

[2022] PBRA 71

Application for Reconsideration by McMahon

Application

1. This is an application by McMahon (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 1 May 2022 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.
3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have also had access to an audio recording of the oral hearing.

Background

4. The Applicant was sentenced on 18 October 2016 after conviction for 19 sexual offences: four counts of making an indecent photograph or pseudo-photograph of children, three counts of possessing an indecent photograph or pseudo-photograph of a child, 10 counts of indecent assault on a female under 16, and two counts of gross indecency with a child (girl) under 14. He received an extended sentence of ten years in respect of the indecent assaults comprising an eight-year custodial term with a two-year extension period. The sentences for the other matters have now been served.
5. His parole eligibility date was 16 February 2022, his conditional release date is in October 2024, and his sentence expiry date is in October 2026.
6. The Applicant maintains his innocence of all offences.
7. The Applicant was aged 58 at the time of sentencing. He is now 64 years old.

Request for Reconsideration

8. The application for reconsideration is dated 20 May 2022 and has been drafted and submitted by solicitors acting on behalf of the Applicant.
9. It submits that the decision was both procedurally unfair and irrational. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.



Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in May 2021 to consider whether it would be appropriate to direct his release. This is his first parole review.
11. On 1 October 2021, the case was reviewed by a Member Case Assessment (MCA) panel which directed the case to an oral hearing. The MCA panel also directed a Programme Needs Assessment (PNA) to establish the Applicant's suitability for attendance on risk reduction programmes. On 21 November 2021, the prison psychologist sought a variation to this direction to enable a full Psychological Risk Assessment (PRA) which could, if appropriate, incorporate a PNA. A PRA would give a greater understanding of the Applicant's risks. The direction was amended accordingly, and a PRA was directed.
12. The dossier contained a letter dated 5 November 2021 to the Applicant from a Treatment Manager for a moderate-intensity accredited intervention for men convicted of sexual offences (the moderate programme). It noted that during assessment, the Applicant was unable to identify any outstanding treatment areas and, due to this, the Applicant was not considered "treatment-ready" to engage in the moderate programme.
13. The PRA is dated 20 December 2021. It concluded that the Applicant presented a moderate risk of sexual violence in the next 12 months and that the risk was posed primarily to children. It stated the Applicant was likely to have a sexual interest in children.
14. The PRA also commented on the Applicant's suitability for attendance on risk reduction programmes. It stated (as per the letter of 5 November 2021) that the Applicant was "*unsuitable to engage with the [moderate programme] at [his establishment] due to his responses to the suitability assessment indicating no deficits in any areas of criminogenic need or desistance*". It noted that the Applicant's account would also render him unsuitable for any other offending behaviour programmes (including higher-intensity group and 1-1 sexual offending interventions).
15. The PRA recommended the Applicant's release. It provided several recommendations for monitoring and risk management in the community.
16. The dossier contained two reports from the Applicant's Community Offender Manager (COM). The first is dated 30 July 2021 and was produced prior to the MCA assessment. His COM stated, "*I would assess his risk as being imminent [in the community] until he has sustained a period of work in regard to his offending and self-management...I would assess the level of risk posed by [the Applicant] cannot be safely managed at this time in the community*". It did not recommend the Applicant's release.
17. The second COM report is dated 29 March 2022 and was produced prior to the oral hearing. This notes that the Applicant is not eligible to complete the moderate

programme in custody and (for the same reasons) would also not be eligible to complete the same programme in the community. It relied upon the PRA's recommendations for monitoring and risk management in the community and noted that the COM could use an alternative non-accredited strengths-based toolkit to structure supervision around the Applicant's sexual management and feelings. The report recommended the Applicant's release, noting there was no core risk reduction work available to the Applicant in custody and that a longer period in the community would provide an understanding of his intentions to comply and complete offence-focused work.

