriate to the Applicant's scores and only available in custody. In my judgment it was not irrational to consider that this was core risk reduction work which he should undertake before release.
38. Ground 3. As summarised in paragraph 3.12 of its decision quoted above, and as developed throughout its reasons, the panel had three concerns about the proposed further work with the therapist: it relied on the Applicant's voluntary engagement; it relied on him to pay for the work; and it was unclear whether the specific and intensive work which the panel envisaged could be completed by her. To my mind these were rational concerns. It is suggested that the professionals would have been in favour of release even if no such work was to be undertaken. Reading the reports, it seems to me that all were of the view that further work was required for the Applicant, but not core risk reduction work which had to be done in custody. As I have explained under ground 2, it was not irrational for the panel to form a different view.
39. Ground 4. I have found that the letter dated 15 December 2019, although sent to a case manager after the hearing and added to the dossier, was not brought to the attention of the panel. In fairness to the case managers who saw the email, I should point out that the email did not explain that the attachment was to be forwarded to the panel; and case managers (who handle many cases and do not attend hearings) will not have appreciated its significance unless alerted to it. However it should have been apparent to a case manager that the hearing had just taken place and a decision was awaited; good practice required that any new document ought to have been drawn to the attention of the panel chair and guidance sought as to whether it should be added to the dossier.
40. I am, however, satisfied that this procedural mishap has not resulted in an unfair hearing or process. The panel was without doubt aware of the contents of the letter: see paragraphs 28 and 29 above. The contents were not controversial: the panel knew that the work with the therapist was considered to have gone well. The contents did not address the issues which concerned the panel: in particular, they did not address the qualifications of the therapist for undertaking a piece of specific and intensive core work of the kind which the panel reasonably envisaged as necessary.

41. Ground 5. It is suggested that, given its concerns, fairness required the panel to adjourn further to obtain an additional report from the therapist or to call her to give evidence. I do not accept this argument. As noted above, the panel had given careful directions in January when it called for a report from the therapist. That gave the opportunity for her to deal fully with the matters she was asked to address. She had produced a relatively short report which did not allay the panel's concerns. The panel put its concerns to the witnesses; it was not asked to adjourn for the therapist to be called or for her to provide a further report, and I do not accept that fairness required it to do so of its own motion.

42. Ground 1. This ground encompasses a number of points which are set out in further submissions by the Applicant's representative and which are said to be errors of fact. For the most part the further submissions are a commentary on the reasons which put forward a different view but do not identify errors of fact. I will deal with those points in the submissions which appear to me to assert errors of fact.

- a. It is suggested that the panel misunderstood and over-estimated the extent of re-offending in the period 2017 to 2019: see submissions, paragraph 26. I do not accept this. In its reasons (paragraph 2.2, third sentence) the panel correctly set out the extent of his offending. The point it made later in the paragraph was that the Applicant did not appear to accept or remember some of this offending.
- b. It is suggested that the panel misunderstood and "wholly misrepresented" a report of the Independent Forensic Psychiatrist dated 9 September 2019: see submissions, paragraph 31. I do not accept that the panel "wholly misrepresented" the report, but there is some force in the criticism made. The report did, as the panel said, recommend continuation of work with the Applicant. It would have been necessary for him to remain in the community for this to be done. The report was obtained by the Applicant's solicitors, and it was put before the sentencing court in mitigation and discussed by the Judge. It was not, however, written for the court and did not make any recommendation about sentencing; in this the panel was mistaken. This error, made by the panel about a historic report when summarising the history of a case which had generated a lengthy dossier, was to my mind not a material part of its reasoning for declining release.
- c. It is suggested that the panel wrongly concluded that the Applicant had only been convicted twice, whereas he had been convicted on three occasions: see submissions paragraph 37. The panel was without doubt aware that the Applicant had been convicted on three occasions: see paragraphs 1.1, 1.2 and 2.2 of its reasons. There is what appears to me to be a slip in paragraph 3.7 where it refers to him having been twice convicted, but I do not think that the panel was in any real doubt about the correct position, still less that this slip affected its reasoning.
- d. It is suggested that the panel was mistaken in referring to the Applicant as a "high risk repeat offender" with "high risk scores". I do not agree. His scores on the OSP (Sexual Offending Predictor) – I and OSP – C scales were respectively high and medium. The OASys assessment was that he posed a high risk of serious harm to children. See dossier, pages 725 to 726. He had attempted to commit a contact offence.

43.I have looked at all the submissions in the Reconsideration Application, whether they appear to raise questions of fact or merely to be a commentary on the panel's decision. I do not accept that, individually or cumulatively, they establish that the decision is irrational.

Decision

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

David Richardson
8 August 2022