

[2023] PBRA 74

Application for Reconsideration by Masterman

Application

1. This is an application by Masterman (the Applicant) for reconsideration of a decision of a panel of the Parole Board ('the Panel') dated 13 March 2023 (the Panel Decision) making no direction for the Applicant's 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 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 the Panel Decision, the Application for Reconsideration of the Panel Decision, the email dated 12 April 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that no representations will be made in response to the Application for Reconsideration of the Panel Decision and the Applicant's dossier containing 333 pages.
4. The grounds for seeking reconsideration are that: -
 - (a) The panel was irrational as it did not explain why it did not consider a placement of the Applicant at an Approved Premise (AP) as arranged by the Community Offender Manager (COM) to be capable of managing the Applicant's risk if he were to be released (Ground 1).
 - (b) The panel was irrational as it failed to give substantive reasons for the decision to refuse to release the Applicant (Ground 2).
 - (c) The panel was irrational as some areas of evidence have been poorly reflected in the Panel Decision (Ground 3).
 - (d) The Panel Decision was irrational as it did not contain sufficient reasons as to why it disagreed with the professional witnesses supporting the Applicant's release and it was illogical to reject the COM's position regarding specific licence conditions (Ground 4).
 - (e) The Panel Decision was irrational as it failed to address the points of law set out in their written submissions regarding the Applicant's continued maintaining of innocence (Ground 5).
 - (f) The Panel acted in a procedurally unfair manner as the Applicant was not provided with a copy of the Victim Personal Statement (VPS) prior to the hearing and so had not considered it at any depth and

therefore struggled to respond to the panel's questions about it (Ground 6).

- (g) The panel acted in a procedurally unfair manner as it was aware the Applicant had not been provided with a copy of the VPS and continued without such arrangements being made (Ground 7).
- (h) The panel acted in a procedurally unfair manner as it has drawn a conclusion about what they refer to as "*an incident*" involving the Applicant getting in the way of staff managing him. The concern of the Applicant is that the Panel have drawn conclusions about this without proper evidence on what actually happened. The Applicant does not consider that this should have been relied on in making their risk assessment (Ground 8).

Background

5. On 3 January 2017, the Applicant, who was then 45 years old, received a 12-year custodial sentence plus an extended period of 1 year on licence following his convictions for assault on a female child under 13 years of age by penetration, indecent assault on female under 16 years of age and a sexual assault of a female child under 13 years of age.
6. The victim was regarded as vulnerable on account of various different factors.
7. In May 2015, when the victim, who was then 19 years of age and was attending College, told her teacher about the difficulties she was experiencing and explained that the Applicant had sexually assaulted her during the time when she was aged between 8 and 13 years of age.
8. The Applicant had pleaded not guilty at his trial and has continued to maintain his innocence. He had unsuccessfully appealed on two occasions and was at the time of the Panel Decision appealing for a third time. The Applicant's case was that no abuse had occurred and that the evidence of victim had been brought on by medication and were not memories.
9. At the time of the offences, the Applicant was residing at the family home with the victim. In the 23 years before 2001, the Applicant had been serving in the armed forces where he had had a distinguished career. On leaving, he did a number of jobs and he was employed by a local authority until the start of his Crown Court trial.
10. According to the Applicant, in 2011-2012, he and his wife separated following a breakdown in his relationship with his daughter who had assaulted him. The Applicant's wife and his youngest daughter also left and the three of them stayed for a short period with his eldest daughter. The Applicant then moved out of the family home into a one-bedroom flat where he stayed for about 7 months before returning to the family home due to financial constraints and where an upstairs bedroom was converted into his television room so that he would live separately from his family during the evenings but he still shared a bedroom with his wife. After the allegations about the Applicant's conduct were made, he was asked to leave the family home and moved in with his brother before later renting a flat where he

stayed until his convictions.

