

[2023] PBRA 43

Application for Reconsideration by Lucas

Application

1. This is an application by Lucas ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') which on 11 January 2023, after an oral hearing on 13 December 2022, issued a decision not to direct his release on licence.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is now aged 37. He is serving a sentence of imprisonment for public protection ('IPP') for serious sexual offences ('*the index offences*') against three young women with whom he had entered into consensual sexual relationships. These offences were committed between November 2007 and August 2008 when he was aged 21-22. The victims were aged between 15 and 24.
4. He was convicted after a contested trial from which he absconded before the jury returned their verdicts. When he was recaptured he was remanded in custody before being sentenced in August 2011. His minimum term ('*tariff*') was fixed at 6½ years less the relatively short time which he had spent in custody after he was recaptured. It expired in January 2018.
5. He had no previous convictions. Between the last of the index offences and February 2011 he was in an intimate relationship with another young woman who bore him a son: there appears to be no evidence of any offences on his part during that relationship (the relationship ended because the young woman's mother disapproved of the Applicant). After that he entered into a number of short-term intimate relationships with other young women. He was clearly sexually preoccupied but again there appears to be no evidence of further sexual offending.
6. He has remained in custody throughout his sentence but on the recommendation of the Board and by the direction of the Secretary of State he was transferred to an open prison in November 2020. He has completed all the



risk-reduction work considered by professionals to be necessary.

7. The present review of his case began in April 2021. There have been inevitable delays (largely due to the COVID restrictions) but he has successfully completed a number of overnight stays at a probation hostel and a robust risk management plan has been formulated for the management of his case if and when he is released on licence.

The hearing, the adjournment and the panel's decision and the application for reconsideration

8. The hearing took place on 13 December 2022 and was conducted by video link. There appear to have been no technical problems with that system. The panel comprised a judicial member and two independent members of the Board.
9. At the hearing oral evidence was given by the following witnesses:
 - a) Ms P (the official responsible for supervising the Applicant in prison);
 - b) Mr G (the official prospectively responsible for supervising him in the community); and
 - c) the Applicant himself.
10. Because of the Secretary of State's current directions neither Mr G nor Ms P was permitted to make any recommendation to the panel about the Applicant's suitability for release on licence. However, in previous reports in July and November 2021 Mr G had reported that he and the official then responsible for the Applicant's supervision in prison were in agreement that, subject to successful completion of overnight releases to the probation hostel (which was subsequently achieved), the Applicant's risk of serious harm to the public would be safely manageable on licence in the community. This was of course part of the evidence before the panel.
11. It was unfortunate that by the time of the hearing Ms P had only recently taken over the case and had little knowledge of the Applicant, but that factor did not affect the fairness of the hearing.
12. A matter of concern to the panel was the relationship between the Applicant and a woman (Ms W) with whom he was evidently in a current relationship. The panel was concerned about any risk of future sexual offending which the Applicant might pose to Ms W or any other future intimate partner.
13. There was a certain amount of information in the dossier concerning Ms W. In his report of 12 July 2021 Mr G had identified Ms W as a potential victim. He stated that: *'On 26th February 2021, I rang [Ms W], however, there was no response. On 28/06/2021, I again rang [Ms W] and left a message for her to return my call. I have not had a response to date. The reason for wanting to speak with [Ms W] is to establish the nature of her relationship with [the Applicant]'*. In his next report of 29 November 2021 and his brief update of 7 February 2022 Mr G made no mention of Ms W. In his undated final report he stated that the Applicant spent a substantial amount of time with Ms W (evidently on his temporary releases on licence).



14. Mr G does not appear to have made any further attempts to contact Ms W before the hearing. Nor had the panel chair directed that any such attempts should be made. Equally the Applicant's legal representative had not sought to obtain a statement from her for production to the Board.

15. The panel questioned the Applicant at the hearing about his relationship with Ms W. His evidence, as recorded by the panel, was as follows.:

'His main contact was [Ms W] with whom he spoke frequently each week. He had known her for some years from his late teens/early twenties but had broken off the relationship. They had not formally lived together. Contact was resumed during his sentence, they were again close and both wanted to live together on release and she, like his sister, did not believe he had done the things claimed and for which he has been convicted because she had known him so long and didn't believe that he was "that kind of person". He accepted [Mr G] would need to meet her and explain these matters, in detail, and then assess her reaction. After their own break-up, she had had another partner with whom she had bought a house but the relationship was now over, the partner had left the property. [The Applicant] did not yet know what would happen to the property.'

