


[2020] PBRA 197**Application for Reconsideration by Anslow****Application**

1. This is an application by Anslow (the Applicant) for reconsideration of a decision of an oral hearing panel dated the 9 November 2020 not to direct release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier (including the decision letter) running to 302 pages and the representations on behalf of the Applicant.

Background

4. On the 23 January 2003, following his conviction for rape and indecent assault on a girl aged 15, the Applicant was sentenced to life imprisonment with a minimum tariff of 7 years. At the time of sentence, the Applicant was aged 42. The minimum tariff expired on the 12 January 2011.
5. Between 1977 and 2002, the Applicant appeared before the courts on 17 occasions for 30 offences, several of which were offences of assault or threatening behaviour. The Applicant was on occasions sentenced to imprisonment; the longest sentence prior to 1997 was a sentence of 2 and a half years imprisonment in 1994 for supplying drugs.
6. In 1997, following his conviction, the Applicant was sentenced to 7 years imprisonment for the rape of a child under the age of 16 years. On that occasion, he also used a knife and threatened to kill his victim.
7. The index offence was committed during the at risk period for the 1997 rape and the sentencing judge in 2003 ordered the Applicant to serve 491 days of that sentence before commencing the present sentence.
8. Following an oral hearing in 2016, the Applicant was released on the 10 February 2017, but was recalled on the 17 June 2019 following an allegation of rape against an adult woman who had been assessed as having learning difficulties.

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9. The application for reconsideration is dated the 30 November 2020.
10. The application is brought under both irrationality and procedural unfairness. The grounds for seeking a reconsideration under irrationality are as follows:
- a) The panel expressly made no finding in respect of the allegation of rape which had led to the Applicant's recall but then relied on the allegation as a ground for refusing release;
 - b) There was insufficient evidence upon which the panel could make the finding that the Applicant's risk in the community was unmanageable;
 - c) The panel found striking similarities between the index offence and the alleged rape in the absence of any evidence to support such a finding; and
 - d) The panel failed to give any or any adequate reasons for departing from the unanimous recommendations of the professional witnesses for release.
11. The ground for seeking a reconsideration under procedural unfairness is as follows:
- a) The panel proceeded without police information which had been sought repeatedly by the Parole Board.

Current parole review

12. The Secretary of State referred the Applicant's case to the Parole Board in July 2019.
13. The oral hearing was listed on the 3 September 2020 but did not start because of lack of time. The panel, which consisted of two independent members and a psychological member, reconvened on the 22 October 2020. Due to the current Covid-19 restrictions, the hearing was held remotely by video link.
14. The panel heard from the Applicant, the Prison Offender Manager, the Community Offender Manager and from the Applicant's solicitor.
15. At the time of the hearing, the Applicant was aged 59. This was his first review since his recall.

The Relevant Law

16. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

17. Under 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



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hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

18. 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."

19. 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.

20. 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

21. 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.

Other

22. 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."*

23. It is not the role of the Parole Board to determine whether a prisoner has committed other offences, but it is not precluded from considering evidence of wider offending when determining the issues of risk and, in exceptional cases, it may have a duty to make further enquiries – **R (DSD and others) v the Parole Board and John Radford [2018] EWHC 694 (Admin)**.

The reply on behalf of the Secretary of State

24. The Secretary of State did not make any representations in this case.

Discussion

25. On the 29 July 2019, a panel member deferred the case so that the Community Offender Manager could produce a report on the outcome of the police investigation into the allegation of rape.

26. Thereafter, panel members made four further sets of directions requiring the disclosure of the police evidence, without success.

27. The Applicant strenuously denied the allegation and pointed both to inconsistencies in the Complainant's account and to reasons why her account could not be accurate in some respects. He said that at the time she said the offence was being committed, he was at the probation office (which was a short distance from the scene of the alleged crime).

28. The panel proceeded without the police evidence. The Prison Offender Manager and the Community Offender Manager both supported the Applicant's release. The panel decided not to direct release but did decide to recommend the Applicant progress to open conditions.