The Evidence of the Prison Offender Manager (POM)

11. After a period of initial confinement in Prison one, the Applicant moved to Prison two on 24 August 2018. The Applicant's POM reported that the Applicant's behaviour was exemplary, that he was polite and courteous and that he asked for help when he needed it.
12. The Applicant has been an enhanced level prisoner on the IEP system since April 2018. He does not have any proven adjudications and has not been the subject of any drug testing. The POM explained that during times of stress in the community, the Applicant had used alcohol to excess, but that this had not led to any anti-social behaviour and that there had not been any evidence of alcohol use in prison.
13. In September 2021, the Applicant was moved off his prison wing as he was seen as challenging the staff about too many things and *"he'd overstepped the boundaries in arguing his point"*. He still maintained his IEP status and his position as a Red Banc worker. The POM explained that the Applicant *"soon recognised that he had overstepped the mark"*.
14. The POM believed that the Applicant had shown insight into his problems with relationships. The Applicant had told the POM that his sexual preference were adult females. The POM had not identified any evidence of the Applicant's sexual preference for children, but he admitted that he had only asked the Applicant about this on 2 or 3 occasions over a period of 2½ to 3 years and he accepted the Applicant's answers.
15. The POM when asked about the Applicant's risk factors stated that *"denial plays a significant role in being protective"* and he also explained that the Applicant's contacts also acted as a protective factor.
16. According to the POM, the Applicant was not eligible for any core risk reduction work and he was not concerned that the Applicant had not done any other work and no reason had been put forward for the Applicant to do one to one work. Overall, the POM considered that the Applicant was dealing very well with prison issues.
17. The Applicant had not done any work on alcohol use, but the POM considered that the Applicant had a good understanding of his previous consumption and was not concerned if he needed to abstain totally. The POM noted that the Applicant had not said anything in relation to children that was causing concern and he concluded that the offences were very situation specific and he doubted that the Applicant would experience a similar situation. He thought that the RMP was very good.

The Evidence of the Applicant

18. The Applicant said that he believed that his victim believed everything she had said.

19. He said that if he could change things he would change his alcohol consumption and that he had been drinking since he was aged 17. He also accepted that he had been too strict with his children, but he did not remember hitting any of the children other than giving them a slight tap.
20. The Applicant said he would be happy to do any programmes in custody and would do the same in the community if required. He could not state what the risk factors were if somebody had committed the offences he was convicted of as *"its not something I did or would do"*.
21. The evidence of the Applicant was that he vehemently denied committing the offences against the victim but he accepts the sentences. He explained that his side of the family believe him regarding his offending while his wife's side of the family and their children do not believe him.
22. In relation to the Applicant's removal from the prison wing for challenging staff and overstepping boundaries, he accepts that he was strict within acceptable behaviour limits but not controlling. As for his behaviour within his family environment, he was strict but *"definitely not controlling or violent"*.
23. The Applicant did not accept that he had ever been violent towards his children. His evidence was that while he had intimacy and sexual gratification with adults but never with children. He said that he had never been attracted to children.
24. He explained that that he had formed a good relationship with Ms H, his Community Offender Manager (COM) which he could build on and she would see that he would observe his licence conditions.

The Evidence of the Psychologist

25. Ms C, the Psychologist considered that there was likely to have been some physical coercion by the Applicant in committing the index offence but that he is likely to have been reckless as to that physical coercion.
26. She did not think that it would be warranted to override the process of the low OSPC score so that the Applicant could then qualify for core risk reduction work because it would be better for him to concentrate on his protective factors as he would comply with his licence conditions as he has been reflecting on his life, acknowledging the problems in his life and his family and abstaining from alcohol.
27. Ms C explained that there was not any *"robust evidence"* that the circumstances of his wing move were offence-paralleling as offence-paralleling behaviour would be sexual offending. She noted that the Applicant described himself as dogmatic and favouring a structured regime but she observed that if a regime was not adhered to, the Applicant would then struggle with it.
28. Ms C noted that there had been a shift as the Applicant now understands the harm to the victim although he still denies committing the offences, but

he now believes that she believes they happened and previously he thought that she was making it up.

