

[2021] PBRA 162

Application for Reconsideration by Ford

The Application

1. This is an application by Ford (the Applicant) for reconsideration of a paper decision dated 20 September 2021 and made pursuant to Rule 21 of the Parole Board Rules 2019 by a panel of the Parole Board (the Panel) not to direct his release.
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. This is an eligible application.
3. I have considered the application on the papers. These include the dossier which runs to 621 pages, the application for reconsideration itself, submissions in support prepared by solicitors representing the Applicant and 31 pages of very detailed observations and comments written by the Applicant himself. On an initial consideration of the papers there appeared to be an inconsistency as to whether the Applicant wished to be represented by the solicitors who had drafted the Grounds for Reconsideration. There was a regrettable delay while this matter was looked into and eventually resolved.

The Background

4. The Applicant is now 57 years of age. In May 1996 he was sentenced to Life Imprisonment for two offences of rape and was ordered to serve a minimum term of just under 10 years which term expired in 2006. He also received lengthy concurrent determinate sentences for two related offences of kidnapping. The sentencing judge described the index offences "*as prolonged and vicious attacks on terrified young women associated with every possible further indignity and perversion imaginable*". All the victims were lone females, strangers to the Applicant and aged between 30 and 13. The first kidnapping offence was committed about a month after he was released from a 10 year sentence for raping a female under 16. In addition to these matters the Applicant had been convicted when aged 17, for wounding a girl with a knife in what was regarded as a sexually motivated offence. The Panel summarised his pattern of offending as "*the conduct of a serial predatory rapist whose offences were planned and which involved extreme and sadistic violence*". The Applicant has consistently maintained that he was not



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responsible for any of the index offences. His conviction and sentence were upheld by the Court of Appeal.

5. In 2012 the Applicant was diagnosed as having Autistic Spectrum Disorder (ASD). An expert witness gave evidence to the panel that the Applicant's risk factors stemmed from neuro-developmental difficulties that included social communication and interaction difficulties, a preference for control through routine, order and predictability, adverse childhood experiences and the development of subsequent psychological difficulties.
6. As for factors considered likely to increase the Applicant's risk of re-offending the panel identified, amongst others:
 - a) An obsession with sex;
 - b) Preferring sex to include violence or humiliation;
 - c) A sexual interest in teenage girls;
 - d) Holding a belief that men should dominate women;
 - e) A strong sense of entitlement;
 - f) A lack of victim empathy; and
 - g) feeling suspicious, angry and vengeful towards others.
7. The panel noted that factors likely to reduce the Applicant's risk of re-offending were difficult to identify at the present time. It is clear from a reading of the dossier as a whole that providing effective treatment to address his risk factors has been complicated by the 2012 diagnosis. Experts have said that there could be a functional link between the diagnosis and his very violent sexual offending. It will be necessary in due course to return to the issue of an appropriate treatment pathway for the Applicant as this was an aspect of this review that clearly occupied the panel and prolonged the proceedings.

Proceedings before the Parole Board

8. This was the Applicant's seventh review which had been referred to the Parole Board in May 2019. The previous review was conducted by a differently constituted panel of the Board in April 2018. In a thorough decision it had detailed the Applicant's progress in prison until then. It is relevant to the current application to note as the Panel did, that all the witnesses at the 2018 hearing agreed that a referral should be made to a particular prison unit specialising in severe personality disorders. Eventually, in May 2021 this specialist unit confirmed that the Applicant had been accepted for an assessment. This was dependent on the Applicant agreeing to a transfer and demonstrating a period of stable behaviour. There was a significant waiting list of at least six months for those waiting to begin an assessment. The Panel noted that on transfer to that unit the first stage was an integration phase which usually took about 6 months to complete, followed by the assessment phase and thereafter treatment.

