

[2024] PBRA 83

Application for Reconsideration by Chalk

Application

1. This is an application by Chalk ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 13 March 2024, after an oral hearing on 6 March 2024, 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 aged 70 and is serving a 'sentence of particular concern' which was imposed on 17 March 1997 for the rape of a girl under the age of 13. The sentence comprises a custodial term of 11 years and a licence extension period of one year.
4. The Applicant became eligible for early release on licence on 18 October 2023. His case has been referred by the Secretary of State for Justice (the Respondent) to the Board to decide whether to direct his early release. If not released early by direction of the Board (either at this stage or in a later annual review of his case) he will be automatically released on licence in April 2029. His sentence will not expire until April 2030.
5. The victim of the rape (and many other sexual offences against the same victim over a period of about 2 years) was aged 7 when the offences began. She is the daughter of the Applicant's stepson, and the offences were committed when she came to stay at the address of the Applicant and his wife (every other weekend).
6. The Applicant was convicted (after a contested trial) of rape, sexual assault of the victim and causing or inciting her to engage in sexual activity. In addition to those offences he pleaded guilty to two specimen counts of possession of extreme pornographic images: 312 indecent images and 5 indecent videos were found on his computer by the police. As well as the lengthy sentence for rape he received shorter concurrent sentences for the other offences.
7. He strongly denies all the offences against the young girl, accusing her and her mother of fabricating those allegations. Although he pleaded guilty to the pornography offences



he now denies them too (asserting that the images were either on his computer when he acquired it or placed there later by someone who hacked into the computer).

8. He has no other convictions, and his behaviour in prison has been impeccable. He has repeatedly said that he is going to appeal against his convictions and that he is assembling evidence for the appeal. However, he has not thus far taken any steps to lodge an appeal (or indeed to apply for permission to appeal out of time).
9. As a matter of law the Board is obliged to make its assessment of the Applicant's risk to the public on the basis of the jury's verdicts and his own pleas of guilty. The Board has no power to re-investigate the criminal case, nor does it have the resources to do so. Only the Court of Appeal has power to reverse the convictions, and unless and until it does so the Board must proceed on the assumption that the Applicant was guilty of all the offences for which he was convicted and sentenced.
10. As related above the hearing of the Applicant's case took place on 6 March 2024. It was conducted by video link. By his own choice the Applicant was not represented at the hearing. The 3-member panel considering the case comprised an independent chair, a psychologist and another independent member. The dossier provided by the Secretary of State contained 266 numbered pages.
11. As will be explained below in more detail, it transpired during the hearing that unfortunately the Applicant had not been provided with a copy of the latest report by his Community Offender Manager ('COM'). (The COM is the official prospectively responsible for the management of the Applicant's case in the community when he is released on licence).
12. A copy of the report which was found to be missing was printed out and given to the Applicant during a comfort break in the hearing. He was offered an opportunity to take extra time to read it, but he declined. Subsequently, as will be explained below, it emerged that other documents were also missing from the Applicant's dossier.
13. As well as the written evidence in the dossier the panel considered oral evidence from the following witnesses in the following order:
 - (a) the Prison Offender Manager ('the POM'), who is responsible for supervising the Applicant while he is in prison;
 - (b) the Applicant himself;
 - (c) a psychologist who had carried out a structured assessment of the Applicant's risks at the direction of the Board; and
 - (d) the COM.
14. The Applicant was seeking a direction that he should be released on licence. None of the professional witnesses supported such a direction.

The Relevant Law

The test for release on licence



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15. 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

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

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

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

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

18. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. As will be explained below the Applicant is seeking reconsideration of that decision on the grounds of irrationality and procedural unfairness. No error of law is suggested.

The test for irrationality

19. 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."

20. 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.

21. 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.

22. 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**.



Procedural unfairness

23. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, thereby 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).
24. 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.
25. Other things may also amount to procedural unfairness, and the overriding objective in any consideration of a prisoner's case is to ensure that his case is dealt with fairly.

