

[2021] PBRA 174**Application for Reconsideration by Hope****Application**

1. This is an application by Hope (the Applicant) for reconsideration of a decision by a Panel of the Parole Board dated 29 October 2021 not to direct his release. The decision was made following the oral hearing of the Applicant's post tariff life sentence review concluded on 25 October 2021.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on the basis that the decision is (a) irrational or (b) procedurally unfair.
3. I have considered the Application on the papers. These comprise: the Application for Reconsideration with representations; the Decision Letter; and the Case Dossier.

Background

4. On 11 June 2001, having been convicted of rape, the Applicant was sentenced to life imprisonment. The minimum custodial term was set at 8 years 9 months after time spent in prison on remand had been taken into account. A concurrent term of 3 years' imprisonment was imposed for an associated offence of assault occasioning actual bodily harm. The Applicant pleaded not guilty to both offences but was convicted by a jury after trial.
5. The Applicant was 23 at the time of the index offences which were committed on 24 June 2000. The victim was an 11 year old girl who encountered the Applicant when cycling in a wooded area on the outskirts of her home town. He punched her in the face as she attempted to pass him and fell off her bicycle. After punching her again, and removing her trousers and underwear, he raped her before allowing her to leave.
6. The Applicant had one previous conviction recorded against him, namely for rape in respect of which he was sentenced on 20 January 1995 to a term of 4 years' imprisonment. His victim on that occasion was a 19 year old young woman. He approached from behind in a public park during the daytime, held a knife to her throat, pushed her to the ground, subjected her to a number of sexual acts, and then raped her. She managed to struggle free and escape.
7. As a teenager, the Applicant had been cautioned by the police for burglary, theft by shoplifting and arson.



8. The judge who sentenced the Applicant to life imprisonment stated *"it is difficult to express adequately the horror and outrage that people feel about what you have done. You have a warped and perverted mind. What you have done is evil beyond words. You deserve, in every way, the condemnation that is now heaped upon you. You will not be released into the community, if ever, for many years. It will be to protect society from you. Little girls and young women need to be protected from you. It will be to punish you and to mark people's hatred for your treatment of this small, unsophisticated, defenceless child. You have marked her life, one suspects forever, but certainly for now. She has become fragile, frightened and dependant. Her bravery in coming to this court to tell you of what you did to her is in contrast to your cowardice in picking on a defenceless innocent child to satisfy your perverted sexual appetite"*.
9. This was the Applicant's eighth post-tariff review. As a preliminary issue the Panel considered written and oral evidence and submissions to determine whether or not the Applicant had committed 6 other sexual offences which had been charged but not proceeded with. In the course of his evidence to the Panel, the Applicant admitted that during this period he would wander round secluded areas looking for potential victims and opportunities to offend.
10. Having expressly applied the Parole Board's Guidance in respect of such matters Issued following the decision in **R (DSD and others) v The Parole Board (2018) EWHC 694 (Admin)** the Panel concluded on the balance of probabilities that he had committed 5 of these offences but was unable to conclude, applying the same standard, that he had committed the sixth.
11. Having considered the reports before it, the oral evidence, its own conclusion in respect of the additional offences and the written closing submissions made by Applicant's legal representative, the Panel decided that the Applicant's risk remained too high for him to be safely managed in the community. It concluded that it remained necessary for the protection of the public for him to be confined and therefore did not direct his release. The Panel went on to decide that his risk remained too high for it to recommend a transfer to open prison conditions.

Request for Reconsideration

12. The Application for Reconsideration is dated 27 October 2021 and contains detailed representations by the Applicant's Solicitors.
13. The grounds for seeking reconsideration are that the decision not to grant release was both procedurally unfair and irrational.
14. It is submitted that the decision was procedurally unfair on the basis that:
- (i) The Applicant did not receive a fair hearing because there was a lack of evidence, for example witness statements, witness evidence and full case papers relating to the additional offences; and
 - (ii) The Panel therefore concluded (inappropriately) that the Applicant had further risk reduction work to complete.



15.It is further submitted that the decision is irrational in providing contradictory findings that there was a single perpetrator for the additional offences but that the Applicant was responsible for only five out of the six.

16.The Secretary of State made no representations in response to the application.

Current parole review

17.The Applicant's case was referred to the Parole Board by the Secretary of State to decide whether to direct his release. The terms of reference included an invitation to advise, in the event of release not being directed, whether the Applicant should be transferred to open conditions. Such advice is not within the remit of the reconsideration application.

