

[2024] PBRA 46

Application for Reconsideration by McLean

The Application

1. This is an application by McLean (the Applicant) for reconsideration of a decision made by a single member panel of the Parole Board (the panel) following an oral hearing held on 2 February 2024 refusing his application for 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, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.
3. I have considered the application on the papers. These are the decision of the panel, the dossier and written submissions in support of the application prepared by the Applicant's representatives.

Background

4. In December 2016, the Applicant, then aged 27 (now aged 34) and without any previous criminal convictions, pleaded guilty to 14 counts which alleged sexual offences against four females, all of whom were between the ages of 13 and 15. Between 2014 and 2016 the Applicant had befriended these teenage girls using various websites to coax and cajole them into sending images of themselves and into watching the Applicant on occasions masturbating. In addition, he attempted to persuade them to meet him for sex and in the case of one of them went to her house when she was alone with that intention, stopping to buy condoms on the way. In her home he engaged with her in non-penetrative sexual activity. Following this the Applicant messaged his victim to say that they would meet again and that he wanted to take her virginity. In relation to another victim who had disengaged from contact, he threatened to post some of the images of her online. This pattern of abusive behaviour continued for around two years, coming to an end only when the Applicant was arrested.
5. The Applicant received an extended sentence of imprisonment. This was made up of a custodial term of 8 years and an extended licence period of 4 years. His sentence expires in August 2028. In passing sentence the Judge said:

"You are and will remain, in my judgment, a danger for a significant period of time, subject to and depending on the attitude you take to your time in custody".

6. During the initial part of his sentence, the Applicant completed a particular programme specifically designed to address his sexual risks, a programme which he regarded as beneficial. In March 2020 his progress was such that the prison service transferred him to open conditions. When first transferred he appeared to struggle to adapt and was for a time not considered fully compliant. His position was reviewed in September 2020 and thereafter his conduct improved. He went on to complete multiple periods of day release from prison without any reported concerns.
7. A first review of this sentence by a differently constituted single member panel took place in February 2022. At this hearing the panel heard evidence from a stand in Prison Offender Manager (POM) and a Community Offender Manager (COM). The Applicant was legally represented. That panel directed release. He was released in April 2022 initially to supervised and monitored accommodation and thereafter to a rented flat. He was recalled in October 2022.

The Current Parole Review

8. The Applicant was recalled as a result of a polygraph test which concluded that he had breached two conditions of his licence – not to have any contact with any female under the age of 16 without prior approval and not to delete the usage history on any internet enabled device or computer.
9. The oral hearing was heard, as I have said, on 2 February 2024. Evidence was given by the then POM, a stand - in COM and the Applicant who was represented by the same legal team who had represented him in 2022.

The Request for Reconsideration

10. On 14 February 2024 the Applicant's representatives lodged written submissions in support of this application on the basis that the decision was irrational and/or procedurally unfair in that:
 - (i) the panel "*disregarded and/or misconstrued*" evidence which favoured release and preferred evidence that did not, leading to a decision that was irrational and,
 - (ii) failed to take any steps to ensure that the Applicant was not held to be accountable for the failure of professional witnesses to discuss and / or consider with him directly specific aspects of the review.
11. I will in due course return to consider these grounds more fully.

The Relevant Law

Parole Board Rules 2019 (as amended)

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).



13. 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)).

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 **DSD** case is an important case in setting out the limits of a rationality challenge in parole cases. Since then another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a 'more modern' test set out by Saini J in **Wells [2019] EWHC 2710 (Admin)**.

17. All of these tests are based on the dictum of Lord Greene in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** which defines irrationality, in the context of Parole Board cases, as a finding that "*no reasonable panel could have reached the impugned decision*". That definition has been explained and expanded in other cases but it has not been challenged in any parole board case.

18. In the **Wells** case Saini J set out 'a more nuanced approach' at paragraph 32 of his judgment when he said:

"A more nuanced approach in modern public law is to test the decision – maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied". It must be emphasised that this is not a different test to the Wednesbury reasonableness test. In the **Wells** case Saini J emphasised at paragraph 33 that "*this approach is simply another way of applying*" the Wednesbury irrationality test.

19. What is clearly established by all the authorities is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration – or a Judge dealing with a Judicial Review in the High Court – to substitute his or her view for that of the



panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

20. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject.

21. Once that stage is reached, following the guidance provided by cases such as **Wells** a panel should explain its reasons whether or not they are going to follow or depart from the recommendation of professional witnesses.