A discretionary remedy

26. Reconsideration is a discretionary remedy. That means that, even if some error of law or irrationality or procedural unfairness is established, the Reconsideration Member considering the case is not necessarily obliged to direct reconsideration of the panel's decision: the Reconsideration Member has a discretion to decline to make such a direction in the particular circumstances of the case. That discretion must of course be exercised in a way which is fair to both parties (the Applicant and the Respondent).
27. Examples of situations where it is appropriate to exercise this discretion by declining to direct reconsideration are:
- (a) where the panel have made an irrational finding of fact but the Reconsideration Member is satisfied that their decision would have been the same if that error had not occurred; and
 - (b) where there has been some procedural unfairness but the Reconsideration Member is satisfied that the panel's decision would have been the same if that had not occurred.
28. The discretion may also be exercised against reconsideration if the Reconsideration Member is satisfied that the evidence against directing a prisoner's release on licence is overwhelming and a new panel would inevitably be unable to make such a direction. In such a situation a direction for reconsideration would involve a significant delay in the conclusion of the review and would therefore not be in the best interests of the prisoner. It would also result in the waste of a good deal of unnecessary time and expense.



The request for reconsideration in this case

29. This request for reconsideration was made by the Applicant himself on 20 March 2024. In his application he provides grounds for submitting that the panel's decision was both procedurally unfair and irrational. Attached to his grounds are a large number of supplementary points which he wishes to make in support of his application.

The reply on behalf of the Respondent

30. The Secretary of State is the Respondent to any application by a prisoner for reconsideration of a panel's decision. He is therefore entitled to submit representations in response to the application. The Public Protection Casework Section of the Ministry of Justice ('PPCS') have indicated on behalf of the Respondent that he does not wish to submit any representations in this case, but (as explained below) they have helpfully provided some further factual information at my request.

Documents considered for the purpose of this application

31. I have read and considered the following documents which have been provided for the purpose of this application:

- (a) The dossier provided by the Respondent for the Applicant's case, which now runs to 278 numbered pages and includes the panel's decision letter;
- (b) The Applicant's application for reconsideration;
- (c) The writings attached to that application; and
- (d) The e-mail of 17 April 2024 from PPCS stating that the Respondent does not wish to submit any representations (but enclosing (i) a response to my request for further information and (ii) a letter from the Applicant responding to that request).

32. Part way through reading these documents I realised that in order to have a clearer understanding of certain matters I needed to listen to the audio recording of the hearing. It was duly provided by the Board's secretariat, and I have listened to the whole of it. It has been very helpful. It is in two parts (the first covers the part of the hearing before the comfort break during which the Applicant was provided with a copy of the COM's latest report, and the other the rest of the hearing).

Discussion

33. It is convenient to discuss in turn (1) the Applicant's complaint of procedural unfairness; (2) his complaint of irrationality; (3) the other points which he makes in his writings, and (4) whether, if I find that there was any procedural unfairness and/or irrationality, I should exercise my discretion to allow this application (see paragraphs 26-8 above).

The complaint of procedural unfairness



34. The Applicant submits the following grounds for his contention that there was procedural unfairness in this case:

'The latest (and updated version) of the COM dossier should have been given to me at least a week before the oral hearing. I was presented with this during the hearing. I was offered time to read its contents (40 pages) to their credit but this was, as stated, during a short comfort break. I have not seen a psychologist's report. At date of writing (18 March 2024) I have still not received it. ... I cannot challenge what I have not been given an opportunity to read and digest.'

35. There were two matters in this submission which puzzled me so I issued a request for further information to be provided (a) by the Applicant and (b) either by the COM or somebody else at the Offender Management Unit ('OMU') at the prison where the Applicant is detained.

36. The first matter was the Applicant's reference above to the COM's report as containing 40 pages. In my copy of the dossier it contains only 12 pages. This discrepancy has not been resolved but is immaterial for present purposes.

37. The second matter was the Applicant's reference to his not having seen a psychologist's report. This of course suggested that more pages were missing from the copy of the dossier which was provided to him before the hearing than I had previously understood to be the case. My copy of the psychologist's report is at pages 154-177, the COM's latest report is at pages 188-199 and the updated OASys assessment is at pages 200-266. (The OASys assessment is a compendious document containing a great deal of information assembled by probation for the purpose of their assessment of the prisoner's risks. It is updated from time to time as more information becomes available).

38. As a result of my request PPCS have helpfully obtained the following information from the prison:

The Parole Board requested the following information:

- (1) *A statement from [the Applicant] explaining (i) whether he was missing [the psychologist's] report at the time of the hearing, (ii) if so, why he did not raise that with the panel at that time (iii) when (if at all) he has received it since then and (iv) whether he now has a copy of the latest OASys and if so when he received it;*
- (2) *A statement from the POM (or someone else in the OMU) stating whether there is any and if so what record of when the various versions of the dossier were provided to [the Applicant].*

PPCS, on behalf of the Respondent, have liaised with the POM and the OMU who have provided the following:

Regarding the first point, [the Applicant] has provided a written letter confirming that he had never received [the psychologist's] report before or during the hearing, the first time he was provided with this was on 02 April 2024. [The Applicant] also



confirmed that he has not been provided with an OASys and when he requested one, he was declined. [The Applicant's] written letter in full has been provided with this response for your viewing.

