

[2023] PBRA 113

Application for Reconsideration by Simmonds

Application

1. This is an application by Simmonds (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 16 April 2023 not to direct his release. The decision was made following a review by way of oral hearing which concluded on 27 March 2023.
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 or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are: the Application for reconsideration with representations; the decision document; the case dossier; and the email message dated 22 May 2023 from the Public Protection Casework Section (PPCS) of the HM Prison & Probation Service on behalf of the Secretary of State.

Background

4. On 2 October 1997, the Applicant was sentenced to life imprisonment after pleading guilty to one offence of rape and two of robbery. The minimum custodial term was set at 7 years less time spent in prison on remand and the Applicant's tariff expired on 6 December 2003.
5. These offences were committed on 30 November 1996 when the Applicant was 23 years of age. He had many previous convictions dating from the age of 11, including convictions for theft, attempted robbery, robbery, burglary, arson, attempted rape, and inflicting grievous bodily harm.
6. The Applicant is reported to have had a troubled childhood. By the age of 10, he was identified as having special educational needs and he functioned at a low level both academically and in terms of general behaviour. Special education arrangements were unsuccessful and the Applicant had a series of placements in foster homes, community homes, hostels and secure accommodation. This chaotic existence was said to be exacerbated by sexual abuse from an older family member.
7. The Applicant's offending had escalated to an alarming level by the time of the index offences which were committed only 10 days after his automatic release on licence under a 5 year sentence for the attempted robbery of a female which he has admitted had sexual overtones. As part of his licence conditions, the Applicant was



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

residing in a bail hostel and after drinking alcohol and taking cannabis, he forced a 20 year old woman into an alleyway, pretended he had a gun, robbed her of a purse, struck her over the head, raped her and then subjected her to other sexually demeaning acts. The Applicant returned to the hostel for short while before going out again, seeking out a 40 year old woman as his second victim, hitting her over the head and robbing her of a shopping bag.

8. During the course of the current sentence, the Applicant has completed a number of accredited programmes and engaged in other work intended to address his offending behaviour. This included both Core and Extended Sex Offender Treatment Programmes (SOTP), Enhanced Thinking Skills (ETS), Controlling Anger and Learning to Manage it (CALM) and the Healthy Sex Programme (HSP). The Applicant spent 16 months in a Prison Therapeutic Community (TC) in 2012/2013 but he left before completing the full term as a result a relationship with a fellow resident breaking down. A Prison Offender Manager report sometime later suggested that he had not stayed there long enough to gain the full benefit of the TC regime.
9. The Panel conducting the Applicant's review on 16 April 2018, recommended his transfer to open conditions. There were delays in the process of implementation because the Applicant was assessed as presenting a high risk when sharing a cell. While awaiting the move, he was adjudicated for assaulting another prisoner and the move was not implemented. The next Parole Board review on 29 January 2020, resulted in a further recommendation for an open conditions transfer and this was implemented on 28 October 2020.
10. A steady increase in concerns about the Applicant's behaviour, including aggressive presentation, alleged violence and controlling others, led to his temporary removal from the open prison in March 2021. In due course, the Secretary of State decided that there had been no evidence of a significant increase in the Applicant's risk of harm and decided that no further action should be taken. The Applicant was given a formal warning and returned to open conditions in June 2021. Since then, he is reported to have settled down with support from the Pathways Enhanced Resettlement Service (PERS) and the Wellbeing Team and has been subject to Enhanced Behaviour Monitoring.
11. By the time of the current review, the Applicant had undertaken 13 unescorted day releases, the last one having been in August 2022, and 6 periods of overnight release on temporary licence (ROTL) all with no adverse feedback. He had incurred proven adjudications in October 2022, for returning to the prison with black vape oil in a bottle and in February 2023, for disobeying a lawful order. During a probationary employment period within the prison, he refused to take off his jacket as required to remove the ability to hide items in pockets. As a result, he lost the job and his status under the Incentives and Earned Privileges (IEP) Scheme was reduced from Enhanced to Standard.

Request for Reconsideration

12. The application for reconsideration is dated 5 May 2023 and contains detailed representations.



13. The grounds for seeking a reconsideration are that: the decision was irrational because the Panel (i) focused and attached too much weight on the relationship the Applicant has with one of his family members; his plans to continue with it in the community and a failure to fairly balance this against the internal and external management strategies available and (ii) attached too much weight on the Applicant's lack of purposeful engagement with the ROTL process, particularly his home leaves.

Current parole review

14. The Secretary of State referred the Applicant's case to the Parole Board on 19 November 2020 to decide whether to direct his release. The terms of reference included a request to advise on the Applicant's continued suitability for open conditions in the event of release not being directed. Such advice is not within the remit of the reconsideration procedure.

15. The case dossier included recent assessment reports by a prison psychologist and a psychologist instructed on behalf of the Applicant, updated reports by the Applicant's current Community Offender Manager (COM), by his Prison Offender Manager (POM) and by the prison security department, and a letter from the PERS within the prison.

16. Oral evidence was given by the respective authors of the psychological reports, by the POM and the COM and by the Applicant himself. Submissions were provided by the Applicant's legal representative. No submissions were made by or on behalf of the Secretary of State who was not represented at the hearing.