29. The decision letter is clear and well argued. The difficulty arises in section 8 where the panel sets out its conclusion and decision. After a succinct and accurate review of such evidence as did exist relating to the allegation, the letter continued with the following paragraph:

"The panel was unable to reach a firm decision as to whether, on the balance of probabilities, you did assault the alleged victim. Adding that uncertainty to concerns from your evidence that you might not be open and honest with a supervisor you didn't like and concerns regarding your interactions with women the panel were unable to conclude that risk was currently manageable in the community, particularly with the prospect of a short period in approved premises. The panel was not satisfied that it is no longer necessary for the protection of the public that you be confined".

30. On the face of it, that paragraph states that the panel took into account an incident which may not have taken place as a reason for refusing release.

31. The legal submissions suggest the panel regarded the rape allegation as the principal reason for its decision. It is correct to point out that the panel did not say that; however, it is the first reason given of three and it attracted more discussion than the other two.

32. The second reason relied on, that the Applicant was not always open and honest with professionals, appears to be based on two pieces of evidence: he failed to inform the Community Offender Manager he had not responded to a police request for an interview and he said he had not discussed worrying behaviour with the Community Offender Manager because "he was useless" and "a horrible person".

33. The third reason, the Applicant's interaction with women, may be based on an incident that occurred on the 18 May 2020 when he was abusive and threatening to Healthcare staff, but the letter does not say if they were women. It is undoubtedly based on an incident during a previous oral hearing, when the Applicant continuously moved close to the Prison OM making her feel uncomfortable. It is also recorded that it was possible he may have shouted at nurses from time to time.
34. What is important is the letter does not say that, even in the absence of the first reason, the second and third reasons by themselves were, in the panel's view, sufficient to refuse to direct release.
35. The Parole Board Guidance on Allegations of March 2019 defines the three courses open to a panel dealing with a disputed allegation as
- a. Choose to disregard it; or
 - b. Make a finding of fact; or
 - c. Make an assessment of the allegation to decide whether and how to take it into account as part of the parole review.
36. In the instant case, the panel appears to have chosen the last course. However, it is impermissible to find the allegation is "*a concern*" and, without more, rely on it.
37. The panel needs to decide (a) what relevance the allegation has to the parole review and (b) the weight to attach to the concerns arising from the allegation, – see paragraph 19 of the Guide. The panel will then have to decide what weight to give to the allegation; most panels will feel obliged to consider most, if not all, the factors set out in paragraph 20 a – f of the Guidance. Finally, the panel has, among other matters, to explain in the decision letter how the allegation has impacted on the decision-making – paragraph 25.
38. Unfortunately, the Decision Letter does not set out the panel's decision-making process in the manner expected in the Guidance.
39. This is a fatal error in an otherwise clear and carefully constructed letter. In those circumstances, Ground 10 (a) is made out.
40. I do not agree there was insufficient evidence upon which the panel could make the finding it did, nor do I think the "*striking similarities*" point lacked supporting evidence and Grounds 10 (b) and (c) fail.
41. As to Ground 10(d), the basis for the panel declining to follow the professional recommendations appears to be confined to the three reasons identified in the passage quoted in paragraph 30 of this decision. As the panel's approach to one, and probably the most important, of those reasons is flawed, Ground 10 (d) is made out.
42. Ground 11 (a) (procedural unfairness) is not made out. In the case of **Radford [2018] EWHC 694 (Admin)**, the High Court accepted that frequently evidence



will be unavailable or inadequate for the purpose of making a finding. The position in this case is insufficiently clear to say the panel was not entitled to proceed on the evidence then in the dossier. The difficulty in the case is how the panel proceeded, having decided the allegation of rape could not be established, even on the civil standard of proof.

Decision

43. In those circumstances, I do not find there to have been a procedural irregularity, but I do find that the decision not to direct release to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Directions

44. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

45. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

James Orrell
23 December 2020