

[2020] PBRA 59

Application for Reconsideration by Hicks

Application

1. This is an application by Hicks (the Applicant) for reconsideration of a decision of an oral hearing dated the 25 March 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 Oral Hearing Decision Letter, the Application for Reconsideration signed by the Applicant's legal representative, and the Dossier which contains 252 numbered pages.

Background

4. The Applicant was born in 1988. On 1 December 2015 he was sentenced to an extended determinate sentence of 8 years' and 2 months' imprisonment, of which 3 years and 2 months was the custodial period and 5 years the extension period. The offence was a single count of sexual assault on a girl. This offence was itself a breach of a Sexual Offences Prevention Order.
5. The Applicant was released on licence on 29 January 2019. His licence was revoked on 12 February 2019, and he was returned to custody on 15 February 2019. His Sentence Expiry Date is 30 January 2024. His case was referred to the Parole Board by the Secretary of State for a review of his detention.

Request for Reconsideration

6. The application for reconsideration is dated 9 April 2020.
7. The grounds for seeking a reconsideration are as follows:

"That the Oral Hearing Panel (OHP) has taken into account incorrect and irrelevant information and has failed to take account of relevant information."

Particulars are given, which I summarise, giving the paragraph numbers in the Application for reference:

- (a) Para 3 – The decision states at the outset that the Applicant was incapable of regulating himself as evidenced by his failure to disclose



he had been in touch with other sex offenders. There was no condition on his licence not to contact other sex offenders, and no inappropriate communications made or received. The OHP has not stated anywhere in its decision that there was no such licence condition.

- (b) Para 4 - It is impossible and incompatible with normal daily life to expect the Applicant not to eat at a fast food restaurant, where children are likely to be present. Eating at a fast food restaurant does not show that the Applicant's risk was not being managed.
- (c) Para 5 - The Applicant is reported to have done really well on [the training course addressing sex offending], yet the Prison Offender Manager (POM) said his risk had not been reduced, with which view the OHP agreed. It is asserted that this demonstrates a refusal to recognise anything positive in the Applicant's case and therefore a blinkered approach.
- (d) Para 6 - The decision letter fails to mention that the [intervention addressing sex offending] which was recommended to reduce his area of risk was not offered until the end of his sentence, some 3 years hence. This was relevant information which was not taken into account by the OHP.
- (e) Para 7 - The decision letter states that the Community Offender Manager (COM) stated that information about the use of computers came from other offenders. This is incorrect: the COM accepted the information had come from the Applicant. The decision letter also states that the COM said there was evidence the Applicant had joined dating sites, when in fact there was no such evidence.
- (f) Para 8 - The OHP appears to have taken the view that the Risk Management Plan (RMP) proposed is the same as the previous one, when in fact the new RMP includes a condition not to associate with sex offenders. This is not mentioned in the Decision Letter at all, which gives credence to the view that the OHP had formed a view that the Applicant was in breach of his licence by doing so when he was not.
- (g) Para 9 - There is no link between accessing the internet for lawful purposes, or eating in a fast food restaurant, and his offending. The suggest of offence paralleling behaviour is another example of a determination by the OHP to take the most negative view imaginable of every piece of information.

Current parole review

8. The hearing took place at the prison on 18 March 2020. Oral evidence was given by the Community Offender Manager (COM), Prison Offender Manager (POM) and the Applicant. The Applicant was legally represented by a Solicitor. The Dossier contained 252 numbered pages. The OHP was asked to consider re-release. All documentation had been available to the Applicant.

The Relevant Law

9. The panel correctly sets out in its decision letter dated 25 March 2020 the test for release.

10. There are two bases on which a decision can be reconsidered: irrationality and procedural unfairness.

11. 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."

12. 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.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

14. 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.

15. 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.

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

16. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily*

decisive) part in the tribunal's reasoning." See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

17. 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.*"

The reply on behalf of the Secretary of State

18. There have been no representations offered in response to the Application by the Secretary of State.

Discussion

19. Although the Application is couched in terms of taking into account incorrect and irrelevant information and failing to take account of relevant information, there is an implicit assertion of unfairness in the approach taken by the OHP, which surfaces in particulars (c), (f) and (g) as set out in Paragraph 7 above. The complaint is of a blinkered approach, a determination to refuse to recognise anything positive at all in the Applicant's case.
20. I consider that the most sensible way to decide this Application is to examine each of the particulars, and in the light of my findings as to them, to step back and look at the overall fairness of the proceedings under discussion.
21. (a) Contact with other sex offenders, use of the internet and eating in a fast food restaurant:
- (i) It is correct that the Applicant's licence conditions did not contain any condition that he should not have contact with other sex offenders. This is plainly set out in the Dossier, where, for example, the Recall Report notes that on 11 February 2020 the Applicant was informed that his licence was to be amended to include such a condition. The assessment of risk of reoffending and outstanding needs report in the Dossier makes it plain that one aspect of the Applicant's previous behaviour, which he acknowledges, was sharing fantasies with other sex offenders over the internet: see page 152 of the Dossier.
 - (ii) To quote the Decision Letter at page 2 "*This [compulsive offending behaviour and incapability of truly self-regulating] is also apparent in your behaviour after release ... when it was*

discovered that you failed to disclose contact with other sex offenders; failed to recognise the risk of remaining within the vicinity of children in a fast food restaurant when there were other options open to you; and failed to disclose your access to the internet on a computer in defiance of licence conditions."