9. The Panel decided the outcome of this review on the papers. In light of some of the submissions made on the Applicant's behalf it is necessary to examine in a little detail the manner in which the review unfolded and concluded in that way. In January 2020 the Applicant through solicitors requested an oral hearing. That application was not granted at that stage largely on the basis that there had been what was described as "*an in depth consideration of the case in July 2018*". That is clearly a reference to the 2018 Panel decision. By July 2020 it was reported to the Board that the Applicant had not engaged in the proposed referral to the specialist unit. In August 2020 it was decided that an oral hearing should be directed. An oral hearing took place on 23 February 2021 when the Applicant was legally represented and the panel heard evidence from the Applicant, a psychiatrist and two psychologists, essentially to determine an application for an adjournment made on the Applicant's behalf. The Applicant had agreed during the course of that hearing to be transferred to the specialist unit and to co-operate with an assessment. Although it was doubtful about the outcome, the Panel agreed to an adjournment to allow for the referral to the specialist unit and noted that there was no application before it for release nor a transfer to open conditions. In view of the fact that the unit had agreed to assess him, and that the Applicant had agreed to a transfer to that unit if accepted, the Panel decided that a full hearing of the review was in light of those developments unnecessary and that the appropriate course was to dispense with the oral hearing and conclude the review on the papers pursuant to Rule 21 Parole Board Rules 2019. The Panel Chair directed the parties to make submissions regarding that decision. I have not seen in the dossier any submissions from the Applicant's representatives; indeed it is unclear if any were in fact submitted. In any event, the panel found that the position had not changed, that the Applicant remained on a waiting list, and that in those circumstances it was appropriate to proceed with the issuing of a decision.

Request for Reconsideration

10. The grounds for seeking a reconsideration are set out in lengthy representations submitted by the Applicant's solicitors on 11 October 2021. It is submitted that the Panel's decision was irrational and/or procedurally unfair, in that the Panel erred in:

- (a) Concluding the review on the papers under Rule 21 prematurely and unfairly.
- (b) Concluding that the Applicant's risk was not manageable in the community.
- (c) Placing too much reliance upon the serious nature of the Applicant's offending and his claim of innocence of the index offences.
- (d) Placing too much emphasis on the statistical probabilities of re-offending rather than "*the actual real life behaviours presented since conviction*".
- (e) Failing to focus on the Applicant's behaviour and conduct in prison - in particular his dealings with and attitudes towards other prisoners and staff.

- (f) Failing to acknowledge failures in the prison system, for example, the lack of specialist support for ASD, which it was submitted hindered his progression.
- (g) Failing to properly and fairly address a witness' failure to answer specific questions.
- (h) Failing to adequately and sufficiently explain why the Applicant was not suitable for a transfer to open conditions.

The Relevant Law

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**.
13. **Rule 21** sets out procedures that must be followed before a decision can be made on the papers after a direction for an oral hearing. Rule 21(1) provides the panel chair with a power to direct that the case be determined on the papers. That power can only be used after new evidence has been received. Provision is made under Rule 21(3) to allow the parties to make representations as to whether the case should or should not be considered on the papers before any direction to do so has been made. Rule 21(6) provides that a direction cannot be made where there is less than 3 weeks to the oral hearing.

Irrationality

14. 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."

15. 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.

16. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28. See for example the case of **Preston [2019] PBRA 1**.

Procedural unfairness

17. 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.
18. 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.
19. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Oral Hearings

20. In the cases of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.


The reply on behalf of the Secretary of State

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21.No submissions on this application have been made on behalf of the Secretary of State.