22. The giving of reasons by a decision maker is "*One of the fundamentals of good administration*" (**Breen v Amalgamated Engineering Union [1971] 2 QB 175**). When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

23. The way in which a panel fulfils its duty to give reasons will vary depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at paragraph 40 Saini J said:

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

24. When considering whether this decision is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk. Importantly it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. As I have already observed, it is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was *Wednesbury* unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

25. In conducting its proceedings, the Board must comply with the requirements of procedural fairness which is the modern term for the rules of natural justice. 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.



26. 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.

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

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

28. The Respondent has indicated that he does not wish to make any submissions in response to this application.

Discussion

The Panel's Decision

29. Given the wide-ranging nature of the Applicant's challenges it is necessary to consider the panel's decision in some detail.

Risk Factors/Future risk

30. The panel identified a number of risk factors as being relevant to the Applicant's case. They included sexual attraction to, if not a preference for, female children; a degree of sexual preoccupation; poor problem-solving skills; impulsiveness; a lack of victim empathy causing him to fail to understand the harm he caused; a degree of sexual entitlement; the lack of a fulfilling intimate adult relationship and substance misuse, including cannabis.

31. While noting that the Applicant was assessed as posing a medium risk of future internet-based offending and a high risk of future contact sexual offending, the panel concluded that the risk of serious harm would likely be in relation to children in either internet based or contact offending. The panel found that:

"... based on the content of the dossier and oral evidence, the risk of re-offending in a manner likely to cause serious harm is fairly described as likely to happen at any time and without warning if released on licence".

Recall

32. The panel noted that the polygraph examination concluded that the Applicant continued to use social media to gain access to females who could be under age. The Probation service took the view that this indicated an escalation in the risk of serious harm and as a result took steps to revoke the Applicant's licence.



33. The panel also noted that the COM was satisfied that the recall was appropriate; the panel confirmed that the Applicant did not at the oral hearing challenge that his recall was appropriate.
34. The report from the polygraph examiner is in the dossier. Given that it was the result of this examination that led to the Applicant being recalled, it is necessary to underline the following matters:
- (a) The examiner confirmed that the request by the Probation Service for an examination had as its purpose to investigate relevant risk behaviour and the Applicant's compliance with three licence conditions as follows:
 - (i) not to have contact with female children under the age of 16 without prior approval,
 - (ii) to make any device capable of making or storing images, available for inspection and,
 - (iii) not to delete the usage history on any internet enabled device and to allow inspection thereof.
 - (b) The examiner reported that during the examination the Applicant denied any contact or attempted contact with the victims of his offending; however it is also recorded that the Applicant accepted that on setting up a new phone he "*may have*" come across old contact details and/or messages and "*may have deleted them*". The examiner goes on to describe the Applicant as being "*very vague*" in describing what he had found and concluded that he had failed to give any definitive information in this respect.
 - (c) The Applicant was also reported to have admitted to sometimes experiencing unhealthy intrusive sexual thoughts about children, but not entertaining them.
 - (d) The examiner concluded that the Applicant was assessed as having answered her questions truthfully during the examination and had made what she described as "*concerning disclosures about offence mirroring behaviours...which constitute a breach of licencing conditions*".

The opinions of the professionals

35. It is submitted on behalf of the Applicant that one of the matters that contributed to the panel's decision being procedurally unfair, was the absence of a meaningful assessment of whether the Applicant could have benefited from any further participation in programmes such as the one he participated in during the early stages of his sentence. The POM, who supported release, told the panel that he had contacted the team responsible for programmes and was advised by them that there was no further accredited offending behaviour work to be undertaken by the Applicant. The COM gave evidence to the panel that she had been advised about the possibility of "*over-treating*" the Applicant - she did not recommend any further accredited work be undertaken. She joined her colleague in supporting the Applicant's release.
36. While considering the evidence given by the professionals it is convenient to examine a submission on behalf of the Applicant noting the failure of professionals to meet and have meaningful discussions with the Applicant prior to the hearing. The panel was clearly very well aware of this issue when it referred to what it described as significant



delays in the Applicant having "*meaningful contact*" with his newly appointed COM who in fact had provided a report to the Board by way of an update which was placed in the Dossier. The Panel noted that the COM had reported on two appointments with the Applicant the last of which was in late October 2023. The panel observed that there had indeed been no detailed discussions with the Applicant and the COM about proposed licence conditions. The COM's evidence was that this would be necessary to ensure that the Applicant clearly understood the terms of any future licence. The panel referred to the disagreement between the COM and the Applicant regarding the proportionality of some of the licence conditions sought by the probation service in the event of release. I shall return to these matters in paragraph 48 below.