16. The panel does not appear to have challenged that evidence.

17. At the end of the hearing the panel decided that it did not have enough evidence about the Applicant's relationship with Ms W. It therefore adjourned the case, expressing the hope that when the further information was received the case could be concluded without an additional oral hearing. The panel also requested further information about the availability of a place at the probation hostel at which it was proposed the Applicant should reside if he was released on licence.

18. Further evidence was provided by Mr G in the form of the following brief report which he submitted on 20 December 2022:

"I can confirm that [a hostel] placement has been reserved for [the Applicant] for 06/02/2023 at [the probation hostel] for a period of 12 weeks.

'[Ms W] was invited to attend [a specified location] on 15/12/2022 for disclosure to be discussed. However, unfortunately, on the morning of this date, I received an e-mail from her indicating that she was unwell and could not attend the meeting. From the correspondence sent by [Ms W] regarding her understanding of [the Applicant's] convictions and the nature of risk he poses, I am led to assess that despite what appears to be [the Applicant's] full admission to her [sic], it is apparent that she does not accept that [the Applicant] committed the offences in the way which is described in the CPS depositions. [Ms W] asserts that she does not believe that [the Applicant] is capable of committing such serious offences and I am therefore unable to comment on how capable she is of safeguarding herself of any risks posed towards her by [the Applicant]'



19. On 21 December 2022 the Applicant's legal representative submitted written closing submissions which, as well as addressing other issues in the case, included the following reference to Mr G's report:

'We note the latest information provided by [Mr G] in relation to [Ms W] in respect of which it has not been possible to take [the Applicant's] specific instructions. However, on the basis that he will be initially residing at Approved Premises for a period of at least 12 weeks, it is submitted that this is a sufficient period to assess any risk posed towards her by [the Applicant].'

20. The panel evidently decided that it was not necessary to hold a further hearing or to obtain any further evidence. It proceeded to issue its decision. A major factor in that decision was its assessment of the risk to Ms W. It stated in its decision letter:

'... the Panel considers that [Ms W], at this stage, remains in real risk of deception and, in the event, of relationship difficulties of serious harm. Until it is objectively clear that she is both aware of and protected against the dangers posed by him, the Panel deems it unsafe for him to be released. The same uncertainty applies to other future partners who he may encounter or seek out.'

The Relevant Law

The test for release on licence

21. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

22. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

23. Reconsideration will only be directed if one of more of the following three grounds is established:

- a) It contains an error of law or,
- b) It is irrational or,
- c) It is procedurally unfair.

24. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- a) A paper panel (Rule 19(1)(a) or (b)) or,
- b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or,
- c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).



25. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration.

The test for irrationality

26. In **R (DSD and others) v the Parole Board** [2018] EWHC 694 (Admin) (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

"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."

27. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

28. The Administrative 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 Board in making decisions relating to parole.

29. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

The test for procedural unfairness

30. 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 from the issue of irrationality which focuses on the actual decision.

31. The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

32. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The request for reconsideration in this case

33. The legal representative submits that the panel's decision was irrational and/or procedurally unfair. Her submissions include a statement which is obviously a mistake and has presumably come from using submissions in another case as a template. That statement reads: *'[The Applicant] maintains his innocence in relation to both the index offences and the unproven allegations.'* That is so obviously at variance with the Applicant's evidence as recorded by the panel in its decision and with the legal representative's other submissions that the only sensible and fair course is for me to ignore it.

34. The legal representative goes on to submit:

'Following the last review in September 2020, [the Applicant] transferred to open conditions with a view to demonstrating that he had internalised his learning and to develop his release and resettlement plans. Other than the absence of sexual thoughts diaries, professionals appeared to agree in evidence that [the Applicant] had done so.'

'Furthermore, [the Applicant] is compliant with the regime and had undertaken successful periods of Resettlement Overnight Release and other release on temporary licence.'

'A robust Risk Management Plan was proposed which includes residence at [the probation hostel] from the 6th February 2023 for a minimum period of 6 months.'

'It is respectfully submitted that notwithstanding the risk scores [shown in probation's risk assessment report] there is no further core risk reduction work required and remaining risk was not considered to be imminent. Any further consolidation work could be undertaken in the community under supervision during the extended stay at the [probation hostel].'

The Secretary of State's (the Respondent) position

35. By e-mail dated 20 February 2023 the Public Protection Casework Section ('PPCS') on behalf of the Respondent stated that he offers no representations in response to the application.

