

[2023] PBRA 180

Application for Reconsideration by Halliday

Application

1. This is an application by Halliday (the Applicant) for reconsideration of a decision of a panel of the Parole Board following an oral hearing 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, undated but received by the Applicant's representative on 15 September 2023;
 - The reconsideration request, drafted by solicitors on behalf of the Applicant and dated 29 September 2023; and
 - The dossier, which currently runs to 503 numbered pages, ending with the decision letter.

Background

4. The Applicant is now 35 years old. In 2012, when he was 24, he received an indeterminate sentence of imprisonment for public protection for sexual offences against a child and breaches of a sexual offending prevention order. The minimum term ('tariff') for the indeterminate sentence expired in June 2014.
5. Before this, when the Applicant was 22, he received a community order, with a mental health treatment condition, for offences of sexual activity with a female child. He was also sentenced for possession of indecent photographs of children.
6. At the time of his sentence in 2012 he disclosed that he was sexually attracted to girls from the age of 12, and he had fantasies about female children. He manipulated his victim by pretending to be a girl on the internet to encourage her to trust him. The sentencing judge described him as determined, dangerous and posing a significant risk of harm to other young girls.
7. The Applicant married in 2005. They divorced in 2008, but remained living together so that he could be the carer she needed, and they subsequently remarried. During his current sentence the Applicant formed a relationship by



letter with a woman who had a daughter, and then with the daughter herself when she reached the age of 18.

8. He has a diagnosis of personality disorder. In 2018 a psychologist instructed on the Applicant's behalf concluded that his presentation was consistent with Autistic Spectrum Disorder.
9. The Applicant went to open conditions in 2017 but returned to closed before a parole hearing in 2019. The panel then recommended that he transfer back to open conditions. He did so in June 2020. Work there focused on his emotional instability and his relationships.
10. The Applicant undertook overnight resettlement leaves (RORs), without any concerns, save that he was expressing a level of boredom in the hostel and town where he stayed. In February 2022 a Parole Board panel recommended that he remain in open conditions. He was briefly returned to closed to allow him to be monitored following the panel's refusal to direct release, but then went back to open prison. He stayed there for 6 weeks, before transferring back to closed conditions. He moved to his current (closed) prison in September 2022. There he has been an asset to staff.

Request for Reconsideration

11. The application for reconsideration is dated 29 September 2023.
12. The grounds for seeking a reconsideration are as follows:
 - (1) The panel failed to give proper weight to the evidence of the witnesses and their recommendations and significantly deviated from the opinion of professional witnesses who had worked and spent time with the Applicant over a significant period. The panel's differences of opinion to all the professional witnesses are irrational.
 - (2) The panel failed to attach sufficient weight to the conclusion that the Applicant's risk was such that he could be managed safely in the community with the proposed robust Risk Management Plan (RMP). The panel have not provided detailed reasons as to why the proposed RMP could not manage the Applicant's risks in the community. Both the Prison Offender Manager (POM) and the Community Offender Manager (COM) were of the opinion that the RMP was as robust as it could get and were confident it could safely manage risk and that any warning signs would be picked up.
 - (3) The panel overemphasised the significance of the Applicant's unknown sexual thoughts. *"We consider that the Professionals involved in [the Applicant's] case have indeed given sufficient weight to this ... The Panel have indicated it needs further 'skilled attention' but make no mention of what this would entail."*
 - (4) The panel raised concerns regarding the Applicant's marriage, saying that *"their continuing commitment as a couple still appear to remain thinly understood"*. The COM has sufficient knowledge of the Applicant's wife.
 - (5) The panel failed to take account of the Applicant's own release plan in respect of how he would occupy his time in the community.



- (6) The panel failed to apply the correct test for release. The decision makes no sense based on the evidence of risk that was considered and that no other rational panel could come to the same conclusion.

13. The issue raised is therefore irrationality. Insofar as Ground (6) might be understood to raise an issue of law, the way in which it is expressed (without, for example, stating what wrong test for release the panel applied), leads me to think that it is in reality a mere summary of the Applicant's position on irrationality.

Current parole review

14. This was the fifth review of the Applicant's case, arising from a referral by the Secretary of State (the Respondent) in July 2022. The Respondent requested the Parole Board to consider release or alternatively a recommendation for open conditions. The Applicant requested release. The panel declined to direct release but did make a recommendation for open conditions. The panel said that it gave primary attention to developments since the oral hearing panel's decision in 2022.

15. The oral hearing took place remotely on 11 September 2023. The panel consisted of two independent members and one psychologist member of the Parole Board. The panel heard evidence from the Applicant, from a psychologist instructed on his behalf, and from the POM and the COM. His legal representative was able to ask questions of all the witnesses and make closing submissions. The Respondent was not represented and expressed no views to the panel. The panel had read a dossier running to 478 pages, to which were added after the hearing a proposed exclusion zone map and some adapted licence conditions.

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 Respondent for a progressive move to open conditions.

17. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

18. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

19. 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. This decision, in respect of an indeterminate sentence, is eligible for reconsideration.

20. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

21. 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."

22. 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.

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

24. 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. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."*

25. 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 Respondent

26. The Respondent has indicated that he does not seek to make any representations in this case.

Discussion

27. The grounds advanced indicate that the Applicant's representatives, and no doubt the Applicant himself, disagree with the panel's decision not to grant release.

28. The basis on which they do is much less clear. Disagreement with the conclusions reached by the panel is not sufficient to found irrationality.

29. 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.

30. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **Wells** above.

31. There is no complaint that the panel took into account irrelevant evidence or failed to take into account relevant evidence. The weight to be attached to the evidence is a matter for the panel. The reality of the Applicant's complaint can only be that the panel did not adequately explain its reasons.

32. The panel's conclusion is set out and explained very clearly in section 4 of the decision letter. Entirely properly, it started from the sustained and persistent efforts the Applicant deployed in pursuit of under-age girls, and his use of manipulation, deceit and non-compliance in his offending. The panel found him to be heavily sexually preoccupied at the time of his offending. There was an ample evidential basis for that conclusion. He offended in the context of his continuing marriage. During his sentence he formed a connection with a vulnerable young woman. The panel did not accept his account of the dynamics of that relationship: there was a proper evidential basis for so doing, which the panel expressed. The panel's conclusion that the risk the Applicant poses cannot be reliably considered manageable was one available to it on the evidence and was fully explained.

33. The panel, like a previous panel, found the Applicant's claim to be experiencing no sexual thought or interest whatever to be highly implausible, in the light of his previous very high level of sexual preoccupation. It is not for the Parole Board to plan sentences: the comment that this aspect of the case merits further skilled attention is proper and justified. The panel was entitled to doubt whether the level of support promised would in fact be realised after release. The finding that under-fulfilment and lack of meaningful activity and connection could heighten the risk of



him grooming further victims is justified on the totality of the evidence, notwithstanding the Applicant's assertions.

34. Overall, it cannot be said that the panel's decision not to direct the release of the Applicant is irrational. The panel considered all relevant matters and explained how its conclusions followed from the evidence.

Decision

35. 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
17 October 2023