

[2023] PBRA 215

Application for Reconsideration by Thomas**Application**

1. This is an application by Richard Thomas (the Applicant) for reconsideration of a decision of a Member of the Parole Board dated 1 November 2023 (the Decision) not to direct the Applicant's 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:
 - (a) the Decision;
 - (b) the Applicant's application for reconsideration;
 - (c) the email dated 8 December 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that no representations will be made by the Respondent in response to the earlier application for reconsideration; and
 - (d) the Applicant's dossier containing 165 pages.
4. The grounds for seeking reconsideration are that:
 - (a) the panel member irrationally judged the Applicant by his past and not the fact that he had had been outside prison and did not commit any further crimes (Ground 1);
 - (b) the panel member acted in a procedurally unfair manner by not sharing important information relating to programmes he had completed and qualifications he had gained, and that the Applicant had not committed any further crimes on licence (Ground 2); and that
 - (c) the panel member committed errors of law by judging the Applicant by his past, providing fabricated information and by judging the Applicant on false information (Ground 3).

Background

5. The index offence occurred in June 2013 after the Applicant had met the victim (KC) (who was then 20 years of age) in the street and they spent several hours drinking together until the early hours of the following morning.
6. As the Applicant and KC were walking to a taxi rank, the Applicant walked to a wooded area and KC followed him whereupon, he raped the victim.

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7. The Applicant had failed to attend court in May 2014 in relation to his offences committed against KC and so he was unlawfully at large when he committed a further sexual offence against a second victim (LC), who was then 17 years of age. After the Applicant and LC were leaving a party and were walking down an alley way, the Applicant proceeded to sexually assault LC.
8. The Applicant pleaded guilty to both the rape of KC and the sexual assault of LC, and he blamed his conduct on the amount of alcohol he had consumed. He stated that he could not remember what had occurred as he was too drunk to know what he was doing. The Applicant had no previous convictions.
9. On 14 October 2014, the Applicant was sentenced to an extended determinate sentence totalling 12 years comprising of a custodial period of 9 years' imprisonment and a period of 3 years' on extended licence.
10. At a subsequent parole review, the OASys, a probation service assessment report, stated that the Applicant had denied committing both offences.

Post-Sentence Conduct

11. The Applicant was released from custody on 1 September 2021, but at some point not recorded, he was returned to custody. On 13 January 2023, he was released from prison with GPS tagging. His release was to an Approved Premises (AP), but he was homeless for a period after that. He secured accommodation and moved in May 2023, but while he was homeless, he was found unfit to complete polygraph appointments as he was too tired. He refused to answer any questions during his appointment with probation on 24 May 2023. The decision of the Parole Board noted that there were some concerns about his alcohol consumption.
12. On 27 May 2023, the police were looking for a vulnerable 16-year-old female who was then found at the Applicant's new accommodation. When the Applicant answered the door, he was "semi-undressed", and the 16-year-old female was "also semi-undressed in [the Applicant's] bed".
13. The Applicant was subsequently arrested for breaching his sex offender registration requirement which was not to stay at an address where there is a child present for 12 hours. He was recalled to custody for failing to disclose an intimate relationship. The Applicant informed the police that he and the female were just friends and that he was aware of her age. The Applicant was not charged as the alleged victim did not make a statement and the police were unable to prove a breach of the 12-hour rule.
14. The Applicant's conduct in custody was not good. He had declined to engage with the substance misuse teams and he refused to accept support about his immigration situation. He had been issued with a negative behaviour warning for an incident in which he had become abusive to nursing staff. Further when he was restrained, he spat in the face of the prison officer and bit the officer's finger.
15. The Applicant's Community Offender Manager (COM) assessed that the Applicant posed a very high risk of serious harm to the public and to children. The risk to the public is

assessed to the women who meet the Applicant in a social setting and establish a connection with him with the risk that the Applicant perceives these meetings as an opportunity for sexual activity with or without the consent of the person concerned. The risk to children is based on his risk to female children who meet the Applicant and is based on the circumstances of his recall with the COM considered the risk to be imminent.

16. These assessments were accepted by the panel who noted that one of the victims of the index offence was a 17-year-old girl while the alleged victim in the episode leading to the Applicant's recall was a vulnerable 16-year-old girl.