Addressing the second point, the [OMU] liaised with administrative staff on 15th April 2024, who were able to confirm a section of the dossier was printed off during the comfort break of the oral hearing but are not able to confirm which part of the dossier this was and there is no information recorded to say what this was'.

39. The Applicant's account of events in his letter was as stated by PPCS, and in the absence of any further information from the prison I accept that account.
40. The most recent version of the dossier should, as the Applicant says, have been provided to him at least a week before the oral hearing on 6 March 2024. The last document in the dossier was the updated OASys, which is dated 9 February 2024. There was therefore plenty of time for the authorities to provide the updated dossier to the Applicant in good time for the hearing. It was important that he should have the opportunity to study the dossier and prepare himself for relying on the favourable parts of its contents and challenging any other parts which he believed to be inaccurate or unfair. He clearly did not have that opportunity.
41. At the beginning of the hearing the Panel Chair, as is normal, had tried to check with the Applicant that he and the panel had the same documents. He told the Applicant that the panel's dossier ran to page 266, and added that the last document in it was the updated OASys. He pointed out that the page numbering of the Applicant's copy of the dossier might be different from that of the panel's. He then asked the Applicant whether he believed that his dossier was the same as the panel's. The Applicant replied: 'Yes, that is the one, I believe'.
42. The hearing then proceeded. It was when the Applicant was being questioned by one of the panel members about the licence conditions proposed by probation that it emerged that he did not have a copy of the latest COM report. He did have a copy of the earlier COM report (dated 23 March 2023) in which there was, as in the latest one, a list of the proposed licence conditions, so he was able to follow the conditions when the panel member read them out and asked him if he had any problems with them.
43. It was nobody's fault that it was not until that point that anybody realised that the Applicant's copy of the dossier was incomplete. In retrospect the Applicant might have spotted that his version had far fewer pages than the 266 in the panel's version, but it might have been easier to spot the difference if (a) the hearing had been conducted face to face at the prison so that the two versions could be directly compared and (b) the Applicant had been legally represented.
44. However that may be, there is no doubt that the failure of the authorities to provide the updated dossier to the Applicant in good time (or at all) before the hearing was a serious procedural irregularity and can properly be regarded as procedural unfairness within the meaning of Rule 28(1). Procedural unfairness is not confined to things done or not done by the panel: it extends to things done or not done by officials of the Respondent in relation to the hearing.



45. As regards the psychologist's report, although a copy of that report should have been provided to the Applicant much earlier than it was, he must have been aware of the thrust of the report because it was explained to him in person by the psychologist at the 'disclosure meeting' which is always held where a psychologist has prepared a report on an offender.
46. It was entirely understandable and certainly not unreasonable that the Applicant declined the offer of further time to study the latest COM report at the hearing. What he needed, and should have had, was the opportunity to study it at his leisure and not under pressure during the hearing.

The complaint of irrationality

47. The Applicant makes two submissions under the heading of irrationality. I have considered them separately.
48. The Applicant's first submission is: *'Two elements of [the psychologist's] report are in the updated dossier. The decision by [the psychologist] to move me up to medium risk based on flawed and erroneous data beggars belief and with respects insulting. The details she has written [have] me portrayed as an uneducated unemployed person, who had bullying problems at an early age! All completely false. See enclosures and extra information'*
49. The first part of this is rather confusing, and I think the Applicant has been (not surprisingly) confused by the fact that probation and psychologists have different systems for assessing an offender's risks.
50. The psychologist's risk assessment was (and remained) entirely consistent: she did not 'move him up' at any stage. In her report (dated 28 November 2023) she made her own assessment of the Applicant's risk of future sexual violence, using the appropriate structured risk assessment methods used by psychologists. Psychologists assess risks of future offending on a scale of 'low', 'moderate' and 'high'. The psychologist concluded that the Applicant's risk of future sexual violence was 'moderate'.
51. In her report she recorded, as is normal, the results of the various risk assessment methods used by probation, most of which are statistical and calculated on the basis of the offender's record of convictions. Statistical assessments can be helpful in assessing risk but can result in significant under-estimates where an offender has convictions for only one or two offences of a particular kind but they are representative of a much wider pattern of offending.
52. The statistical method which is relevant for present purposes is the one which attempts to calculate, by reference to an offender's convictions for pornographic image offences, his risk of committing further offences of that kind in the future. At the time of the psychologist's report that risk was assessed by probation, in the Applicant's case, as 'low' on a scale of 'high', 'moderate' and 'low'.
53. The COM's report was not submitted until 2 February 2024 (three months after the psychologist's report). For the purpose of her report the COM revisited the Applicant's statistical risk of committing further pornographic offences, and (for reasons which she