18. The dossier also contained two reports from the Applicant's Prison Offender Manager (POM). The first is dated 22 July 2021. It recommended a PNA, and completion of programme work if the Applicant was found suitable. The second is dated 17 March 2022 and supported release, following a discussion with the COM and the author of the PRA.
19. The case proceeded to an oral hearing on 20 April 2022 before a three-member panel comprising a judicial chair, a specialist psychologist member, and an independent member. The case was held via video conference. It was the only case listed on the day. The Applicant was legally represented throughout. Oral evidence was taken from the Applicant, his POM, his COM, and a prison psychologist (author of the PRA).
20. All professional witnesses supported the Applicant's release. The Applicant was seeking release. The panel did not direct the Applicant's release.

The Relevant Law

21. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019

22. 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)).
23. 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**.

Procedural unfairness

24. 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.

25. 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.

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

Irrationality

27. 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."

28. 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.

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

Duty to give reasons

30. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.

31. The duty to give reasons was most recently considered in the context of parole decision in **R(Wells) v Parole Board [2019] EWHC 2710**. Saini J acknowledged (at para. 38) that a panel of the Parole Board is not bound by the expert evidence before it, but that (at para. 40):

"The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting".

Other

32. In **R (Oyston) v Parole Board [2000] PLR 45**, Lord Bingham said at para. 47:

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

33. The Secretary of State has submitted no representations in response to this application.

Discussion

Inaccuracies in the decision letter

34. The first ground submits that the decision contains several inaccuracies which would suggest the evidence given in the hearing had not been properly considered and noted.

35. Although Lord Bingham in **Oyston** was clear that a decision does not require impeccable draftsmanship, it is nonetheless possible for errors in a decision to amount to procedural unfairness if those errors, taken individually or cumulatively, undermine the fairness of a panel's decision. In other words, to establish procedural unfairness, it must be shown that the errors have made a material difference to the panel's decision.

36. I will deal with each of the perceived inaccuracies in turn. Within this discussion, paragraph numbers refer to the relevant part of the panel's decision.

a) Para. 1.1 notes the offences took place between September 1989 and September 1984. The application notes the offences took place between 1989 and 1994. Para. 1.1 further notes that the Applicant was convicted of gross indecency with a child and indecent assault on a male under 14 in 1984. The application notes these took place in 1994. The application states this may simply be a typographical error. I agree: it has not affected the fairness of the panel's decision. The application also states that the Applicant accepted he masturbated for a very short period of time in front of the complainant in the earlier matters but pleaded not guilty on counsel's advice. The decision states the Applicant denied the offences. Probation records note that "*despite being found guilty, [the Applicant] continues to deny these offences, initially claiming the victim had made this up, then in recent interviews stated he was showing [the victim] how to masturbate*". The decision's reflection of this position is accurate.

