

[2022] PBRA 138

## Application for Reconsideration by the of Secretary State in the case of Buxton

### Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of an oral hearing panel (OHP) made on the 8 August 2022 to direct the release of Buxton (the Respondent).
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 dossier, the OHP decision, the representations of the Secretary of State and the representations of the Respondent.

### Background

4. On 29 February 2016 the Respondent was sentenced in relation to two offences of entering property with intent to commit a sexual offence. He was also convicted of one offence of sexual assault. The Respondent entered the homes of two women in the early hours of the morning. In one case the woman occupier, who was asleep, woke up, and found the Respondent standing over her. The Respondent made an excuse about his presence there and left. In the second case the Respondent got onto the bed of the victim, lifted the duvet, and sexually assaulted the female victim by running his finger down from her buttocks to her knee. The victim woke at this point and called for help.
5. The Respondent was sentenced to an extended period of imprisonment. The custodial element of the sentence was eight years, the extension period was two years. The Respondent became eligible for parole in December 2020.
6. The Respondent was 33 years old at the time of the oral hearing. He was 26 years old at the time of sentence.

### Request for Reconsideration

7. The application for reconsideration is dated 9 September 2022.
8. The grounds for seeking a reconsideration are set out below. The discussion and decision are also set out below.



## Current parole review

9. The Respondent's case was referred to the Parole Board by the Secretary of State on 11 February 2020. The Secretary of State requested the Parole Board to consider whether it would be appropriate to direct the release of the Respondent.
10. The reference was considered by two independent Parole Board members and one psychology member at an oral hearing. The panel received evidence from the Prison Offender Manager, the Community Offender Manager, and a prison psychologist. The Respondent was legally represented at the hearing.

## The Relevant Law

11. The panel correctly sets out in its decision letter the test for release.

### *Parole Board Rules 2019*

12. Pursuant to 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. When made by an oral hearing panel, after an oral hearing, the decision is eligible for reconsideration (Rule 25(1)).

### *Irrationality*

13. 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."*

14. 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.
15. 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*

16. 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.

17. 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.
18. The overriding objective is to ensure that the Applicant's case was dealt with justly.
19. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).
20. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties. Procedural unfairness is not argued in this case.
21. 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."*

### **Failure to give sufficient reasons**

22. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same. The reason for requiring adequate reasons had been explained in a number of decisions including:
- R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**  
**R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**  
**R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**  
**R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**
23. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In Wells Mr



Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

### **The reply on behalf of the Respondent**

24. The Respondent made representations in this case. I considered those representations. They were contained in a detailed letter sent by the Respondent. The Respondent's representations are reflected in the discussion below.

### **Discussion**

25. I have set out below a summary of the Grounds of appeal by the Applicant together with a discussion and response to the grounds.

#### **Ground 1 – Too much weight was placed by the OHP on the availability of supported accommodation.**

26. In this case, the accommodation element of the risk management plan, proposed that, if release were directed, the Respondent would be required to reside in Approved Premises. Thereafter it was proposed by his Community Offender Manager that he should live in supported accommodation. The Community Offender Manager had told the panel that supported accommodation would be appropriate as it would provide a degree of support and monitoring and the proposed accommodation was near to the Respondent's home area.

27. The argument adduced by the Applicant is that the OHP placed too much weight upon the availability of this supported accommodation. The argument was that the accommodation provider would require assessment and therefore that the accommodation had not been secured and confirmed at the time of the hearing.

28. The OHP had indicated, in their decision, that supported accommodation would reinforce the risk management plan as it would include elements of control and monitoring for a sustained period.

### **Discussion**

29. Parole Board panels are clearly obliged to consider, with care, the accommodation arrangements for those leaving prison. The panel were also obliged to consider the Respondent's risk in the long-term future. However, it is well established that supported accommodation providers routinely require an assessment before making offers of accommodation. It is also a reality that accommodation providers have limited accommodation and can make firm offers only once places become available, rarely will accommodation providers offer an open place for some months in the future.

30. In this case the panel had appropriately considered the type of accommodation proposed by the Community Offender Manager. The Community Offender Manager had also identified a potential provider. That provider had not guaranteed a place for the Respondent however, the panel had appropriately taken account of the proposed plans by the probation service as far as future accommodation was concerned.



31. I am not therefore persuaded that a guaranteed future accommodation place, some months after residing in a probation hostel, would have been a reasonable expectation. The panel correctly relied upon the evidence from the Respondent's probation officer that the probation service would find appropriate supported accommodation, hopefully it would have been the accommodation which had been named and identified. The panel were also reinforced by the fact that the Respondent would be residing in a probation hostel prior to admission to any supported accommodation. The probation service itself therefore was in a position to manage any delay by retaining the probation hostel place until the accommodation was available.