- (iii) It is noteworthy that the reference to licence conditions is restricted to accessing the internet on a library computer. It is not suggested in the Decision Letter that contact with sex offenders or eating at a fast food restaurant were of themselves breaches of licence conditions. This is confirmed at p5 of the Decision Letter: *"It is clear that you were breaking your licence conditions from the first day of release and that you had access to a computer from the day of release."*
- (iv) At page 4 of the Decision Letter it is recorded that the POM's evidence was that *"You have continued to be in contact with like-minded individuals despite this being expressly prohibited in your licence conditions."* This evidence was on the face of it incorrect, but there is no indication that the OHP lost sight of the fact that there were no licence conditions in operation preventing contact with other sex offenders.
- (v) The Decision Letter mentions the issue of compulsive offending and the inability to truly self-regulate in the context of an analysis of the Applicant's offending. This comment is entirely justified in the light of the offending history discussed in the Sentencing Remarks and bearing in mind that the lead-up to the index offending started within days of the Applicant's release from prison from an earlier sentence. The sentencing judge himself spoke of the Applicant's inability to comply with court orders.
- (vi) It is asserted that no inappropriate communications on the internet were made or received. The evidence in the Dossier is that the Public Library may or may not have been able to check internet use on the relevant computer(s) but had not actually done so. If that is correct, there was no evidence other than from the Applicant himself as to what the communications were. The Applicant accepted he had made contact with other sex offenders. He explained his breach of the relevant condition of his licence as being a misunderstanding of what he was and was not permitted to do.
- (vii) **Conclusion** on this aspect: The OHP was entitled to take the view that disregard of the licence condition prohibiting uncontrolled internet access was linked to his offending behaviour. The Applicant himself accepted to a police officer he could not trust himself to use the internet. Many of his previous convictions involved internet use, and on his own account his contact offending started with the internet: see page 6 of the Decision Letter. The OHP was entitled to reject the Applicant's explanation

of why he used a computer of which his supervisors knew nothing in order to access the internet. There is no irrationality in this aspect of the OHP's decision.

22. (b) Eating at a fast food restaurant:

- (i) It is apparent from the Dossier that this incident came to light because the Applicant told his COM about it. At p5 of the Decision Letter the COM's concerns are set out.
- (ii) It is strenuously urged in the Application that eating in a fast food restaurant is not a breach of any requirement not to have contact with children beyond what is unavoidable. The Applicant was asked about this in evidence and is reported at page 6 of the Decision Letter as being at a loss to explain why he chose to eat in a place where there were many children.
- (i) Whether something falls within the description of avoidable or unavoidable contact is a matter of fact which is for the assessment, in this case, of the OHP. There can be no general rule: the question must be considered on the facts of each case. A reasonable tribunal approaching the matter properly on the evidence recorded in the Decision Letter could properly come to the conclusion that the Applicant's contact or deliberate running of the risk of contact with children in the fast food restaurant was avoidable.
- (iii) **Conclusion:** There is no irrationality in this aspect of the OHP's decision.

23. (c) and (d) The issue as to offending behaviour work:

- (i) It is correct the Decision Letter recorded the POM's view that the Applicant had done really well on the training course addressing sex offending.
- (ii) However, that does not mean that the risk of serious harm he presents is necessarily reduced.
- (iii) The assessment of risk of reoffending and outstanding needs report makes it plain that training course addressing sex offending

is for medium risk offenders. A very high risk offender like the Applicant is likely to need further offence-based programmes to reduce his risk. The author of the report recommended an intervention addressing sex offending as a suitable programme, and the professionals were of the unanimous view that this was core risk reduction work that needed to be completed before the Applicant's risk could be said to be reduced.

- (iv) In the Application the assertion is that the Decision Letter fails to mention that an intervention addressing sex offending will only be available towards the end of the sentence. That fact is plainly expressed in the Dossier, and there is no reason to suppose the OHP was unaware of it or failed to take it into account so far as relevant.
- (v) **Conclusion:** There is no irrationality raised by these complaints. The task of the Parole Board, through the OHP, is to assess risk. The Applicant's risk is assessed as very high, and it is not irrational for the OHP to follow, after due consideration, the advice of the professionals that the only way in which the risk can be reduced is by participation in a specific programme. The fact that the programme may not be immediately available does not change the risk assessment.