explained in detail) she concluded that probation's previous assessment of that risk had been erroneous and that it should be raised from 'low' to 'medium'. The OASys was accordingly amended in that respect.

54. That decision meant that, on the rather rigid system operated by prison psychologists, the Applicant might now qualify for a risk reduction programme in prison.
55. I am satisfied that the detailed reasons given by the COM for her decision to raise that particular statistical risk assessment from 'low' to 'medium' were entirely reasonable, and that the Applicant's criticisms of that decision (which was a decision made by the COM and not by the psychologist as the Applicant thought) are unfounded.
56. The other part of this submission will be discussed in paragraphs 64-5 below along with other similar complaints.
57. The Applicant's second submission on irrationality is that *'The condition of not owning or using a camera on licence 28 is irrational and unreasonable. This formed no basis for change [should that be charge?] or evidence of and no mention in court proceedings. My photography was ongoing 14 months prior to trial [see enclosures]. This forms part of [my] own life's hobbies 40 years plus.'*
58. This condition was challenged by the Applicant as being unreasonable when he was being taken through the list of proposed conditions by one of the panel members at the hearing (see paragraph 42 above). He said he had never understood why that condition was there. The panel member suggested that that might be because, although there was no charge about it, there was some suggestion that he had taken indecent photographs of the victim.
59. The Applicant said that there was no such evidence and that his cameras were returned to him by the police once the lead officer had checked it all out and found that there was nothing untoward at all in them. The Applicant's point was that the cameras would not have been returned to him if the police had believed that they had been used for the purpose of any criminal activity.
60. As the panel recorded in their decision *'The victim claimed that [the Applicant] had taken photographs of her naked/in her underwear but this did not form part of the offences which were convicted.'* The panel made no finding about that allegation, nor did they find there was any basis for treating it as a *'matter of concern'*. Clearly, therefore, they attached no weight to it. Similarly I attach no weight to it for the purpose of this decision.
61. The Applicant's understandable concern is that when he is released from prison (as he will certainly be at some stage) he might be prevented by a licence condition from pursuing his hobbies of botany and archaeology. It will be a matter for the next panel who consider his case to decide whether this particular proposed licence condition (if probation are still requesting it) is necessary and proportionate.
62. I should point out that the condition currently proposed is not an unqualified prohibition on owning or using a camera but one that the Applicant should not own or use a camera



'without the permission of his supervising officer' (my underlining). The Applicant can certainly argue, if there should be such a condition requested by probation and approved by the next panel, that it would be unreasonable for the supervising officer to refuse permission for him to own or use cameras for taking photographs of botanical or archaeological subjects. No doubt a suitable agreement could be reached.

63. Having said all that, I need to explain that any complaint about a proposed licence condition is irrelevant to this application for reconsideration of the panel's decision not to direct the Applicant's release on licence. That is because, the panel's task was simply to decide whether the test for release on licence was met: if it was not, as the panel found to be the case, any dispute about the appropriateness of proposed licence conditions would fall by the wayside. It will only need to be considered, if necessary, by the next panel if they decide to direct the Applicant's release on licence. At this stage the Applicant's argument is not a ground for reconsideration of the panel's decision.

Other complaints

64. As mentioned above, attached to the Applicant's grounds are a large number of writings in which he says there were factual inaccuracies in the dossier, especially in the psychologist's report. He makes a number of points in support of his denial of the offences of which he was convicted and in rebuttal of any suggestions that his mother (who believes in his innocence) had attempted to influence the victim. He also makes various points critical of the victim's mother. He says there are other things he could write but *'they are legal and he cannot disclose them at this time'*.
65. He is particularly critical of things which the psychologist wrote in her report about his past history. It was clearly difficult for her to obtain an accurate picture of his past and his personality, which are always relevant in a case of this kind. She described the Applicant's presentation in interview as follows in her report:

'[The Applicant] presented at ease and willing to participate in the process. He responded to most of his background questions, although his accounts were not always linear and sometimes lacked credibility. For example, [the Applicant] omitted two live-in relationships until asked about the number he had initially cited and when asked about gaps in relationships. Similarly, [the Applicant] believed he left his last employment in 2011 but when asked again revised this.