The Applicant's evidence summarised

37. From the panel's decision it is clear that the Applicant's evidence covered a number of important areas of the review. By way of example, while on licence:

- He accepted that he had deleted contact details - that is phone numbers, videos and messages, from at least one of his devices.
- His account was that he did this when setting up a new phone and that he stopped when he realised what he was doing.
- He agreed he had disclosed during an early supervision meeting that he was using a specific application called "*Meet me*" and that he was advised by the police and probation not to use certain applications and social media but nonetheless continued to do so.
- He accepted engaging with at least one female thinking that she was a university or college student. He acknowledged viewing profiles and live feeds of females in classrooms wearing school uniforms.
- His evidence relating to the sending of a message to a female he thought looked 15 years of age, before actually viewing her profile was contradicted by the COM whose evidence was that this was not technically possible. The panel found that it preferred the COM's evidence and concluded that it represented an example of the Applicant seeking to minimise his conduct in contacting underage females.
- He admitted receiving unsolicited naked photographs from females.
- He told the panel he had "unhealthy sexual thoughts" about children. When the Applicant was asked to explain these thoughts, the panel found he was unable to do so and that he was unclear on what would amount to unhealthy sexual thoughts of children.
- He confirmed he had not been questioned by the COM or by the POM about his past or current sexual thoughts.

The panel's findings and conclusions

38. The panel was satisfied that there was on all the evidence and material before them "*persuasive evidence*" that the Applicant was seeking opportunities to engage with under age females and had in the panel's opinion failed to apply key areas of learning from the important programme he had completed earlier on in his sentence.

39. The panel made clear it had noted carefully the recommendations for release made by the professional witnesses. It indicated that in reaching its conclusions the panel placed significant weight upon the following six areas of the review:



- (i) Neither professional (COM or POM) had any discussions with the Applicant regarding his sexual thoughts whilst on licence or following recall.
- (ii) There was in the panel's judgment clear evidence of offence paralleling behaviour while on licence and no evidence that the risks associated with this behaviour had been addressed since the Applicant's return to custody.
- (iii) The absence of a proper assessment regarding the possibility of further appropriate programmes for the Applicant to undertake which could not be undertaken without a clearer understanding of the Applicant's triggers and sexual thinking.
- (iv) The panel having heard the Applicant's evidence that he had unhealthy thoughts as recently as Christmas 2023, assessed the account he gave as being "*highly confused and unpersuasive*". The panel concluded that either the Applicant was seeking to mask his real thinking, or remained entirely unclear about what might constitute unhealthy sexual thoughts about children, in which case he was they found unable to identify that which triggers his risks, or how to monitor them.
- (v) The relationship with the COM was very new and needed developing.
- (vi) There remained before the panel significant disagreement over key elements of the proposed risk management plan.

40. In light of those findings the panel reached the following conclusions:

- (i) The Applicant continues to experience what he described as "*unhealthy sexual thoughts*", which he appeared unable to explain.
- (ii) While on licence he exhibited offence paralleling behaviour.
- (iii) He was unlikely to be able to identify triggers or to know when he should make disclosure to those responsible for his management.
- (iv) There was no evidence at all of any reduction in his risk.
- (v) There remained a real possibility he would continue to seek to engage with underage females, without warning.
- (vi) The proposed risk management plan was inadequate and insufficient to manage his risk.
- (vii) There remained core reduction work to be concluded on risk factors associated with his insight into the triggers of his offending, awareness of what constitutes unhealthy sexual thinking and his attitude to licence conditions.

The Applicant's submissions in more detail

41. Having set out in some detail a summary of the background to and assessment of the Applicant's offending, his past and present circumstances and the panel's analysis thereof, it is appropriate now to consider the Applicant's submissions in more detail.

Irrationality

42. In support of the rationality challenge, the submission is that the panel disregarded and/or misconstrued evidence that was in favour of release. In so submitting the Applicant points to the following examples:

- (i) That in an early supervision session the Applicant disclosed his use of a particular application which he had been advised by police and probation not to use and about which he gave an explanation as to why he did so. It is submitted that his openness and honesty was not recognised by the panel.



- (ii) In other evidence it is submitted that the panel was wrong to reject the Applicant's version of events.
- (iii) In considering the proposed risk management plan the panel "*failed to consider*" the requirement that all licence conditions needed to be both necessary and proportionate. Further that the panel was "*biased*" in its apparent disagreement with the views of the professional witnesses. It is submitted that the Applicant's compliant behaviour in custody was given insufficient weight.
- (iv) The panel's description of an important area of the evidence as being "*confused and unpersuasive*" was not attributable to a lack of honesty but rather to the Applicant's inability to concentrate during the hearing.
- (v) A finding that the Applicant would be unlikely to be able to identify his triggers was inappropriate weight given the circumstances of his recall to prison.
- (vi) The panel's conclusion that the Applicant was in need of undertaking additional work to reduce his risk was contrary to the evidence of the professionals whose opinions that the Applicant should be released were expressed with confidence and consequently should have been persuasive.