17. The risk management plan (RMP) prepared by the COM provided for release in the first instance to designated premises within a Psychologically Informed Planned Environment (PIPE). A place had been secured for the Applicant for a period of 6 months from May 2023. It was not considered possible to make arrangements for move on accommodation until the Applicant had settled there, community networks and employment opportunities explored and further assessments undertaken.

18. The Applicant had completed 7 out of 8 sessions with PERS and there remained the opportunity to re-engage with them if needed. He had not been accepted by Discovery, which was an organisation offering 4 different support pathways in the community, including both 1-1 and group sessions with psychology.

19. The OASys Report dated 21 March 2023 assessed the probability of both violent and non-violent re-offending by the Applicant to be low. His sexual contact re-offending risk was assessed as very high and his dynamic risk of serious recidivism over a period of two years (RSR) was assessed to be medium at 5.17%. The risk of serious harm to the public in the event of any re-offending in the community was assessed as high. The risk of such harm to children, any known adult and to staff, including probation staff, was assessed as medium.

20. The prison psychologist assessed the Applicant's future risk of sexual violence in the community to be moderate and manageable. Although he was motivated to avoid confrontational situations, evidence following his ROTLs highlighted a



significant level of resources and support needed to manage his risks of violence generally.

21. The psychologist instructed by the Applicant referred to a moderate risk of imminent sexual violence towards strangers, a moderate risk of violence towards his family member, as a consequence of resentment of the historic abuse by them, and a low to moderate risk of substance related violence, rising to high should he return to substance misuse, and a low to moderate risk of further general violence. The COM confirmed that the Applicant remains very angry about the abuse the family member had allegedly perpetrated on him. There has been contact between them and, when it has been face to face, someone else has always been present. The Applicant is worried that, if confronted with the issue, any family support may be withdrawn. The COM told the Panel that the relationship is "*definitely a concern to be monitored*".
22. As long ago as the PSR, the author of that report referred to the traumatic and psychological harm which the abuse is likely to have caused the Applicant, the impact on his self-esteem and the development of sexual fantasies and an interest in sexualised violence.
23. All four professional witnesses supported the Applicant's release but the prison psychologist agreed that the relationship with the family member has the potential to destabilise him. It was accepted that he had not achieved or pursued all the objectives set for him in open conditions and that he would be reliant on professionals to ensure sufficient levels of support were put in place. Both psychologists agreed that the gap left by the Discovery project would need to be filled.

The Relevant Law

24. In its 16 April 2023 Decision Letter, the Panel correctly sets out the test for release, namely that the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out in the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

25. Under Rule 28(1) of the Parole Board Rules 2019, a decision concerning whether the prisoner is or is not suitable for release on licence 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)). This case concerns the decision of an oral hearing panel after an oral hearing. Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)) but this does not apply to the present case.
26. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)). The present case falls under Rule 28(2)(a).



27. 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**.

Illegality

28. An administrative decision is unlawful under the broad heading of illegality if the panel:

- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

29. No issue of illegality arises in this case.

Irrationality

30. 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."

31. 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.

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

Procedural unfairness

33. 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.

34. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy the reviewer 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.

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

36. No issue of procedural unfairness arises in this case.

Other

37. 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.

38. No mistake of fact has been alleged in this case.

39. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Secretary of State (the Respondent)

40. PPCS has confirmed that no representations are offered by the Respondent.

Discussion

41. The 2018 panel concluded that the Applicant did not need to undertake any further core risk reduction work. The Applicant's risks were considered to be manageable in the conditions of lesser security afforded by the open prison regime.



42. Having heard first hand from the Applicant, the Panel concluded that his relationship with the family member remains unresolved. The prison psychologist agreed that this *"does have the potential to destabilise him and it is important for everyone to be aware of the potential complexities in this dynamic situation."*
43. Whilst, in common with the other professionals, the COM did not accept that the Applicant needed further time in open conditions, she conceded that he had not been fully tested in the community. The Panel expressed concern that he may not have been fully tested in open conditions in terms of being challenged, managing his verbal aggression, forming new support networks and building his own release plans to keep himself occupied and motivated.
44. The COM had identified an activity hub in the community which could be beneficial in the absence of Discovery in terms of providing opportunities to build networks and for the provision of mentoring. However, it was a new service which she needed to investigate and she was unsure whether it could be a source of the emotional support needed.
45. The Panel expressly gave credit to the Applicant for his positive engagement in offending behaviour reduction work, his adaptation over time to conditions of lesser security and his commitment to working towards release. However, it remained concerned that the professionals involved in the Applicant's case have *"skirted round the subject of the Applicant's [family member] and the alleged abuse"*.
46. The Panel acknowledged that the professional witnesses supported release, albeit with some reservations. However, in view of the outstanding issues of concern requiring further exploration and resolution, and particularly the need for a stronger risk management plan, the Panel was unable to conclude that the test for release had been met.
47. A panel should always take account of the opinions expressed by professional witnesses, particularly where they have been directly involved in the management and supervision of an offender, as both the COM and the POM have been. However, it should exercise its independent judgment, taking into account all the evidence before it and may properly reach a different conclusion. It is apparent that in this case the opinions expressed were not without reservation.

Decision

48. In my judgment, the Panel carefully assessed and weighed in the balance all the evidence received and submissions made before making an objective and well-



reasoned conclusion. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

HH Judge Graham White
19 June 2023