

[2023] PBRA 72

## Application for Reconsideration by Davies

### Application

1. This is an application by Davies (the Applicant) for reconsideration of a decision, dated 20 March 2023, of a three member Panel of the Parole Board refusing to direct his release. The Panel, which included a Psychologist Member, had further declined to recommend that the Applicant be transferred to open conditions.
2. The review was conducted by video conference on 13 March 2023. Evidence at the hearing was given by the Applicant himself, the Prison Offender Manager (POM), Community Offender Managers (COM) and a Prison Psychologist (C).
3. I have considered this application on the papers. These comprise of the dossier (707 pages), the decision of the Panel and the application for reconsideration.
4. 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.

### Background

5. On 20 April 2007, the Applicant, at the age of 26, received an indeterminate sentence of imprisonment for the protection of the public, with a tariff of 5 years, having been convicted by a jury, after a not guilty plea, to an offence of anal rape on a 16-year-old girl, an offence described by the Sentencing Judge, as "*extremely grave*." The offence was the culmination of an earlier meeting, exchange of texts and an evening drinking in a local Club before going to his flat for consensual intercourse. After this had taken place, the Applicant had become violent and imposed anal sex upon a resistant victim inflicting extremely serious, bloody, injuries. The Applicant was a man of substantial build and his victim described as "*petite*."
6. At the time of the index offences, the Applicant had only a limited criminal record consisting of aggravated vehicle theft and breach of a Community Order.
7. The Applicant was said to have had a history of preoccupation with sex and, in particular, to have become interested, through pornography, in anal sex, to which he was attracted as a means of feeling in control, powerful and of worth.



8. In general terms, the Applicant's custodial behaviour was good and, by 2012, he had completed all core risk related work including P-ASRO (2009), TSP (2010) and SOPT (2012). In December 2012, a Parole Board Panel considered his risks to have been reduced sufficiently for it to recommend a transfer to open conditions. The transfer took place in 2012 but the Applicant was returned to closed conditions in September 2013 after the discovery of a SIM card which he was alleged to have tried to conceal by throwing it into dense undergrowth. During his time in open conditions, the Applicant entered into a relationship which he disclosed. In May 2014, a further Panel recommended a return to open conditions where he remained from August 2014 until December 2015. During this time, he was thought to progress well and undertook individual 1:1 work with a psychologist, aimed at reducing core risk factors, particularly in relation to the violence in the index offence, acceptance of responsibility and understanding of victim perspective. In November 2015, the Applicant was granted a ROTL, subject to strict conditions, to attend a family gathering. He claimed that, during that gathering, a female (KW) with whom he had been in communication for over 12 months but, he claimed, he had never previously met in person, happened by chance to be at the same restaurant. Sexual relations took place. Subsequent enquiries, however, revealed that they had met previously and, according to KW, planned to live together. The Applicant was returned to closed conditions and evidence at a further Parole Board hearing in 2017 confirmed that the Applicant's version had been untrue, leading to a conclusion that, since Christmas 2014, any contact had been either through his brother or by means of a phone not known to the prison. The 2017 Panel, concerned at the lapse of time since the Applicant undertook accredited programmes, suggested retaking of TSP or beginning Horizon or Kaizen alongside consideration of a PIPE Unit or TC. It directed the Applicant remain in closed conditions.
9. The final, earlier, Parole Board review was concluded on 21 February 2020 when, again, no progress was recommended, the Panel being concerned that the Applicant's risk of sexual reoffending remained high and as to his ability to be honest and open with professionals.

### **Request for Reconsideration**

10. The application for reconsideration, dated 10 April 2023, comprises a 4-page document submitted by the Applicant's Legal Representative. It seeks reconsideration solely on the grounds that the decision is irrational.
11. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge of irrationality, procedural unfairness or error of law. The application seeks reconsideration only on the ground that the decision was irrational. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issue of irrationality are dealt with below.
12. The Application submits irrationality on two grounds:
- i) An irrational finding that the Applicant remained sexually preoccupied with violent anal sex.