32. I am not, therefore, persuaded that the decision by the panel to accept the proposed plan by the probation officer to secure supported accommodation for the Respondent after his residence in the probation hostel was irrational in the meaning set out above.

**Ground 2 - It was irrational for the panel to conclude that there was no core risk reduction work remaining as report writers highlighted that core risk reduction work was outstanding.**

33. The Applicant submits that the oral hearing panel failed to explain why it rejected the evidence of the reporting psychologist and the Community Offender Manager (COM) indicating that further core risk reduction work was required to be undertaken by the Respondent before release.

## **Discussion**

34. The role of the OHP was not to make an assessment as to whether more or less behavioural and intervention work was required. The role of the panel was to make an assessment of risk, based upon the evidence within the dossier and from those witnesses who gave evidence at the hearing. The test being the statutory test as set out in the panel's decision.

35. Clearly behavioural and intervention work is a matter to be considered by a panel. The importance of that work is whether it has addressed the perceived risk to the public, as assessed by the panel. Risk assessments will rely upon a number of factors in addition to behavioural work. Factors such as insight into offending, prison behaviour, future plans and attitudes of the prisoner (in particular openness and honesty), licence conditions, the identification of warning signs and the likelihood of compliance will be considered.

36. In this case the fundamental issue to be addressed was associated directly with the index offence convictions. The convictions related to entering into property as a trespasser with intent to commit a sexual offence. Clearly the primary risk in this case related to the Respondent's potential for committing sexual offences after entering property. The Respondent also had a previous sexual conviction and there were concerns about the use of online sexual material.

37. The risk of serious harm to the public posed by the Respondent was assessed by the probation officer as high. The panel accepted this (risk of serious harm) assessment as being appropriate.



38. The panel also noted that the risk assessments by the Respondent's probation officer rated the Respondent as having a very high risk of contact sexual reoffending. The panel appeared to take the view that the risk of contact sexual offending would be better set at high, rather than very high. The panel indicated, in their decision, that they concluded that the risk was less than that assessed by the professionals because of the Respondent's presentation to the panel at the hearing and what was described as "*the panel's exploration of risk factors with witnesses*". This reassessment by the panel, of the risk level, was inadequately explained, particularly as the witnesses appear to have maintained their view that the risk levels, in their view, were as recorded in the dossier. The panel, in my determination, failed to explain why the Respondent's presentation at the hearing led them to conclude that this crucial risk score, relating to contact sexual offending, should be reduced.
39. As indicated, fundamental to the panel's decision was the basis upon which the panel concluded that the Respondent's risk met the test for release. The panel listed a number of positive factors.
40. The first was that the panel assessed that the Respondent's behaviour and insight had improved. However, an important qualification to this comment was that the professional witnesses, despite an improvement in behaviour and insight, had all taken the view that the Respondent's risk could not be managed in the community.
41. The second positive factor was said to be the comments in a post programme report. The report analysed the outcome of the intervention undertaken by the Respondent.
42. An analysis of the post programme report indicates that the Applicant had set himself four goals at the outset of the programme. These were; to learn to deal with problems better; to learn new ways to be positive about himself; to manage mental health better; and to put effort into completing the program.
43. There appeared to be no reference, within the goals set by the Respondent, to address the fundamental issues raised in the index offences, namely the entry into property with intent to commit sexual offences and in particular the triggers and motivations for the offending.
44. In the post programme discussion, which was noted on the dossier, the only reference to offending behaviour related to the Respondent's use of pornography. The panel, however, concluded that the Respondent had shown some evidence of learning from the programme and strategies to manage risk. The panel failed to explain how it could be that the Respondent had acquired strategies to manage his risk, in circumstances where the programme that he had undertaken made no reference whatsoever to his fundamental risk of entering premises with a view to committing sexual offences.
45. The panel's additional bases for reaching the conclusion that the Respondent's risk could be managed safely, was recorded as being; because there was an absence of recent self-harming behaviour; that the Respondent had acquired problem-solving skills from his programme work and; that medication had stabilised his mental health.
46. Again, the difficulty with these findings was that they omitted to explain how they were said to address the risk which was illustrated by the index offences. There was no



evidence, addressed by the panel, that the index offences had occurred because of a need to self-harm or indeed because of unstable mental health. The panel therefore failed to explain why it concluded that these factors led it to the view that the risk of serious harm had reduced sufficiently to manage the Respondent's risk in the community.