29. Ms C found it *"hard to formulate"* why the Applicant committed the index offence but she thought he was attracted to the victim and this together with poor coping and lack of empathy led to the offence being committed.
30. Her evidence was that there would be differences in him if he were to be released now such as a shift in him as a person. She thought that the RMP was *"good"*. Ms C considers that external controls are important for him and that he now had internal controls as well because his offending had finished in 2002 and nothing had occurred since then.
31. According to Ms C, the Applicant's risk of reoffending is low irrespective of whether he is in custody or in the community. In addition, she did not consider the risk to be imminent *"given that the offending was context specific and would require [the Applicant] to have close access to children again"*.

The Evidence of the Community Offender Manager

32. Ms H explained that she thought the sexual interest of the Applicant was quite specific to the victim of the index offence but *"she didn't think there was a sexual attraction to children per se [and] she thought the victim's learning difficulties made her more vulnerable"*.
33. She thought that the Applicant's risk factors were access to children, alcohol and relationships and they remained a concern as he had not completed any offence-focussed work. This also meant that it was harder to identify any motivation behind his offending but she thought that there must have been a sexual interest or arousal for him to have done what he did. Her view was that the Applicant's sexual interest was quite specific to the victim.
34. When asked how confident she was that the Applicant was manageable in the community, the COM's response was that *"compliance is high for [the Applicant], he has a lot to lose, its just the untested part of it"*.
35. The COM explained that the RMP involved the Applicant staying at a house where the occupant had young relatives who would be unable to visit the house while the Applicant was staying there.
36. The licence conditions relating to schools and the swimming pool were in the COM's opinion *"not 100% necessary but I think may be appropriate, not knowing about his sexual interest in children"* and she considered that an abundance of caution might be required for that condition. The COM considered that exclusion zones were also in place to cover areas where his victim or family may be located.

The Approach of the Panel

37. A three-member Panel of the Board held an oral hearing on 20 February 2023 at which the panel heard oral evidence from:

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- (a) the Applicant's POM;
- (b) The Applicant's COM;
- (c) the Psychologist and from
- (d) the Applicant.

38. The Applicant was represented at the oral hearing by his solicitor. The Secretary of State was not represented by an advocate. A victim impact statement was provided and was presented in writing. There was no evidence which could not be disclosed to the Applicant. The decision letter was not concluded until 13 March 2023 because a panel member required hospital surgery.
39. The Panel had to determine the significant question of whether it was necessary for the protection of the public for the Applicant to remain in custody.
40. The Applicant was assessed in the Offender Assessment System using static factors as posing a low risk of reoffending over 2 years. Dynamic factors kept the Applicant's probability of proven violent reoffending as low and his probability of proven non-violent offending as also low. His risk of serious recidivism was assessed as low. The Panel agreed that the Applicant posed a high risk of harm to other children.
41. Having considered the evidence, the Panel concluded that it could not be satisfied that the Applicant's risk of serious harm could be managed in the community and did not direct release.

The Relevant Law

Irrationality

42. 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 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."

43. 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

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44. 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.
- 45.44. 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

46. Procedural Unfairness means that there was some procedural impropriety. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 has to establish 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 fairly; and/or
 - (e) the panel was not impartial.

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

The reply on behalf of the Respondent

48. PPCS stated in an email dated 12 April 2023 that the Respondent was not making any representations in response to the Applicant's reconsideration application.

Discussion

49. 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.

50. 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.
51. 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.
52. 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.
53. 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

54. This Ground is that the Panel was irrational as it did not consider the second and alternative part of the case for the Applicant. This had to be considered by the Panel if the Applicant's risk could not be safely managed if he was to be released to reside with his relative as explained in para 35 above. This second and alternative ground was that a placement of the Applicant at an Approved Premise (AP) would have been capable of managing the Applicant's risk if he were to be released so that it would be no longer necessary for the protection of the public that the Applicant should be detained.
55. On the facts of the Applicant's case, the COM explained that her recommendation was that the Applicant should reside with his relative as explained in para 35 above. It was made clear in the closing written submissions of the Applicant's legal representative that if the Panel did not agree with that approach and concluded that if the Applicant resided with his cousin, there would be too great a risk of contact with children there so that it could not be concluded that it was no longer necessary for the protection of the public that the Applicant should be confined, the Panel then had to consider the Applicant's second above and alternative case which was that if the Applicant was to be released to an AP as arranged by the COM, it would be no longer necessary for the protection of the public that the Applicant should be confined. In other words, if the panel did not agree with the COM's recommendation that the Applicant should reside with his cousin, the panel was then obliged to consider in accordance with the