Assessments of risk

17. The COM did not recommend release as it was not thought likely that the Applicant would comply with a further period on licence. There were concerns that the circumstances leading to recall suggest that the Applicant was actively seeking opportunities to offend.

18. The conclusion of the COM was that the Applicant needed to address his sexual offending and was requesting that he is assessed for suitability to complete an accredited programme in order to help him to *"reduce risk and understand his risk factors"*. The Risk Management Plan (RMP) in the dossier at the time of the panel hearing appears to be the same as that which was in place when the Applicant was last released to an AP. As there was no accommodation in place when the dossier was submitted, a further referral to an AP would have been required.

19. Concerns had been raised while the Applicant was in the community and on his return *"there was no evidence that he had any protective factors at the time of the Decision"*.

20. The Applicant's compliance with licence conditions was not good while his behaviour leading up to recall was *"at best indicative of lack of insight and poor consequential thinking skills and at worst highly concerning and index offence paralleling"*.

21. The Applicant had been in the community for just over 5 months and although he attended supervision appointments, he was unable to complete polygraph assessments due to being homeless.

22. Further, the recall incident involved a vulnerable young female about whom the Applicant told police they were just friends, but according to police, both of them were partially undressed when they were found together. Although the Applicant was not charged with any offence, it remains a matter of concern that the Applicant appears to have become involved again with a teenage girl considerably younger than himself. It was noteworthy that the index offences of rape and sexual assault also involved younger women or girls.

23. It was noted by the panel that the Applicant does not appear to have addressed his sexual offending conduct during his previous period in custody or while in the community. The COM wrote that they were requesting that he should be assessed for an accredited intervention and the panel thought that this constituted core risk reduction work. The panel noted that the Applicant's behaviour *"has not been good"*

and when the dossier was compiled he was waiting the outcome of an adjudication for assault on an officer. So, the panel explained that *"this suggests a "heightened emotional state and poor self-control and consequential thinking"*.

24. The Applicant did not appear to dispute his recall and the panel having reviewed all the information in the dossier was satisfied that recall was appropriate.

The Conclusions of the Panel

25. To appraise the grounds of appeal, it is necessary to summarise the conclusions of the panel which are that:

- (a) the Applicant had pleaded guilty to the rape in June 2013 of a 20-year-old girl who he had pushed to the ground, before pulling down her tights and underwear and then raping her;
- (b) while unlawfully at large in May 2014 for failing to attend court proceedings in relating to the June 2013 rape, the Applicant committed a sexual assault on a 17-year-old girl with whom he was walking down an alley before he pulled her to the ground, got on top of her and put his hand up her skirt. The Applicant had pleaded guilty to that offence; He was sentenced to a custodial period of 9 years' imprisonment and an extension period of 3 years' imprisonment and had a sex offender registration requirement;
- (c) the Applicant was released from custody with GPS tagging in January 2023 but on 27 May 2023 when the police were looking for a vulnerable 16-year-old girl, she was found at the Applicant's new accommodation with the Applicant *"semi-undressed"* and the 16-year-old female *"also semi-undressed in [the Applicant's bed]"*;
- (d) the Applicant had attended supervision appointment during his period of 3 months when in the community, but he was recalled to custody for failing to disclose an intimate relationship;
- (e) the panel having reviewed all the evidence was satisfied that recall was appropriate;
- (f) the Applicant's conduct in custody was not good as he had declined to engage with the substance misuse team. He had been issued with a negative behaviour warning for an incident in which he had been abusive to nursing staff and prison officers;
- (g) the COM did not recommend release as it was not thought that the Applicant would comply with a further period on licence and there were circumstances leading up to the recall which suggest that the Applicant was actively seeking opportunities to offend;
- (h) the Applicant did not appear to have addressed his sexual offending conduct during his previous period in custody or while in the community. The panel thought that this constituted core risk reduction work;
- (i) the panel considered that even with a robust RMP, the Applicant did not have *"adequate internal controls for his risk to be manageable"* on release;
- (j) the panel did not think that the Applicant's risk would be manageable in the community at the time of the Decision as his compliance with licence conditions was not good while his behaviour leading up to recall was *"at best indicative of lack of insight and poor consequential thinking skills and at worst highly concerning and index offence paralleling."*;

- (k) the panel agreed with the assessments that the Applicant posed a very high risk of serious harm to the public and children and that the risk he posed was imminent; and
- (l) the panel could not be satisfied that it was no longer necessary for the protection of the public that the Applicant remains confined and so release was not directed.

