

**[2024] PBRA 101****Application for Reconsideration by Vernon****Application**

1. This is an application by Vernon (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 9 April 2024. The decision of the panel was not to direct release.
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)) either on the basis (a) that the decision contains an error of law, and/or (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 dossier consisting of 441 pages; the Application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

**Background**

4. On 26 November 2019 the Applicant was sentenced in relation to offences relating to sexual offending. The Applicant was sentenced to an extended sentence consisting of 6 years imprisonment and an extension of licence of 3 years. He was aged 33 at the time of sentencing and is currently 37 years old.
5. The Applicant was convicted of two counts of causing a child under 16 to watch a sexual act; sexual activity with a female child under 16; two counts of sexual assault of a female by penetration; two counts of attempt/cause/incite a female child under 16 to engage in a sexual act with an offender over 18; two counts of attempt/cause a child under 16 to watch a sexual act; attempt/cause/incite a girl under 13 to engage in sexual activity; two counts of attempt/engage sexual communication with a child.

**Request for Reconsideration**

6. The application for reconsideration is dated the 23 April 2024.
7. The grounds for seeking a reconsideration are set out below.

**Current parole review**

8. The Applicant was eligible for parole in October of 2023. His conditional release date (CRD) is in October 2025. His sentence expires in October 2028.



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## Oral Hearing

9. The review was conducted by an independent Chair of the Parole Board, a psychologist member of the Parole Board and an independent third member of the Parole Board. Oral evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist and a Community Offender Manager (COM). The Applicant was represented by a solicitor.
10. A dossier consisting of 418 pages was considered.

## The Relevant Law

11. The panel correctly sets out in its decision letter dated 9 April 2024 the test for release.

### *Parole Board Rules 2019 (as amended)*

12. Pursuant to 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)).
13. 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**.

### *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: **Preston [2019] PBRA 1** and others.

### *Procedural unfairness*



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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.
20. 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.*"
21. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

### The reply on behalf of the Respondent

22. The Respondent offered no representations.

### Reconsideration grounds and discussion

#### Ground 1 (a)

23. The Applicant's legal adviser submits that the panel rejected the professional opinion of a more qualified expert and that the decision letter failed to provide justified reasons in coming to their conclusion as set out in (R (Wells) v Parole Board [2019] EWHC 2710 Admin).

#### Discussion



*More qualified expert.*

24. The Applicant's legal adviser appears to argue in this part of the first ground of the reconsideration application that there was a relevant difference in the qualifications of the experts which affected the quality of their assessments and recommendations. This argument is not developed in any depth. The dossier indicates that the prisoner instructed psychologist had a range of experiences and was a forensic psychologist, chartered with the British Psychological Society. This psychologist was involved in the assessment and treatment of men and women committing sexual and violent offences and had worked with forensic populations, including in high security prisons since 2007.
25. The prison instructed psychologist was HCPC Registered, had gained a Master's qualification and worked at a specialist prison relating to sexual offenders with a role which involved the delivery of interventions and the administration of structured risk assessments for men who had committed sexual and violent offences.
26. Any challenge to the qualifications of a professional in Parole Board hearings should be made before the panel at the time of the hearing to enable both the panel and the professional concerned to address issues of lack of experience. On the basis of the credentials set out by the psychologists, both have extensive experience in the assessment of risk in relation to men committing sexual offences. The crucial qualification for psychologists in this field is registration with the HCPC, both psychologists were so registered. The solicitor acting on behalf of the Applicant indicates that the independent psychologist had more qualifications and was therefore the most qualified of the witnesses in the case. As indicated above, the issue of qualifications in connection with psychology in this field is primarily registration with the HCPC. As to practical experience, it was clear from the indications in both reports that both psychologists had substantial practical experience in the delivery and assessment of sexual offending programs and managing sexual offenders. The role of the panel was to assess the evidence from the psychologists. Both psychologists used well understood assessment tools and came to very similar conclusions in relation to the assessment of risk. The fundamental difference between the psychologists was that the prisoner instructed psychologist took the view that the Applicant had addressed his risks of serious harm and could therefore be released. The prison instructed psychologist disagreed with this view and took the view that the Applicant had not fully addressed his risks of serious harm. The difference in this recommendation does not appear to me to have any connection with academic or other psychological qualifications or experience, decisions in this area of assessment are finely balanced and experts frequently offer a different approach. This aspect of ground 1 does not, in my view, amount to procedural irregularity or irrationality.