Documents considered

36. I have considered the following documents for the purpose of this application:

- (i) The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 332 and includes a copy of the panel's decision letter;
- (ii) The representations submitted by the Applicant's solicitor in support of this application for reconsideration;
- (iii) The e-mail from PPCS stating that the Respondent offers no representations in response to the application.



Discussion

37. For reasons which will be apparent I am going to start by considering the issue of procedural unfairness.
38. It is clear that the information provided by Mr G after the hearing played a significant part in the panel's decision not to direct release on licence. What I need to consider is whether it was procedurally unfair for the panel to issue a negative decision without obtaining further information to add to what Mr G had been able to report.
39. This question brings into play the well-established principle of the 'duty of enquiry' to which the Board is subject. That duty has been explained in various decisions of the courts and of reconsideration panels including, for example, the following decision in **Samuel [2021] PBRA 100**:
- 'One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary, for that purpose).'*
40. It is understandable that the panel should have wished to conclude this review without further delay. However, I am satisfied that by doing so without further evidence about Ms W and her relationship with the Applicant it placed itself in a position (inadvertently, of course) where it did not have all the evidence necessary to enable it to make a fair and fully informed decision.
41. There is no evidence that the Applicant himself was to blame for that situation arising. His evidence to the panel was sensible and constructive. As regards Ms W's failure to respond to Mr G's message in 2021 it is not uncommon for someone in her position to be reluctant to discuss her private life with probation, and Mr G does not seem to have made any further attempt after that to contact her. We do not know whether she was genuinely unwell on the day she was due to meet Mr G in December, and it would be unfair both to her and to the Applicant to assume that she was malingering. Mr G referred to correspondence from Ms W but no attempt seems to have been made to provide or obtain it.
42. It would, I believe, be unfair to the Applicant (who according to Mr G's report made a full disclosure of his offending to Ms W) to regard either:
- a) her reluctance to believe the full extent of that offending as stated in the CPS papers or
 - b) the scant evidence of her unwillingness to engage with probation as reasons for regarding the Applicant's risk as being unmanageable in the community.
43. Matters would no doubt have become somewhat clearer if the panel had the benefit of seeing and hearing from Ms W or at least hearing from Mr G a full

account of the kind of discussion with her of the kind sensibly envisaged by the Applicant.

44. I am satisfied, therefore, that this is a case where the duty of enquiry should have caused the panel to adjourn the case again and to obtain the necessary further evidence, instead of making a decision on the incomplete and unsatisfactory (through no fault of the Applicant's) evidence which it had.

Decision

45. For the above reasons my decision is to direct reconsideration of the panel's decision on the ground of procedural unfairness. This decision could also have been arrived at on the ground that it was irrational for the panel to make its decision when it did on the evidence which it had.
46. Since there will now be a further hearing, the Applicant and his legal representative may wish to consider whether it would be beneficial to arrange a meeting as soon as possible between Ms W, Mr G and the legal representative at which the full legal position can be explained to her and her views and wishes can be obtained. They may also wish to consider asking Ms W to attend the next hearing and give evidence.
47. Having arrived at my decision as above, I do not need to consider the other submissions made by the Applicant's legal representative. There is however one point which may be worth mentioning for the benefit of the parties.
48. The panel placed great reliance on one of the risk assessment systems (or 'tools' as they are often called) which were used by probation in this case. This particular tool assessed the Applicant's risk of future contact sexual offending as being 'very high'.
49. It is important to note that this tool provides an actuarial calculation of the prisoner's risk, based on 'scores' which are in turn based on factors existing at the time of his offending. The actuarial calculation takes no account of the prisoner's progress during his sentence or any reduction in his risk. It therefore remains at its original level throughout his sentence: it can be raised if he commits a further offence but it cannot be lowered if he has done well. It follows that it can sometimes be a mistake to place too much reliance on this particular tool.
50. Another tool used in this case was the clinical assessment made by probation of the prisoner's risk of serious harm to various categories of people in the community. If, as was the case with the Applicant, he clearly posed a high risk of serious harm at the beginning of his sentence, it is customary for probation to keep his assessed risk at that level unless and until he has demonstrated by a sustained period of compliance and good behaviour in the community (irrespective of the progress which he has made in prison). The Applicant has of course, like many prisoners safely released at the direction of the Board, not yet had the opportunity to demonstrate in that way that his assessed risk of serious harm should be reduced.



Jeremy Roberts
16 March 2023