Discussion

22. Before I deal with each of the grounds on which reconsideration is sought it is important in my judgment to place the decision of the Panel in context. For that it is necessary to consider some of the decisions and findings made by the panel in 2018 which had concluded the Applicant's previous review:

- (a) That panel heard evidence from four psychologists and a neuropsychiatrist all of whom agreed upon a referral to a specialist unit, indeed the same unit that featured in the decision under consideration in this application, as being the most appropriate treatment pathway for the Applicant.
- (b) The panel received evidence that all the professional witnesses agreed upon the 2012 diagnosis of the Applicant that he suffered from ASD.
- (c) The issue that was central to the evidence heard by the panel in 2018 was the identification of a treatment pathway within the prison system that could enable the Applicant to explore and address his risk factors.
- (d) Good prison behaviour was acknowledged as were the efforts the Applicant had made to gain some understanding of how his ASD impacted upon his interactions with others.
- (e) The panel made clear that denial of offences was not a bar to progression and release.
- (f) It identified the Applicants risk factors which in its opinion remained largely unaddressed.
- (g) The panel found that he posed a very high risk of serious harm to female adults and children, and,
- (h) Finally, that substantial core risk reduction work remained outstanding and needed to be completed in a secure setting.

23. It is noteworthy just how much of what the previous panel found in 2018 is echoed in the current decision in 2021. If that is a fair and accurate view then it follows that the Panel in 2021 would have been keen to search for and carefully examine any significant changes in the position.

24.I turn to deal with each of the specific Grounds relied upon in support of the application for reconsideration:

- (a) The decision to conclude on the papers. This was in my judgment an appropriate course for the Panel to take. In doing so, it took into account not only the history of the case up to that point and in particular the decision of the panel in 2018

but also the further evidence it had read and heard, the fact that the relevant prison unit had agreed to accept the Applicant for assessment, that the Applicant himself had told the hearing he had agreed to be transferred to that unit, that there was before the Panel no application for release or transfer to open. Clearly in the opinion of the Panel it was, given all the circumstances, unlikely that there would be any significant reduction in risk within the review period and that there was nothing to be learnt nor gained from an oral hearing because fairness to the Applicant did not require there to be one. I find there is no basis for a finding that the decision to proceed to a conclusion of the review in this way was either premature or procedurally unfair.

- (b) Concluding that the Applicant's risk was not manageable in the community. There was no support for release from any of the professionals. There was before the Panel what was described as "*an embryonic*" release and risk management plan. The Panel reached the clear conclusion that there was no plan which as matters stood would safely manage the Applicant's risk. The Panel considered all the material and the submissions made including those from the Applicant's representative, it reviewed the facts and circumstances of the index offences and the Applicant's previous convictions noting what it described as "*their predatory and terrifying nature*" in which there was extreme sexual violence. Further, the Panel accepted the opinions from expert witnesses following psychological risk assessments of both a psychologist instructed by the Parole Board and one instructed on the Applicant's behalf that further treatment was necessary and that he could not be managed in the community nor in open conditions - an opinion with which both the Applicant's Prison Offender Manager and his Community Offender Manager agreed. It should be noted that the Applicant himself did not dispute the conclusions of any of these witnesses. This ground must fail due to there being no proper basis for it.
- (c) Placing too much reliance on the serious nature of the offending and his maintenance of innocence. The Applicant consistently maintained that he was not responsible for any of the index offences. Beyond confirming the fact that his convictions and sentence were upheld by the Court of Appeal, the assertion of innocence is not referred to again by the Panel in its decision. The Applicant would know full well, this being his seventh review, that denial of offending is not and could not by itself be a bar to progression or release. In my judgment there is no sound basis for suggesting that the Panel placed too much emphasis or inappropriate reliance either on the Applicant's denials or the very serious nature of his offending.
- (d) Too great an emphasis was based on the statistical probabilities of reoffending. Every Parole Board panel is required when making its own expert assessment of risk to consider the relevant risk assessment tools used by professional witnesses and to pass comment upon them where appropriate. The Panel in its decision simply and briefly referred to the assessments. In respect of one group, they said that they did not consider that the assessments adequately expressed the Applicant's risks and in respect of other assessments the Panel simply indicated it agreed with them as representing a more accurate picture. The conclusions reached by this Panel were entirely within its remit. There is quite simply no evidence to support the contention that too much emphasis was



placed by the Panel upon these assessments. In my view they were dealt with in an appropriate and fair - minded way.