## **Grounds 1 (b) and Ground 2**

27. Failing to provide justified reasons.

## **Discussion**



28. As noted above, I have merged two of the arguments within the reconsideration application, as set out by the Applicant's solicitor. Although addressed in slightly different forms, the fundamental ground of application relates to a suggestion of a failure by the panel to give sufficient reasoning or justification for its conclusion.
29. It is necessary in order to assess this application to set out the facts in brief. In 2018, the Applicant was detected being engaged in highly sexualised conversations. He believed that he was undertaking these conversations with young females. An indecent photograph was sent by the Applicant and suggestions were made by the Applicant that he was masturbating during these conversations. It transpired that the conversations were not in fact being undertaken with underaged females, but with a group styled as "*paedophile hunters*". The Applicant accepted that he had engaged in sexualised conversations with people he believed to be underage females and from which he derived sexual gratification. He was subsequently charged with attempting to commit relevant sexual offences.
30. Whilst on bail in relation to these offences (the attempt offences) the Applicant sent a sexually explicit video to a 14 year old female and engaged in phone contact with the 14 year old. This sexual messaging developed into physical, sexual contact, on more than one occasion.
31. The Applicant described to a parole panel that he was (at the time) suffering from low self-esteem and craving sexual attention from others to make him feel better about himself. He became preoccupied with pornography. When younger, he admitted having a sexual relationship with a 15 year old. He indicated that his interest in pornography related to young women of legal age in school uniform.
32. However, he also indicated to the panel that these interests were now in the past and that he now had an interest in adult women. He denied in evidence that he had a sexual interest in young girls. He attributed the behaviour to problems (at the time of offending) with relationships, isolation and feelings of low mood and loneliness.
33. When in prison he had completed a moderate intensity, strengths-based offending behaviour program. The programme undertaken was one which is aimed at addressing factors which may have been problematic in the lives of the offenders, and which contributed to their behaviour. The ethos of the programme is said to instil hope and optimism in the participants through working with them to strengthen and develop protective factors within their lives.
34. Having completed this program, and before any further assessment of behavioural needs had been completed by a psychologist, the Applicant was moved by the prison service to an open prison and appeared before the panel from an open prison.
35. At the oral hearing the panel heard evidence from a prison instructed psychologist and a prisoner instructed psychologist. In brief, the prison instructed psychologist took the view that, whilst the Applicant had completed a programme related to insight, responsibility and improved ways of coping, he had not completed work which directly addressed the topic of his sexual interests. The prison instructed psychologist identified a possible program available to prisoners to address this aspect of risk. That programme is a cognitive behavioural programme aimed at



prisoners with offence related sexual interests. The view of the prison instructed psychologist was that the Applicant had not undertaken sufficient work to demonstrate that he had addressed his sexual interest in children.

36. The prison instructed psychologist took a different view. On the basis of an assessment of the Applicant, the prison instructed psychologist advised as follows *"whilst sexual arousal towards post pubescent teenagers has been noted as relevant to the offending behaviour, [the Applicant] did not offend in order to act upon this interest and other(s) strong factors are present with regard to what triggered and drove offending"*. I have understood the psychologist to have been saying that the conclusion was that the Applicant did not offend, in order to act upon an interest in post pubescent girls, but that other strong factors were present with regard to what triggered and drove the offending. The prison instructed psychologist went on to say that the Applicant had a great deal of insight into the triggers and risks associated with sexual offending and addressed them when undertaking the strengths-based program.
37. The prison instructed psychologist also recorded as follows (p7.3.4 of report) *"whilst I appreciate this is not a conventional decision when someone has sexually offended against children and they also acknowledge sexual arousal to this stimulus, the (alternative programme) is also not always the most suitable pathway for all individuals and [the Applicant] has shown more independently, and with the support of (the strengths-based program), that he can acquire the necessary skills for managing risk in the future"*.
38. The prison instructed psychologist had concluded, that the Applicant's offending and explanations did not indicate a sexual interest in young girls, and therefore that a second programme was not a suitable pathway for this Applicant, and accordingly the second sexual behaviour programme was not needed to address risk.
39. By contrast, the prison instructed psychologist was recommending an additional intervention which was aimed at addressing specifically a sexual interest in young females. The prison instructed psychologist took the view that this could be achieved by the cognitive behavioural programme available in the prison and aimed at this aspect of sexual offending behaviour. The prison instructed psychologist also suggested that the deficit in psychological input (if a formal programme was not undertaken) could be met by way of one-to-one work with a psychologist, rather than by a programme. This appeared to have been particularly of relevance because of the fact that the Applicant had now been moved to an open prison, where intervention programs are not offered.
40. There was therefore a clear demarcation between the views of the psychologists. Although the psychologists clearly dealt with a number of other issues relating to the Applicant, the fundamental point appeared to be that there was a difference of opinion as to whether he did or did not indeed have a sexual interest in young females and if so, whether that sexual interest had been appropriately addressed and therefore the risk of offending against young females also addressed.
41. The panel noted in the decision that the Applicant had *"given differing accounts to different professionals at different times regarding the factors which he says*