- b) Para. 1.2 summarises the Applicant's non-contact offending, referring to the Applicant's computer and a particular messaging platform. The Applicant maintains there were no images on the messaging platform, only text messages. I take this to mean that the Applicant contends there were indecent images stored on his computer, but no indecent images (and only text messages) on the messaging platform (which may or may not have been on his computer). A careful reading of para. 1.2 in fact supports the Applicant's view. Para 1.2 states "*[the Applicant's] computer was examined by the police and the indecent images were discovered together with on-line conversations*" and "*[the Applicant] accepted no responsibility for any of these images or the sexual content [online]*". This implies that images were on the Applicant's computer and the on-line conversations were text-only. Although the Applicant denies discussing anything sexual on the messaging platform, the trial judge's sentencing remarks refer to those communications as "*[demonstrating] a clear ongoing sexual interest in young children*". In any event, the decision's reflection of this position is accurate.
- c) Para. 1.7 considers the Applicant's risk factors (those things that make it more likely that he will reoffend in the future). The panel notes that it is likely that there are risk factors that are currently unknown, including the Applicant's lack of taking responsibility for his actions and a lack of victim empathy. The application notes the Applicant has never been asked about victim empathy and therefore the panel's concern is not correct since the matter was not put to him in the hearing. Cases in which a prisoner is maintaining innocence makes an analysis of risk factors more difficult and it is often the case that there will be unknowns. Given the Applicant's maintenance of innocence, it is difficult to see what the panel would have gained by asking him about victim empathy: as a matter of logic someone who denies offending must also deny creating victims. Probation reports also refer to "*a total lack of victim empathy*". The decision's reflection of this position is accurate.
- d) Para. 2.1 refers to the Applicant's suitability for programmes. It notes the Applicant "*was assessed for the [moderate programme] but was assessed as unsuitable and the PNA could not identify any outstanding treatment needs*". The application notes that the Applicant had been asking to participate in the moderate programme since 2017, but the prison psychologist's evidence was that there were no identifiable treatment needs and that the Applicant was not suitable. It further notes that both moderate and high intensity programmes can be undertaken by those who maintain their innocence. While that is true, it is also clear from the evidence that the Applicant is unsuitable for programme work because he could not self-identify any outstanding treatment areas, regardless of his stance towards the index offences. The PNA could not identify outstanding treatment needs because it was wholly reliant on the Applicant's view on whether there were any. While the Applicant maintains he has no treatment needs, it does not follow that he is correct. The decision's reflection of this position is accurate.
- e) Para. 2.2 summaries the POM's evidence. It notes "*the panel was told that [the Applicant] had not engaged in any offence related course work or done*

any in-cell work". The application notes the Applicant has never been asked to complete any in-cell work and does not consider the matter should be held against him. Whether or not the Applicant has been asked to complete in-cell work does not detract from the POM's evidence: the Applicant had not done any in-cell work. The decision's reflection of this position is accurate. There is nothing in the panel's conclusion that suggests the lack of in-cell work was held against the Applicant; neither was it cited as a material factor in the decision not to release the applicant. The Applicant's assertion to the contrary is unfounded.

- f) Para. 2.7 notes that the Applicant had *"applied for contact in writing with [his] daughter...who [he] said is 13 but would only want contact with her after she was 18 if she would be willing"*. The application notes that the Applicant's daughter was 13 at the time he applied for contact in 2018 but will turn 18 in 2023. While this is an error, I cannot see that it has affected the panel's decision. The Applicant's daughter is mentioned nowhere else in the decision and her age does not form part of the panel's reasons not to direct release. The misstatement has not made the panel's decision unfair.
- g) Para. 2.11 discusses certain aspects of the prison psychologist's evidence including the Applicant's sexual interest in children. It notes the image offences were 20 years after the contact offences. The application notes the Applicant's made clear he had no convictions since 1994, notwithstanding that he has been involved with two families in the community with children. While that may be true, the submission does not indicate any perceived inaccuracy in the recording of the evidence in para. 2.11, so I have no need to consider it further.
- h) Para. 2.13 discusses the proposed licence conditions and the prison psychologist's view that the Applicant could be managed in the community if he was compliant. One of his main concerns about compliance would be the Applicant's lack of openness. The application notes the COM's evidence that the Applicant had been highly compliant in custody and consistent in his presentation. It further notes the prison psychologist's evidence that the Applicant would comply with robust licence conditions. I have listened to the audio recording of the hearing. The prison psychologist states the Applicant could be managed in the community *"as long as he was compliant"* but that *"the only thing around compliance...only concern...is an element of lack of openness"*. The prison psychologist's evidence is accurately recorded in para. 2.13. The point made about the COM's evidence is not relevant to the accuracy of para. 2.13, and, in any event, the COM supported the Applicant's release for reasons clearly documented in paras. 2.14 – 2.17. I do not find any unfairness here.
- i) Para 3.2 notes the Applicant questioned the need for some of the proposed additional licence conditions. The application contends the panel found this a matter of concern and had failed to accept the role of the Applicant's legal representative in testing the necessity and proportionality of the proposed licence conditions. Para. 3.2 does not say the panel was concerned by the Applicant's challenge to certain licence conditions, although I accept the

context might suggest a negative inference. It certainly does not go so far as to say or imply the panel did not accept the legal representative's role and I find this assertion unfounded. The Applicant's wish to test the proposed licence conditions does not appear to have formed a material part of the panel's decision not to release him and I do not find any unfairness here.