26. (These reasons will hereinafter collectively be referred to as "*the Parole Board's Conclusions*").

27. The panel noted the principles set out in **Osborn, Booth & Reilly v Parole Board** [2013] UKSC 61 and stated that if the Applicant believed that "*oral evidence would assist in providing information that might mitigate the apparent level of risk presented or would enable the clarification of any points relevant to the assessment of risk...he is invited to submit representations to the Parole Board within 28 days of receipt of the decision*". This offer will hereinafter be referred to as "*the panel's invitation*". The Applicant did not submit any representations within 28 days of the receipt of the decision or at all.

The Relevant Law

Parole Board Rules 2019 (as amended)

Irrationality

28. 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."

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

Other

30. 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.

31. 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 craftsmanship."

Procedural Unfairness

32. A party seeking to complain of procedural unfairness under Rule 28 must establish that either:

- (a) express procedures laid down by the 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 fairly; and/or
- (e) the panel was not impartial.

33. The overriding objective is to ensure that the Applicant's case was not dealt with justly.

The reply on behalf of the Respondent

34. PPCS stated in an email dated 8 December 2023 that the Respondent was not making any representations in response to the Applicant's original reconsideration application.

Discussion

35. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

36. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

- 37.Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.
- 38.Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.
- 39.Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

Ground 1

- 40.The first ground of challenge is that the panel member irrationally judged the Applicant by his past and not the fact that he had had been outside prison and that when there, he did not commit any further crimes and that he has changed himself for the better. The Applicant points out that the courses that he completed in prison had helped him to "*stay out of trouble*" when he was in the community. He contends that he is now free of alcohol and drugs.
- 41.This ground fails for five reasons which individually or cumulatively show that this ground does not have any merit. The first reason for rejecting Ground 1 is that it fails to appreciate that there was strong evidence that the Applicant had not "*changed himself for the better*" as he failed to comply with his conditions when he was released with GPS tagging in January 2023 as very significantly, he was recalled on or about 27 May 2023 after the police, who had been looking for a vulnerable 16-year-old girl found her at the Applicant's new accommodation with the Applicant "*semi-undressed*" and the 16-year-old female "*also semi-undressed in [the Applicant's bed]*". The panel reviewed all the relevant information and concluded that the recall was appropriate because the Applicant had failed to disclose an intimate relationship and no challenge has been made to this decision. This finding showed that he acted in breach of his conditions when released as well as showing index offence paralleling conduct which was "*at best indicative of lack of insight and poor consequential thinking skills and at worst highly concerning and index offence paralleling*". The panel was entitled to regard the Applicant's conduct a few months before the panel hearing as relevant to determining how he would behave if released.
- 42.Second, this ground cannot be accepted as the panel was entitled to conclude that the Applicant's risk would not be manageable in the community at the time of the Decision. The panel considered that even with a robust RMP, the Applicant did not have "*adequate internal controls for his risk to be manageable*" on release. Further, the Applicant's COM considered that the Applicant would not comply with a further period on license. The Applicant did not appear to have addressed his sexual offending conduct during his previous period in custody or while in the community. The panel thought that this constituted core risk reduction work. Nothing has been put forward to show that the panel was not entitled to reach these conclusions or that these findings reached the high threshold required for a finding of irrationality.

43. A third reason why this ground cannot succeed is that where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is *manifestly obvious* that there are compelling reasons for interfering with the decision of the panel.
44. It is very difficult to establish that that it is *manifestly obvious* that there are compelling reasons for interfering with that decision of the panel because for among other reasons, due deference has to be given to the expertise of the panel in making decisions relating to parole. That is my fourth reason for rejecting this ground.
45. My final reason for rejecting this ground is that the Applicant's case on this issue fails to reach the high threshold for a finding of irrationality which is in the words of the Divisional Court in the **DSD case** set out in paragraph 27 above that the panel's 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*".