18.The Panel considered a dossier running to 468 pages. The latest Prison Offender Manager (POM) and Community Offender Manager (COM) Reports were dated respectively 9 and 19 July 2021. The dossier also included a psychological risk assessment by a prison psychologist dated 30 June 2021. The COM expressed the joint view of himself and the POM to recommend the Applicant's release. The author of the prison psychologist recommended a transfer to open conditions. These recommendations had been made before the further information about the additional offences had been considered.

19.According to the decision letter "*at least two of the professionals indicated that their recommendations would be unlikely to be different had the additional allegations been admitted*". This was the view expressed by the COM and the psychologist. The letter does not refer to any opinion expressed by the POM in that context but all three professional witnesses expressed support at the hearing for the Applicant's release.

20.After the hearing, written Closing Remarks dated 22 October 2021 were provided by the Applicant's Solicitors. They refer to the extensive work undertaken by the Applicant to reduce his risks and the consolidation he has achieved. They referred to the agreed evidence by the professionals that the Applicant's risk was not imminent, and they submitted that the release plan was robust. They did not refer to the effect of the additional offences upon risk.

The Relevant Law

21.The Decision Letter correctly sets out the test for release.

Parole Board Rules 2019

22.Under Rule 28(1) of the Parole Board Rules 2019, the only type of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b) or by an oral hearing panel after an oral hearing (Rule 25(1) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Procedural unfairness



23. The issue to be considered under this ground would be whether there is evidence that the correct legal process was not followed either in the application of the Parole Board Rules or in the fair conduct of the hearing.

Irrationality

24. 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.”

25. This test had been earlier 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 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 uses the same word as is used in judicial review proceedings demonstrates that the same test is to be applied.

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

27. The importance of giving adequate reasons in Parole Board decisions has been made clear in two High Court cases. In **Wells [2019] EWHC 2710 (Admin)** it was suggested that, rather than ask was the decision being considered irrational, the better approach is to test the decision makers ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence while giving due deference to the panel’s experience and expertise.

28. The material in the dossier relating to additional offences had been provide to the Applicant in advance of the hearing. It is clear from the decision letter that the Panel questioned him by reference to that material and in particular about suggested similarities between the index offence and the additional offences. The Applicant’s responses are set out in the decision letter.

29. The professional witnesses were asked for their recommendations having regard to the Panel’s findings of fact.

30. 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 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 it accepts and what evidence it rejects. Once that stage has been reached, following the guidance provided by cases such as **Wells** and also **Stokes [2020] EWHC 1885 (Admin)**, a panel should explain in its reasons whether or not it is going to follow or depart from the recommendations of professional witnesses.



31. It follows that, in reaching a decision about irrationality on this application, I am required to decide first, whether I am satisfied that the conclusions reached by the panel were justified by the evidence and second, whether I am satisfied that the conclusions are adequately and sufficiently explained.
32. In considering the amount of detail needed to be included in a decision letter, there has been guidance from the High Court, 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 require elaborate or impeccable standards of draftsmanship."*

Discussion

33. The case was initially set down for an oral hearing to take place on 15 July 2021. Panel Chair Directions were issued on 8 May 2021. The Chair identified a need for further information to be provided about the unproved allegations and directed the provision of Police and Crown Prosecution Service (CPS) reports about them. Following a case conference on 3 June 2021 attended by the COM, the POM and the Applicant's legal representative the need to resolve this issue was acknowledged. Following the resultant directions, a CPS case summary in respect of all 6 incidents and the transcript of a videoed police interview with one of the victims was provided. Police reports were limited to a letter of confirmation emailed on 11 October 2021 stating that *"having reviewed the records, [the Applicant] was the suspect of a number of other sexual offences at the time, but that there was insufficient evidence to charge these cases due to issues with identification. All the offences were similar in their nature and in a similar location and hence why [the Applicant] was the suspect in them"*.
34. The additional charges were that he indecently assaulted a 12 year old girl on 12 February 2000; indecently assaulted another 12 year old girl on 13 April 2000; unlawfully took and carried the 12 year old away on 13 April 2000; unlawfully took and carried away a named female on 29 April 2000; attempted to rape a 7 year old girl on 29 April 2000; and attempted to rape an 18 year old woman on 5 May 2000. All these offences were alleged to have occurred in the same small town. The CPS Reports describe all the offences as having strong similarities.
35. At the hearing, the Applicant was questioned about the circumstances of the additional offences and denied them all. He drew attention to the fact that there had been no formal identification by victims or witnesses; explained that at some time he had dyed his hair blonde whereas virtually all the witnesses described a brown haired man; pointed out that the clothing described was generic rather than personal to him; and explained that he was near to 6 foot in height whereas most of the witnesses described someone under 6 foot.
36. The Applicant accepted that hostility and violence were involved in the commission of the index offence. He also told the Panel that during part of the time between February and June 2000, being the period during which the additional offences occurred, he was in a heightened state of dysregulation and was spending time in the town in question, hiding and masturbating and looking for potential victims.