*underpinned his index sexual offences.*". The panel also directly addressed the issue of sexual interest in young female children. As follows:

*"There has been much discussion in [the Applicant's] case as to whether or not he had a sexual interest in young teenage girls or a sexual preference for them and whether he would meet the criteria for [a relevant] programme. The key point, in the panel's judgement, is that [the Applicant] has shown himself to be capable of being sexually aroused by young teenage girls such that he has engaged in non-contact and contact sexual offending against them, notwithstanding that he was also engaging in age-appropriate sexual relationships. His viewing of teenage pornography and of women dressed in school uniforms and his relationship when he was 20 with a girl who was then aged 15, suggest that he may well have a sexual preference for young teenage girls. On the other hand, should this amount to a sexual interest rather than a sexual preference, [the Applicant's] feelings of emotional congruence with young girls means that he still poses a significant risk to them."*

42. Dealing specifically with the complaint in this ground, the panel set out its reasons for rejecting the views of the prisoner instructed psychologist. They were that the weight of evidence indicated that the Applicant had a sexual interest in young female children, that interest was (in the view of the panel) a motivating factor behind the offending and that interest had not been fully addressed and therefore his risk of serious harm remained at a level that was not consistent with the statutory test for release. The panel set out its detailed views in paragraph 4.4 of the decision.

43. The view of the prison instructed psychologist was "*[the Applicant] has completed [the strengths based intervention] which has aided with developing insight, responsibility taking and improved ways of coping. However, he has not yet completed an intervention that directly addresses sexual interests, such as [a programme aimed at addressing the sexual preference for young females]*". The panel clearly took the view that the opinion of the prisoner instructed psychologist was not supported by the evidence and explained why they favoured the view of the prison instructed psychologist. I am therefore not persuaded, as set out in this ground, that the panel failed to explain the reasoning behind their decision. I do not therefore find this part of the decision to be irrational in the sense set out above.

### **Ground 1 (c)**

44. The panel failed to explain why the risk management plan was not sufficient to manage risk and why the Applicant was thought to be lacking insight and lacking the willingness to be fully open with professionals.

### **Discussion**

45. This view was explained by the panel. The Applicant had been asked to keep a diary of his sexual thoughts (a common component of the treatment and assessment of those committing sexual offences). Despite disclosing that, prior to his prison sentence, he had had over a hundred sexual partners from the age of 15 and had been sexually preoccupied and heavily reliant on pornography, which he considered



to be an addiction, he indicated to his POM, who asked about the diary, that he had had no sexual thoughts, save for one relating to an adult. (Noted at paragraph 2.7 of the decision). The inference in the decision was that this absence of any sexual thoughts lacked credibility in the light of the Applicant's history. Also noted (at paragraph 2.17 of the decision) was the fact that the Applicant gave differing accounts to the prison instructed psychologist about the motivation for committing the contact sexual offences. He told the psychologist in interview that his sexual preference was the driving force. In evidence, in the oral hearing, he indicated that the driving force was in fact difficulties with his relationship at the time. The panel's view therefore, that the Applicant lacked insight and may not have been entirely open or credible with professionals, was well supported by evidence which was set out by the panel in the decision.

### **Ground 1 (d)**

46. The Applicant's legal adviser indicates that the Applicant's POM had contacted the Parole Board (following the decision being issued) to ask what further work was anticipated by the Board in the light of their decision. Thus implying that the prison professionals had not understood the concerns of the Board.

### **Discussion**

47. This point can be taken shortly. As is well acknowledged, the role of the Parole Board is not to direct or advise the prison, or any prisoner to undertake any particular behavioural work. However in this case, the prison are assisted by a report from a prison instructed psychologist setting out proposals for either programme work or possibly one-to-one psychological work. This is not an issue relevant to reconsideration.