Procedural Unfairness

43. The Applicant in support of the procedural unfairness challenge relies on four conclusions reached by the panel as follows:

- (i) That neither professional witness had any "*meaningful discussions*" with the Applicant regarding his sexual thoughts while on licence or following recall;
- (ii) The Applicant's relationship with the COM was new and required development;
- (iii) There had not been a further assessment of the need for additional programmes for the Applicant to undertake and,
- (iv) There remained core risk reduction work to be undertaken by the Applicant.

44. It is submitted that none of these matters were in any sense the fault of the Applicant and therefore to reach adverse conclusions amounted to procedural unfairness as steps could and should have been taken to address each of them, if necessary by adjourning the review.

Analysis and conclusions

The irrationality challenge

45. I am unable to accept any of the submissions made on behalf of the Applicant which in my judgment misunderstands the manner in which the Panel are obliged to undertake its evaluation of risk. In **R (DSD and others v the Parole Board)** the court considered this role in the following way:

"117. The evaluation of risk, central to the Parole Board's judicial function is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced.... The individual members of a panel, through their training and experience, possess or have acquired skills and expertise in the complex realm of risk assessment.."



118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain...

133. A risk assessment in a complex case is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself ”.

46. Having had the advantage of hearing and assessing all of the evidence which of course included the evidence of the Applicant himself, a very experienced panel provided a detailed and comprehensive decision which clearly considered all of the evidence with care and reached in my judgment reasonable conclusions that it was perfectly entitled to reach.

The procedural unfairness challenge

47. In the Panel's decision it summarised the closing submissions made at the conclusion of the evidence by the Applicant's legal representative. I am bound to observe that there is no material before me to indicate that there was any application then or at any other stage before, during or after the oral hearing for any further steps to be taken or for there to be any adjournment of the review prior to its conclusion to address any of the matters now relied upon as constituting unfairness.

48. It is also appropriate to draw attention to the fact that the professional witnesses in their evidence both consistently supported a direction for the Applicant's release based upon the proposed risk management plan notwithstanding the concerns they had raised.

49. The question for me is whether there are grounds for finding that there was any procedural unfairness in the conduct of the proceedings. As I have mentioned in paragraph 35, the Applicant relies on difficulties encountered by professionals being unable to meet with the Applicant and discuss matters of potential importance with him. Regrettably, as often occurs there were over the course of this review changes of professional personnel responsible for the Applicant's case. That said, I am entirely confident that if this experienced panel had come to the view that changes in personnel or any other difficulties had put the Applicant at any disadvantage in his review they would have said so and proceeded accordingly. I do not accept that there is a legitimate basis for the Applicant's submission that the panel "*held the Applicant accountable*" for failings on the part of the professionals to discuss certain matters with him. I find that this submission to be regrettable and without merit. It is clear to me that all these matters were known to the panel and carefully considered by them.

50. I can see no basis on which it can be credibly asserted that what is submitted by the Applicant amounts to procedural unfairness. There was in my judgment nothing procedurally unfair in the way the hearing was conducted. In my view this application stands or falls on whether the decision was irrational.

51. As I have already said, a panel is not obliged to follow the recommendations of professional witnesses, even if they are unanimous as they were in this case. It is the panel's responsibility to make their own assessment of the prisoner's risk of serious harm and its manageability on licence in the community. However, if they depart from



the recommendations of professionals as they did in this case, they must explain their reasons for doing so.

52. On my reading of the Decision as a whole I am in no doubt that the panel fully and adequately explained why it found itself differing from the recommendations made by the professional witnesses. I find therefore that the panel satisfied its public law duty to provide evidence-based reasons that adequately and sufficiently explained and justified the conclusions that it reached to refuse release.

53. In my judgment, an experienced single member panel provided a balanced and fair-minded analysis of all of the evidence and available information. The panel had very serious concerns about important aspects of the Applicant's manageability were he to be re-released into the community.

54. In my judgment, it cannot be sensibly argued that this was a decision that no reasonable panel could have come to and accordingly I find the decision is not irrational.

Decision

55. For the reasons I have given, I do not consider the decision of the panel was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

HH Michael Topolski KC
01 March 2024