37. In summary, I find no inaccuracy on points (b), (c), (d), (e), (g), (h) or (i) above. There are minor inaccuracies in points (a) and (f) but these have not affected the fairness of the panel's decision individually or in their collective impact. There is therefore no procedural unfairness arising from the content of the decision and this ground fails accordingly.

Conduct of the hearing

38. The second ground submits that the Applicant was aggrieved that he was not afforded sufficient time to present his case and had formed the view the panel had taken against him. It is further submitted that the panel chair expressed irritation towards the Applicant. During a break in the hearing, the application notes the matter was discussed between the Applicant and his legal representative. The Applicant did not want to raise the matter as he did not want to provide the panel with a further reason to form an unfavourable opinion of him.

39. I have listened to the recording of the hearing in its entirety. As the application acknowledges there were times at which the Applicant was interrupted but, in doing so, the panel indicated it was necessary to focus on relevant issues. Indeed, no objection is raised to the reasons given from preventing the Applicant saying all that he wanted to within the hearing. I do not find that the panel chair's conduct towards the applicant was indicative of bias; neither do I find any evidence to support the Applicant's view that the panel had formed an early unfavourable opinion of him. By contrast, the panel asked reasonable questions, remaining focussed on risk throughout and giving all witnesses the opportunity to answer.

40. I also do not find that the hearing was rushed. All evidence was given at an appropriate pace. The hearing lasted close to four hours (from the recording I have). It was the only case on the day. There was no need for the panel to rush, and it did not do so.

41. If the Applicant had concerns about the procedural fairness of the hearing it was open to him to raise it at the time. He was legally represented and discussed the matter with his legal representative during a break in proceedings. He chose not to raise the matter with the panel and has now given his reasons for not doing so. Those reasons are based on the false assumption that the panel was already prejudiced against him.

42. Having listened to the entire hearing, I do not find that the Applicant was prevented from putting his case properly. Neither do I find evidence of bias or a lack of impartiality. I have already found no evidence to support the Applicant's view that the panel had formed an early unfavourable opinion of him. There is no procedural unfairness arising from the conduct of the hearing and this ground fails accordingly.

Irrationality

43. The third, and final, ground submits that the panel's decision was irrational in the light of the evidence presented by the professional witnesses. That said, the application also rightly acknowledges that the panel are not bound by the recommendations of the professional witnesses. To say otherwise would undermine the panel's role as an independent assessor of risk.
44. I must look at the panel's decision as a whole in the light of the evidence before it and ask whether it was so unreasonable that every other panel would have decided differently and released the Applicant. Following **Wells**, the panel has a clear legal duty to give reasons. The more a panel departs from expert evidence, the more heightened its duty to give reasons for doing so, particularly when the liberty of the prisoner is at stake.
45. The panel sets out clear and cogent reasons why it disagreed with the recommendations of professionals. These reasons relate to the evidence in a rational way and are adequate, intelligible, and comprehensible. In short, the Applicant is an untreated child sex offender who does not consider himself to have any treatment deficits. As he does not consider himself to have any such deficits he cannot engage in moderate or high intensity programme work. He also has limited internal controls to manage his risks. His risk factors are not well understood and as such his risk of serious harm was such that he did not meet the test for release.
46. I find the panel has discharged its duty to give reasons and has reached an entirely sustainable conclusion based on the evidence before it. I have no reason to interfere with it. The legal test for irrationality is a very strict one. This case does not meet it.

Decision

47. The complaints of procedural unfairness and irrationality are not made out on the evidence before me.
48. Accordingly, this application is dismissed.

Stefan Fafinski
7 June 2022