Ground 2

46. This ground of challenge is that the decision was made in a procedurally unfair manner by not sharing important information relating to programs he had completed and qualifications he had gained, and that the Applicant had not committed any further crimes on license. He also contended (with emphasis added) that: -

*"The process was procedurally unfair and the correct process was not followed etc. The important evidence was not shared. The programs I completed in prison and the qualifications I gained. I didn't commit any further crime on license. **I complied with every rule in the community and I didn't broke[sic] any rule.** I was arrested on the 27th of May 2023 for breaching my license. Police investigated and found me no wrongdoing (sic). Dismissed the case on the 28th of May 2023. When the police dismissed the case then the probation service recalled me back to prison on the 30th of May. The probation service knew that I didn't commit any further crime or breaching my license. Recalled for bad behavior and pending investigation. I spend long time on homeless but I didn't commit any further crime in public. Sleeping in street every day but I didn't commit any further crime. I proved myself am not risk to the public."*

47. This ground must be rejected for two reasons which individually or cumulatively show that this ground must fail. First, this ground is based on the incorrect basis that the "*I complied with every rule in the community and I didn't broke any rule*", when the true position is that he was recalled to custody for failing to comply with an especially important term of his license in the light of his index offences; that term was to disclose an intimate relationship and the panel concluded that the recall was appropriate. This was a serious breach of the Applicant's license and was "*at best indicative of lack of insight and poor consequential thinking skills and at worst highly concerning and index offence paralleling*". I add that the panel's decision that the recall was appropriate, and this important conclusion has not been challenged even though it undermines the Applicant's case that he complied with all rules.

48. Second, this ground must be rejected as the panel's invitation set out in paragraph 26 above gave the Applicant an opportunity to challenge the decision of the panel and to ensure that the panel then considered any evidence which the Applicant considered that the panel had ignored or to which the panel had failed to attach the correct level of importance. Therefore, even if the panel had failed to consider the programs he completed in prison and his compliance with the rules as well the fact that he had not committed any further crimes on license, the Applicant's remedy was to take advantage of the panel's invitation set out in paragraph 26 above. The Applicant failed to avail himself of this opportunity.

49. I should stress that as explained in paragraph 32, the basis of every claim (such as Ground 2) based on procedural unfairness is that the Applicant's case was not dealt with justly. The panel's invitation nullifies any such claim as it gives the Applicant to argue his case.

Ground 3

50. This ground of challenge is that the panel member committed errors of law by judging the Applicant by his past, providing fabricated information and by judging the Applicant on false information.

51. The Applicant explains that he strongly disagrees with the panel's decision not to grant his release as it was (with emphasis added):

*"**unlawful and nonsensical** on the evidence of the risk considered. No other panel could have come to the same conclusion. The parole board judged me by my past ...and unfair and incorrect procedure. And also **fabricated** information was provided that make it unlawful and unfair procedure. Judged by **false** information".*

52. This ground must be rejected for two reasons which individually or cumulatively show that this ground must fail.

53. First, in so far as the complaint is that the Applicant is being judged by his past, it has been explained in paragraph 40 above that he was instead being judged on highly relevant matters such as his recent behaviour and the circumstances leading to his recall a few months before the panel's hearing and it was undoubtedly open to the panel to regard this behaviour as a prediction of how he would behave if released. Those circumstance leading to his recall showed that as at the point of time just before the panel's hearing the Applicant had not changed himself for the better as he had failed to comply with his conditions when he was released with GPS tagging in January 2023. As has been explained in paragraph 40 above, the Applicant was recalled after he had been found semi-undressed and with a vulnerable 16-year-old girl also semi-undressed in his bed. The panel concluded that the recall was appropriate for failing to disclose an intimate relationship and no challenge has been made to this decision. This showed that the Applicant was in in flagrant breach of his conditions when recalled a few months before the decision as well as showing index offence paralleling conduct. Such conclusions on relevant issues do not constitute errors of law.

54. A second reason why this ground cannot be accepted is that the Applicant does not give any *specific* criticisms of the decision other than claiming that the Applicant is

judged "*by my past*". No particulars are given of the Applicant's criticisms that the Decision is "*unlawful*", "*nonsensical*", "*fabricated*" and "*false*". The onus is on the Applicant to give details of the matters which show why reconsideration should be ordered on those grounds and this means that without those details, the Applicant's case and criticisms cannot be appraised and reconsideration cannot be ordered.

Conclusion

55. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
21 December 2023