'It was difficult to determine whether this was the result of poor memory for events given the passage of time or lack of candour. However, [the Applicant] provided additional details when told that some of his accounts seemed implausible. For example, [the Applicant] referred to an additional live-in relationship, when asked how he met his sexual needs during a time when he reported being single. [The Applicant] also reported that he bought a house with this individual, having previously stated that he lived in her flat but when asked about reliance on females, he added another detail to say they bought a house together. [The Applicant] also appeared irritated at this point protesting that his history was personal to him and that he was being honest.

'I was not satisfied that I had an accurate account of [the Applicant's] psychosexual history in particular.'



66. The Applicant says that the psychologist misunderstood or misrepresented much of what he told her about his past, a particular example being her reference to his having told her that he had been bullied at school. I find it difficult to believe that she could have misunderstood or misrepresented what he himself told her about that, or indeed about other things in his past. She is an experienced professional (a Chartered Psychologist and Registered Forensic Psychologist) and is accustomed to recording accurately what she is told in interview by offenders.
67. It is obviously not possible for me to unravel all the assertions of inaccuracy which the Applicant makes. It is not uncommon for there to be mistakes of fact in dossiers. Sometimes those mistakes, individually or cumulatively, may lead to a finding that a panel's decision was irrational. In this particular case, in order to decide whether to make a finding of irrationality, what I need to do is to focus on the key issue on which the panel's decision depended. That was whether the Applicant needs to complete some risk reduction work in prison before it is safe for him to be released into the community.
68. On that issue all three professional witnesses were agreed that it is not at this stage safe to release the Applicant unless he has first completed some work to reduce his risk to the public.
69. Denial is not in itself a risk factor, but it may make it difficult for a convicted sex offender to demonstrate a significant reduction in risk. Assuming, as the Board has to assume, that the Applicant was rightly convicted, he must be regarded as an untreated sex offender. There are programmes and other forms of '*treatment*' (i.e. risk reduction work) which a '*denier*' can undertake to reduce his risk.
70. Until relatively recently the Applicant did not meet the criteria (based of his record of convictions) any accredited risk reduction programme. When his statistical risk of future pornography offences was raised from '*low*' to '*medium*' (as explained above) he did meet the criteria for one programme but, when the POM and the COM (separately) contacted the programmes team about his case, it became clear that it was most unlikely that the Applicant would be accepted for that programme. There is a long waiting list for the programme and priority is given to offenders who are motivated to undertake the programme (which the Applicant is not).
71. The professionals therefore recommended that he should undertake a different form of work, namely completion of cell packs and 1:1 sessions with the POM (who is willing, able and qualified to provide it.) The Applicant told the panel that he was willing to undertake that work provided that he is not expected to admit his guilt of the offences of which he was convicted (which he would not be).
72. A panel of the Board are not obliged to follow the unanimous recommendations of the professionals but, if they are going to do so, they need to provide adequate reasons for departing from those recommendations (otherwise their decision is liable to be quashed by the High Court or by a Reconsideration Member as being irrational).
73. The panel in this case obviously did not feel able to depart from the views of the professionals (which were clearly explained by the professionals) and I cannot find any



reasons for doing so. I cannot, therefore, make any finding of irrationality in the panel's decision.

Should I exercise my discretion to allow this application?

74. It will be apparent from the above discussion that, whilst I am satisfied that there was no irrationality in the panel's decision, I am also satisfied that there was procedural unfairness in this case (i.e. the failure of the prison staff to provide important documents to the Applicant before the hearing). That leaves me with the question whether I should exercise my discretion by directing reconsideration of that decision on the ground of procedural unfairness.
75. The failure of the prison staff was a serious one but at the end of the day I am satisfied that the panel's decision would have been the same if that failure had not occurred. Furthermore I believe that a direction for reconsideration would not be in the Applicant's best interests: another panel would be bound to come to the same conclusion as the previous one, and all that would be achieved would be a delay in completing this review which in turn would delay the next review of the Applicant's case. As it is, that review will now commence in about a year's time. It is certainly now in the Applicant's best interests to undertake the work proposed by the professionals so that he will have a better chance of showing, in his next review, that he is ready for release on licence.

Decision

76. For the reasons which I have set out in detail above, my decision must be to refuse this application.

Jeremy Roberts
29 April 2024