Applicant's alternative case that if the Applicant was released to an AP as arranged by the COM it would be no longer necessary for the protection of the public that the Applicant should be confined. A further reason why the Panel should have considered whether the Applicant could be released if sent to an AP was that the COM in her report explained in relation to the Applicant and his conviction that *"usually, with a person assessed as high risk with this kind of conviction, we would recommend an AP initially on release as an AP would provide a greater level of monitoring"*.

56. In its decision letter, the panel noted that the cousin with whom it was proposed that the Applicant would reside had grandchildren who lived in the same village and probation would be reliant on children's social care in order to manage the risk posed by the Applicant. The panel concluded that it *"didn't find this level of risk acceptable when [the Applicant's] risk is to be managed mainly by external factors."*
57. This panel was then required to consider the Applicant's alternative case which entailed considering whether the Applicant's risk of serious harm could be managed if he were to go to an AP bearing in mind first, that, crucially that the Applicant's legal representative's closing submissions had asked the panel to release the Applicant to an AP arranged by the COM and second, as has been explained above, that an AP would usually be recommended for people like the Applicant with this kind of conviction as it *"would provide a greater level of monitoring"*.
58. Instead of considering whether placing the Applicant in an AP would have managed the Applicant's risk so that it was no longer necessary for the protection of the public that he should be detained, the panel merely noted (with emphasis added) that *"the COM didn't think an AP was necessary as the Applicant be monitored via a GPS tag and a curfew [but] neither of these would have prevented the index offence which was carried out at his home address"*. The COM was not saying that the Applicant's risk of serious harm could not be managed in the community if he was to be released to an AP of his choice which was the issue which the Panel had to consider.
59. Crucially, the panel failed to consider the critical issue which was whether if the Applicant was required to reside in an AP, it would then be satisfied that it was no longer necessary for the protection of the public that the Applicant should be confined with the consequence that the Applicant could be released. The panel failed to give any reasons why it failed to consider these matters. These failures by the panel show that it acted irrationally. Additional or alternative reasons why this failure was irrational are that:
- (a) Placing the Applicant in an AP would allay any concern about the Applicant having direct contact with children without the knowledge of probation and the Applicant was more than willing to reside in an AP; and/or
 - (b) there is no allegation made by PPCS on behalf of the Respondent in their response to this alternative Ground for Reconsideration contending that the Panel would have been obliged as a matter of law to reject this alternative ground that it would be no longer necessary for the protection of the public that the Applicant should

be detained if he was sent to an AP; and/or
(c) as has been explained above, a placement in an AP would usually be recommended for people like the Applicant with this kind of conviction as it “*would provide a greater level of monitoring*”.

60. For all those reasons, this ground succeeds and reconsideration has to be ordered.

Ground 2

61. This ground is that the Panel acted irrationally as it failed to give substantive reasons for the decision to refuse to release the Applicant and in particular as to why it did not consider whether he could be safely released to an AP.

62. The reason why the panel was required to give reasons is that it had to be shown to have given consideration to the request by the Applicant’s legal representative for the panel to consider the alternative scenario of a move by the Applicant to an AP if the panel rejected as unsuitable the possibility of the Applicant residing with his cousin and spouse.

63. The reasoning set out in relation to Ground 1 applies equally to this ground which succeeds with the consequence the reconsideration has to be ordered on this Ground as well.

Ground 3 to 8

64. As reconsideration has to be ordered in respect of Grounds 1 and 2, it is unnecessary to consider grounds 3 to 8.

Sir Stephen Silber
26 April 2023