47. Additionally, the panel indicated that they recognised, in the Respondent, a limited amount of insight, a limited acceptance of responsibility and a less than full acknowledgement of his risk factors. Having addressed these concerns the panel indicated that it was not "*persuaded that further programme work was essential to address these factors as it was evident that [the Respondent] had benefited from the [behavioural] programme in acquiring skills to address the triggers to his offending*".
48. As indicated above the post programme report relating to the behavioural programme, undertaken by the Respondent, made no reference to the fundamental risk in this case which was the potential to commit sexual offences after entering properties as a trespasser. The reality in this case was that the triggers leading to the Respondent's offending were unknown and unidentified. The Respondent had made it quite clear that he rejected the convictions. The Respondent's position was that his offences were related to burglary alone. He accepted, when discussing the matter with a psychologist, that the extent of any misbehaviour of a sexual nature was that he had lifted the covers of the bed occupied by a female victim. His motivation, upon his own explanation, was "*I was being a pervert trying to look at her*". In reality therefore the Respondent's position was that, on one occasion, during a burglary, he impulsively lifted a bed cover. The Respondent therefore maintained his denial of the conclusion of the jury in his case, namely that his entry into the two premises was with sexual intent. He also denied one important aspect of the victim's evidence, namely that he had sexually touched the victim while she was in bed.
49. The panel therefore failed to explain how they concluded that the Respondent, by undertaking the behavioural course, could have acquired skills to address the triggers to his offending. The Respondent was entitled to deny the offences, however in denying the fundamental detail of the convictions, the Respondent clearly did not accept that his offending was triggered by sexual motivation. The panel failed to explain how they concluded that the Respondent had acquired skills to address the triggers to his offending, in circumstances where he denied that his offences involved any sexual element.
50. The Applicant's submissions on this ground are that the panel failed to accept that further core risk reduction work was required. As indicated above, the role of a Parole Board panel is not to make assessments about required work.
51. However, also as set out above, I have concluded that the panel were irrational in asserting that there was evidence that the Respondent's risk could be safely managed in accordance with the statutory test. The panel relied upon the Respondent's completion of a behavioural programme in which the Respondent had not addressed the fundamental risk posed by him.

52. The panel also relied upon self-harm (and its absence) in circumstances where there was no evidence that the Respondent's risk of serious harm or his offending was directly associated with self-harm.
53. The panel also relied upon residence in a probation hostel and upon the positive effect of supported accommodation after residence in the probation hostel. Again the panel failed to explain why it had concluded that stability of accommodation addressed the fundamental issue in this case, namely the risk of sexual offending by way of entering properties as a trespasser.
54. I have considered the response by the Respondent in this case. The Respondent indicates that he was assessed for a more intensive programme but had been told that he was not suitable for that more intensive programme. Accordingly, he completed the behavioural programme mentioned in this application. He also indicates that he had been told that after completing the behavioural programme he would not be required to undertake any further work in programmes. The Respondent further complains that he should have been offered more intensive programme work at an earlier stage of his sentence. The Respondent also argues that there is an unfairness in the assessment process in that he was assessed as unsuitable for the more intensive programme and therefore could not have been expected to complete it.
55. The Respondent also indicates that, although a psychologist assessed him, and recommended further intervention work, the psychologist had spent most of her assessment period discussing a neuro diversity issue with him.
56. I have considered the representations. I am sympathetic to the fact that the system of recommending behavioural work within prison can be complex. However as I have indicated in this decision. The question to be addressed by the OHP related to the Respondent's risk, rather than issues as to whether he had been appropriately offered risk reduction programmes.
57. The Respondent also indicated that, as the period of time before he was automatically released was relatively short, it would be more sensible for the OHP to release him to allow him to do further behavioural work in the community.
58. As indicated, I have considered these representations by the Respondent. As indicated earlier in this decision, the issue for the OHP related solely to the question of whether the Respondent's risk could be safely managed in the community on release and required the application of the statutory test.

**Ground 3 - The panel relied too heavily upon external controls**

59. The Applicant argues that the OHP wrongly relied upon the fact that the risk management plan, with its elements of monitoring and support for a sustained period (beyond that normally available) would be sufficient to manage the respondent's risk. The inference being, that these elements would be factors in addressing and reducing risk.

**Discussion**





60. As indicated above I determine that the panel failed to adequately explain how the external elements of the risk management plan would address the fundamental risk in this case. The point raised in ground 3 mirrors that in ground 2 namely that the panel failed to adequately explain how it concluded that the statutory test was met. My decision in relation to ground 3 is reflected within the comments in Ground 2.

61. Accordingly, my overall conclusion in this case is that the OHP failed to give adequate and evidence based reasons as to why it concluded that the Respondent's risk could be safely managed in the community, and accordingly why the statutory test was met. This was a case where professionals were arguing that the Respondent's risk could not be safely managed in the community. The OHP were not obliged to follow the views or recommendations of the professionals, however as set out in the decisions above, the duty to give clear reasons is heightened in circumstances where the OHP is rejecting the recommendations or views of professionals.

## **Decision**

62. Accordingly, whilst I do not find there to have been a procedural irregularity, I do consider, applying the test as defined in case law, that the decision to direct release was irrational in the sense set out above. 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.

**HH S Dawson**  
**10 October 2022**

