

[2022] PBRA 100

Application for Reconsideration by Day

Application

1. This is an application by Day (the Applicant) for reconsideration of a decision of an oral hearing dated 12 July 2022 not to direct 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.
3. I have considered the application on the papers. These are
 - The Decision Letter;
 - The Reconsideration Representations submitted by the Applicant's solicitor and dated 15 July 2022; and
 - The dossier, which now contains 414 numbered pages, ending with the Decision Letter.

Background

4. The Applicant is now 39 years old. When he was 33, in 2016, he was sentenced to an extended sentence of imprisonment of 8 years, consisting of a custodial period of 4 years and an extension period of 4 years, for offences of making and distributing indecent photographs or pseudo-photographs of children. He was in breach of a Sexual Harm Prevention Order.
5. He had received a community order in 2011 and a short sentence of imprisonment in 2013 for similar offences.
6. On 15 September 2020 he was released on licence. He was recalled on 17 December 2020. His licence conditions included polygraph testing. Before his first polygraph test he disclosed to the tester having used his phone to make contact with men on dating apps and discuss with them sexual fantasies about abusing children. He admitted to masturbating to thoughts about abusing girls aged 11 or 12. He had another internet-enabled phone in breach of his licence conditions.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



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Request for Reconsideration

7. The application for reconsideration is dated 15 July 2022.
8. The grounds for seeking a reconsideration are as follows:
 - (1) Irrationality – failure to follow witness evidence.
 - (2) Irrationality – there is no purpose to his continued incarceration. He has completed all relevant offender behaviour work.
 - (3) Irrationality – *"There is no explanation provided within the decision as to how, or why, even if [the Applicant] did reoffend again in a similar fashion by viewing indecent images, why this would pose more than a minimal risk of serious harm to the public, given that it is not a contact offence."*
9. I will deal at once, and summarily, with Grounds (2) and (3).
10. As to Ground (2). The question for the Parole Board is always and only whether the Board is satisfied that it is no longer necessary for the protection of the public that a prisoner should be confined. Whether there is or is not further work a prisoner can do, whether there is purpose to his continued incarceration, is irrelevant to the test for release the Parole Board must apply. Ground (2) does not, therefore, raise any issue of irrationality and I will say no more about it.
11. As to Ground (3). It is somewhat concerning to find solicitors suggesting that viewing and distributing indecent images of children poses no more than a minimal risk of serious harm to the public. Both parliament, in making an extended sentence available for such offending, and the sentencing judge, in passing such a sentence, recognise that every such photograph shows a child being abused, often horrifically so, and that offences of this type, by encouraging and rewarding the taking of such photographs, are perfectly capable of posing more than a minimal risk of serious harm to the public. The suggestion that only contact offences pose a risk of serious harm to the public is unsustainable. Ground (3) is without merit. I will say no more about it.

Current parole review

12. The Secretary of State referred the Applicant's case to the Parole Board for consideration of release. The hearing was due to take place by telephone link on 12 October 2021, but was adjourned to enable the Applicant to transfer to a prison where he could complete a programme for sex offenders. The hearing took place on 12 July 2022 by video link.
13. At the adjourned hearing the Applicant was represented. He gave evidence, as did his Community Offender Manager (COM), his Prison Offender Manager (POM) and the prison psychologist.



The Relevant Law

14. The panel correctly sets out in its decision letter dated 12 July 2022 the test for release.
15. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

Parole Board Rules 2019 (as amended)

16. Under Rule 28(1) of the *Parole Board Rules 2019* the only types of decisions which are eligible for reconsideration are those concerning whether 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)).
17. 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)).
18. There is no suggestion in this case of the Parole Board's decision being tainted by illegality. Nor is there any suggestion of procedural unfairness.

Irrationality

19. 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."

20. 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.
21. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.



22. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"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 respect 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."*

The reply on behalf of the Secretary of State

23. The Secretary of State has notified the Parole Board that he does not wish to make any representations in this case.

Discussion

24. The remaining Ground, Ground (1), is a complaint that the panel did not accept the recommendation of the COM and the forensic psychologist for release.

25. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

26. The panel pointed out that the Applicant had completed a programme for sex offenders before his release, in the course of which he acknowledged that in the community he would seek help and support if he could not manage his sexual fantasies. He did not seek such help and support, instead he sought out men with whom to share his fantasies on the internet.

27. The panel further pointed out that the Applicant's behaviour has escalated over time from viewing indecent images to discussing abusing children with others. *"Although he maintains he would not commit a contact offence, and there is no evidence that he has done so, the panel was not confident that that would remain the case, given the strength of his sexual interests."*

28. This was a conclusion open to the panel. The panel noted that the Applicant had, within a short time of being released on licence, despite all the risk reduction work he had completed, and the anti-libidinal medication he was taking, disclosed behaviour which indicated an ongoing sexual interest in children. He disclosed this behaviour, the panel concluded, reasonably on the evidence, because he thought it would be brought to light by the polygraph test he was about to take, not, as he claimed, because he thought it was the right thing to do. There is therefore a history of him engaging in offending and risky behaviour despite having addressed his risks and despite being subject to external controls. He has previously admitted that he



has not been able to stop himself viewing indecent images. The panel was not confident that he could resist his strong sexual interest in children when in the community. There was, the panel thought, a high risk of the Applicant engaging in offence-paralleling behaviour during the period he would otherwise be in prison.

29. There is a risk, said the panel, that if he feels down, bored, anxious or isolated he will resort to old patterns of behaviour, as he has done in the past. The risks include contacting other men online with similar interests, engaging in sexualised discussions about children, viewing indecent images directly, and a risk that he might act out his fantasies and commit a contact offence, though since he has not done so before that scenario might be less likely.

30. The panel was not confident that the Applicant would manage his risks if he were in the community, especially given how soon he engaged in risky behaviour after his release on licence.

31. All of these were conclusions to which the panel was entitled to come. It did so after carefully weighing the evidence, and its conclusion, that the Applicant did not fulfil the test for release, cannot be stigmatised as irrational.

Decision

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

Patrick Thomas QC
5 August 2022