- (e) Insufficient attention paid to good prison conduct. Panels are well used to dealing with prisoners who have committed the gravest offences, who may have a number of personal, physical and/or mental health issues to contend with, who are facing long sentences, yet who nonetheless conduct themselves well and compliantly both in their dealings with staff and fellow prisoners. The suggestion that seems to be made here in this ground is that the Panel barely touched on the point. I am in no doubt that this experienced Panel would have given prison conduct and behaviour appropriate weight in the Applicant's favour. It would have noted that the 2018 panel acknowledged both his good behaviour and good engagement with staff. The fact it is not specifically mentioned in the current decision by no means legitimates the suggestion made that the Panel "*hardly focused*" upon it as a factor. It is not necessary to mention in a written decision everything that is taken into account. Put another way, the fact that something is not mentioned does not mean that it was not taken into account.
- (f) Failures in the prison system, for example, a lack of support for sufferers from ASD have hindered progress during his sentence. I am able to take this shortly. This is not in my judgment an appropriate complaint to make about a decision of the Parole Board. The level and nature of available support for those with particular difficulties be they physical or psychological or both are for HM Prison Service and not for the Parole Board.
- (g) A procedural failure in that particular questions were not answered. This ground is I am afraid difficult to follow. It appears to relate to some further evidence that the Panel sought via the Applicant's Prison Offender Manager who was directed to provide an updated report from the specialised unit where it was proposed to transfer the Applicant. The material from the witnesses have seen did provide some information. Importantly, there is nothing before me to suggest that the Panel's final decision is in any way fatally flawed in this respect or that there was any procedural unfairness.
- (h) Failure to explain sufficiently the reason why no transfer to open conditions was recommended. 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. As I have already indicated in paragraph 12 above, the decision in this case not to recommend that the Applicant be moved to open conditions is not eligible for reconsideration under the 2019 Rules. That disposes of this ground. However, because I am well aware that the Applicant has been engaged in the preparation of this application it is only right that I should indicate that in my view, the Panel's Decision at paragraph 8 of the decision explains and justifies very briefly the reason why in a recommendation of a transfer to open conditions could not in its judgment be made.

Conclusions

25. This was and remains a serious case. The attacks carried out by the Applicant in 1994 and 1995 were prolonged and horrific. The issues which engaged previous

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panels and those that engaged the current panel are to a significant degree similar. All the experts agreed that the diagnosis in 2012 which revealed that the Applicant has high functioning Autistic Spectrum Disorder, specifically Asperger's Syndrome, has led to the suggestion that there could be a link between his ASD and his sexual offending. The real difficulty facing the Applicant and all the professionals engaged in his case has been and remains identifying an appropriate "treatment pathway" that can effectively enable him to examine and address his risk factors. Previous panels in 2014 and 2018 as well as the current panel all considered the specialist unit which during the course of this current review agreed to accept him for assessment - a development agreed to by the Applicant. In those circumstances the Panel were perfectly entitled to decide that the review could be concluded "on the papers" under Rule 21 Parole Board Rules 2019.

26. There are two key issues that I must decide. First, whether the conclusions reached by the Panel were justified by the evidence they considered and secondly whether the conclusions were adequately and sufficiently explained.

27. As for the first issue I am entirely satisfied that the decisions to conclude the case in the manner that it was concluded and not to release the Applicant were fully justified on the totality of the evidence. There was nothing to be added to the panel's consideration of the case and in the Panel's view it was fair to conclude it without another oral hearing.

28. The second issue is whether the Panel have in any significant respect failed to provide any or sufficient reasons explaining why it found that the Applicant did not meet the test for release. Taking a step back and looking at the Decision as a whole I conclude that the Panel has satisfied the public law duty to provide evidence-based reasons that adequately and sufficiently explain the conclusions that were reached.

Decision

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

HH Michael Topolski QC
Date 18th November 2021