24. (e) The issue as to the source of the information about the use of computers:

- (i) There are two complaints packaged under this heading. The first is that the COM stated that the information about the Applicant's use of computers came from other offenders. It is asserted that she in fact accepted that the information came from the Applicant. The second is that the COM said that there was evidence that he had joined dating sites but stated at the hearing there was no such evidence.
- (ii) The Dossier confirms that the COM learnt about the Applicant's contacts with other sex offenders by questioning the Applicant and examining his mobile phone and email account (see the Recall Report). The Applicant did not initially notify his COM of these matters. In the course of the same interview he admitted having used a computer at a Public Library without the prior approval of his COM. It is therefore correct that the initial information about computer use came from the Applicant.

- (iii) The Decision Letter at pages 5-6, recording the COM's evidence, says that information about the Applicant's use of computers had come from other offenders; that he had been in contact with another sex offender on more than one occasion; that there was evidence that he had joined dating sites, and, that although there was no evidence of his accessing children, he had offered the names and numbers of all the prisoners he had been in contact with.
- (iv) It is, of course, perfectly possible and consistent with the wording of the Decision Letter for the initial information to have come from the Applicant and further later information to have come from other prisoners with whom he had been in contact. I cannot, however, find clear evidence in the papers that that is what happened, so I will assume it did not.
- (v) I have tried to obtain access to the recording of the oral hearing, but I have not been able to do so. In the circumstances the only fair way for me to proceed is to accept the assertion in the Application that the COM stated in her evidence that there was no evidence of the Applicant joining dating sites. The highest it is put in the Dossier is that "*there is evidence that he may have signed up to dating sites*".
- (vi) **Conclusion:** Accepting that there were errors in the OHP's summary of the evidence, the question is whether they were so fundamental as to render the OHP's decision irrational. In the context of the whole case these matters were minor details only, not fundamental. They do not establish or even indicate that the decision was irrational.

25. (f) The proposed Risk Management Plan:

- (i) The assertion is that the OHP appear to have taken the view that the proposed RMP is the same as the previous one, when in fact it differed by the addition of a condition not to contact other sex offenders.
- (ii) I can find nothing in the Decision Letter that suggests that the OHP was unaware of the difference in the two RMPs. The OHP summarised the proposed release plan as having two elements: residence in designated accommodation; stringent conditions to reduce the possibility of re-offending. The focus in the relevant

section at page 8 of the Decision Letter is on the Applicant having on his previous release, while subject to restrictions, set up situations which led to opportunities to access the internet and possible offence paralleling. This formulation does not necessarily imply that the restrictions were thought of as identical.

- (iii) **Conclusion:** If there is any substance in this complaint it does not affect the rationality of the decision.

26. (g) The link between the Applicant's behaviour on licence and his pattern of offending:

- (i) The Application strenuously asserts that there is no link between accessing the internet in a public library to do nothing unlawful and eating in a fast food restaurant and the extremely covert and illegal use of the internet in the Applicant's offending and contact sex offences.
- (ii) The OHP found that the Applicant is aware of his risks but is driven to ignore them in the furtherance of his own agenda. The panel assessed the risk as being both intensely driven and imminent. The panel assessed the risk to children as being a real one, and found him apparently helpless to resist his impulses. The Panel found that further intensive work is required for the Applicant's understanding of his risks and to build up resistance and desistance strategies.
- (iii) **Conclusion:** These findings were clearly open to the OHP on the evidence. The decision to eat at a fast food restaurant where there were so many children could, in the context of the Applicant's admitted continuing sexual interest in children, properly be seen as unjustified risk taking, which the Applicant was unable to explain or justify. The use of an unsupervised computer for any purpose was a plain breach of licence conditions. It was properly of concern bearing in mind the history referred to at Paragraph 22(i) above. The OHP was entitled to conclude that this was offence-paralleling behaviour in the light of the Applicant's detailed history of offending via the internet and moving from the internet to contact offences.

27. The above analysis results in a conclusion that the decision of the Oral Hearing Panel cannot be categorised as irrational. I must now consider whether there is evidence that the hearing was procedurally unfair as discussed above.

28. I cannot find any such evidence. The Applicant was legally represented throughout. His legal representative had the opportunity to question each of the three witnesses heard by the panel, including the Applicant himself, and to make submissions before the panel made its decision. Each of the matters complained of as indicating a blinkered approach was an assessment the panel was entitled to make on the evidence.

29. The decision itself was a rational one, justified by the evidence. In particular, the finding that further intensive work is required for both his understanding of his risks and to build up resistance and desistance strategies is firmly based on the evidence of the assessment of risk of reoffending and outstanding needs report in the Dossier and that of the Prison Offender Manager and the Community Offender Manager. Such work is not available in the community.

Decision

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

Patrick Thomas
27 April 2020