### **Ground 2**

48. The panel failed to consider the progress made by the Applicant and how he plans to manage risk in the future.

### **Discussion**

49. At paragraph 4.3 of the decision, the panel acknowledged the programme work which had been undertaken by the Applicant and acknowledged that he had shown a degree of insight into his grooming behaviour. Also acknowledged was his custodial behaviour and his good relationship with staff. The panel noted that the Applicant was hoping to secure employment and to rebuild relationships with his family. The panel also noted that there would be support from his family. An oral hearing decision letter is unlikely to contain every aspect referred to in the dossier and in evidence. The purpose of the letter is to explain briefly the evidence recorded and considered, and to focus directly upon the issue of risk and the question of whether the statutory test for release has been met. I am not persuaded that the panel ignored the positive factors in relation to the Applicant's progress in custody. Referring back to the original complaint. The issue in this case related to whether or not the Applicant had demonstrated that he had addressed his risk of serious harm to young females. The panel found that he had not. This complaint does not,





in my determination amount to irrational decision making in the sense set out above.

### Ground 3

50. The legal representative for the Applicant submits that the Panel Chair "*rudely*" intervened and accused the legal representative of "*giving evidence*". The legal representative submits that the intervention was merely an attempt to assist the Panel. The submission is that the examination of witnesses is not the only role of a legal representative (as implied by the chair) and that it was inherently unfair for a chair to make such a statement during the course of the proceedings. It is submitted that the incident affected the perception of fairness as enunciated in (The Parole Board Oral Hearing Guidance, December 2023). The submission is that the stance taken by the Panel Chair was both "*intolerant and prejudicial*".

### Discussion

51. I have listened to a recording of the exchange referred to by the legal representative. The context was that a panel member was asking the COM questions about the reasoning behind a decision by a judge at a court hearing involving the Applicant. The decision had been not to impose a particular order (in connection with sexual offending). The COM was attempting to answer questions about why the judge had not imposed the particular order. Whilst these questions were being asked of the COM, the legal representative intervened and began to explain her view as to why the court may not have imposed the particular order. She said that the order was "*probably*" not made because the court "*would not want to go against the view of the sentencing judge*".

52. The panel chair then intervened and said that this was a matter which should be "*wrapped up*" in the legal representative's submission rather than by this intervention. The legal representative then said "*I was just trying to assist in why this may have been the case*". The Chair then indicated "*I am just saying procedurally you are here to ask questions not to give evidence*".

#### *The issues*

53. There are issues which arise in relation to this exchange. Firstly, it is not appropriate for a legal adviser or any other person, save the Chair, to intervene in the course of questioning of a witness, unless it is a serious matter of procedure. If there is such a matter of procedure, the appropriate way to intervene is to ask the Chair for an opportunity to pause the questioning to allow representations to be made. In this case the legal representative intervened, in the midst of the questioning, without any reference to the chair, which would, in my view have been the appropriate and procedurally correct, approach.

54. It is also not appropriate to make representations which amount to answering questions on behalf of a witness. In reality, advocates use various techniques to introduce evidence of this sort, for example, by suggesting to the witness during the legal representatives questioning (often called leading questions), the possible reasons for the decision (in this case of the court) or by including the evidence or opinion in final submissions.



55. In fact the issue raised in this case by the legal representative was not strictly one which was legal, but was the legal representative offering an opinion, based on experience, as to why a court may not have taken a particular path. As indicated above, this opinion would have been better introduced, either in examination of the witness by the legal representative, or by way of a submission at the conclusion of the hearing. The request by the Chair therefore, to make the submissions in closing remarks, was not, in my determination unreasonable.
56. However, panel chairs have a responsibility to act with utmost courtesy at all times to all of those appearing before them. Courtesy ensures that the formality and seriousness of the proceedings are preserved, and goes to ensuring that the confidence of the prisoner is not publicly undermined. The Chair's response in this case was sharply delivered. It was a legally correct response "*you are here to ask questions not to give evidence*". However the message should and could have been delivered in a more supportive and courteous manner.
57. I have considered, for the purposes of this application, whether the exchange was procedurally unfair in the sense set out above. I have no doubt that serious cases of discourtesy and the undermining of witnesses or advocates could amount to a procedural irregularity in the sense set out above. It is also a reality that some element of robustness is expected of advocates and parties in quasi court proceedings. Although I accept that the legal representative in this case may have felt upset by the exchange. It was of short duration (2 minutes), and having listened to the tape recording of the hearing, quite clearly had no effect upon the decision of the panel. I also do not find that the incident would have materially affected the confidence of the Applicant. For that reason I do not find that the incident amounted to procedural irregularity.

#### **Ground 4**

58. The psychologist panel member asked a question in a "*belittling*" manner when asking about an abuse issue.

#### **Discussion**

59. I have listened to this aspect of the questioning. The question by the psychologist was reasonable and balanced. It was preceded by an understanding comment about the inevitable effects on the Applicant of being asked about childhood trauma. This ground has no merit in my determination.

#### **Decision**

60. In all the circumstances therefore I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

**HH S Dawson**  
**23 May 2024**