37. The COM confirmed that the author of the post-sentence report dated 27 November 2001 was a probation officer based at the police station in the same town at the time of the index and additional offences. That probation officer stated in his report that "*It is highly significant that no further offences of this type occurred once [the Applicant] had been taken into custody*". The Panel heard evidence that the town in question is a small and close-knit community.
38. The Panel took the view that "*the likelihood of two offenders with a similar proclivity stalking young children within the parameters of a small market town over the same period was extremely low*". It concluded on balance of probabilities that it was likely there was one perpetrator.
39. The Panel went on to conclude on balance of probabilities that the Applicant was the perpetrator of offences numbered 1-5. However, it decided that, although the Applicant had committed the offence of rape against a similarly aged victim in 1994, it could not satisfy itself to the required standard, namely the balance of probabilities, that he had attempted to rape the 18 year old female on 5 May 2000.
40. The Applicant submits that these two conclusions are inconsistent and therefore irrational. I do not agree. The Panel has simply applied the correct test in respect of each allegation and has done so in a logical and rational manner. It has demonstrably weighed up all the relevant facts. There was clearly sufficient evidence of similarity in modus operandi and location, his admitted state of mind and behaviour at the time, and the cessation of similar offending once he was in custody, for the Panel to reach the decision which it did. The Panel clearly applied its thinking in a cautious manner without simply relying on assumption. The common features about the five offences found to have been committed include the fact that the victims were all female children under the age of 14, as was the victim of the index offence. The fact that the Panel found the sixth offence not proved to the required standard does not rule out the possibility that the Applicant was responsible for it.
41. In reaching the conclusion that it was not satisfied, on balance of probabilities, in the light of the evidence before it, that the Applicant had committed the sixth offence, the Panel did not thereby rule out the possibility that it was him. It was not the same as concluding that he did not do it. The decision that he was responsible for the other five offences, all of which had common features, is not inconsistent and cannot be said to be irrational.
42. The Applicant's compliance and excellent conduct, as a Class B prisoner holding enhanced status under the Incentives and Earned Privileges Scheme was not in dispute. Nor was the fact that he had completed a great deal of work to address his offending behaviour and had spent a considerable amount of time consolidating that work, including within a regime designed and supported by psychologists to help people recognise and deal with their problems.
43. The decision letter provides a detailed analysis of the Applicant's offending behaviour, a review of his risk factors and an assessment of current risk after consideration of the material available to the Panel by way of reports and in oral evidence at the Hearing. The Panel expressly had regard to the opinions expressed by the professional witnesses, but it was entitled as an independent judicial body to reach its own conclusions. These



were set out in the decision letter as follows: *"...the panel's conclusion in relation to the additional offences is highly significantyou have embarked on the behavioural work over the past few years without at any time accepting that your offending was not a single incident occurring out of an upset with a publican but a gravely serious series of offences indicating that, in the words of the sentencing judge, 'you have a warped and perverted mind...'*"

44. Denial is not in itself a bar to reducing risk but the extent of the Applicant's serious sexual offending and his refusal to accept it limits the extent and value of his insight which is an important factor. The Panel concluded that, until he was able to embark upon work which would include acceptance of serial offending against young children, his risk would remain impossible to measure. It concluded that despite the robust risk management plan proposed and the confidence of the POM and COM the Applicant's risk remained too high for him to be safely managed in the community.

Decision

45. The Panel clearly took into account the written representations by the Applicant's Solicitors. The Panel expressly acknowledged the progress made by the Applicant and the evidence of positive change. It further acknowledged that the risk management plan was robust. However, taking into account the circumstances not only of the index offence but also those of the additional offences which it concluded he had committed, it was entitled to reach the conclusion that he does not yet have sufficient internal controls for safe management in the community.

46. In my judgment, there was sufficient evidence for the Panel to properly conclude on balance of probabilities that the Applicant had committed the five additional offences referred to.

47. Applying the test as set out in case law, and on the basis of the evidence before it, I do not find that the Panel's decision was irrational. A panel is not bound to follow the recommendation of professional witnesses. It adopted a careful approach to the issue of risk and reached its own decision on a rational basis. It is clear from the Decision Letter that it made an objective assessment of risk and applied the correct legal test in a fair and objective manner.

48. The Application for Reconsideration is accordingly refused.

HH Judge Graham White
7 December 2021