The Applicant submitted:

- ) There was no evidence of such preoccupation since his return to closed conditions in 2015 nor of general violence towards staff or fellow prisoners. He had completed and submitted Sexual Thoughts diaries and the fact that the Panel itself did not seek to view the diaries themselves demonstrated lack of concerns as to their contents.
  - ) He had completed 1:1 psychology work.
  - ) That, whilst acknowledging breach of rules in "*alleged non-reporting of a relationship*", his return to closed conditions in 2015 did not involve offence paralleling behaviour and although "*ill advised*" did not "*play to*" his risk of serious harm.
  - ) That during the considerable lapse of time since return to closed conditions, he had demonstrated excellent behaviour and controlled emotional management. There had been no demonstration of any behaviour which could be linked to a sex offence risk factor.
- ii) That the Panel became "*irrationally fixated on the assessed need to complete a PIPE or the HSP programme*".
- ) In being twice recommended for open conditions, Panels were satisfied that no core risk reduction was needed in Category D and that there was no evidence to suggest his risk factors had become active as to require an extensive period in a PIPE environment or needed HSP in closed conditions.
  - ) HSP was "*neither necessary or proportionate*" to assessment and management of his risk of serious harm and that it was "*completely rational*" for him to be unwilling to volunteer for an HSP assessment bearing in mind extensive waiting lists and the need to transfer prisons for both HSP and for a PIPE unit – all of which would involve an extensive period of further detention in closed conditions.
  - ) It was irrational to conclude that he needed to complete core risk reduction work at this stage of his sentence, he had not been assessed for suitability for HSP and the course was voluntary providing no additional benefit over and above the 1:1 psychology work completed on return to closed conditions in 2015.
  - ) He would be willing to undertake Horizon in the community notwithstanding, he claimed, that within prison he had been assessed as too low a risk and unsuitable.

13. In support of both grounds of appeal, the application prayed in aid reports from and evidence given, previously, by Mr M a Chartered Forensic Psychologist of many years' experience in treating and reporting on sex offenders. Mr M had submitted a number of independent reports on the Applicant over 2015, 2016, 2018 and 2019 and given evidence to Panels in 2017 and 2020. Mr M had consistently recommended that the Applicant should be released.



## Response from the Secretary of State (the Respondent)

14. The Respondent, by e-mail dated 13 April 2023, indicated that they had no representations to make in response to the reconsideration application.

### Current parole review

15. The Panel considered a dossier of 687 pages and in a comprehensive 12-page decision, detailed the index offences and the factual and psychological background to the Applicant's behaviour, his progress prior to transfers to open conditions, the circumstances of the recalls to closed conditions and details of his custodial behaviour since return to custody. It listed a substantial number of risk factors including not merely preoccupation with sexually related matters but his failures to be open and honest, his circumvention of external controls and supervision and a minimisation of his offending behaviour. It gave him credit for a positive work ethic, his commendable prison attitude and approach and his maintaining Enhanced Status. It took into consideration that he had begun, in early 2022, to complete Sexual Thoughts Diaries which were described by the psychologist witness as including appropriate sexual thoughts in daily life, such as when watching TV. It emphasised that the Applicant had protective factors including wide support from family and friends, his work ethic and, apparent, desire to maintain a good working relationship with professionals. Expressing the opinion that risk of violent re-offending was underestimated but accepting that the risks might not be imminent, the Panel judged that it could happen, without warning, were the Applicant to enter a new relationship and fail, as in the past, to disclose it.

16. None of the professional witnesses were supportive of progress. They considered his recall behaviour was offence paralleling particularly in his failure to disclose information about intimate relationship when in Category D which demonstrated an ability to deceive professionals responsible for his management. It was emphasised that, as far back as 2019, the Prison Psychologist had recommended work to enable the Applicant to enter into "*an honest dialogue*" regarding his sexual preoccupation and deviances. The last Panel had, on the evidence of the same psychologist, envisaged further offence focussed work but although he had begun the diaries, the Psychologist's current views as to his needs had not changed. Furthermore, the professional witnesses were also of the opinion that, even if the recommended HSP in custody work were completed, he should, before release, spend a further period in Category D for which, at the current stage, he did not meet the progression requirements.

17. The Applicant had accepted, before the Panel, that he had declined to be assessed for HSP, a decision he attributed to "*legal advice that taking part in the programme was neither proportionate nor necessary to address and reduce his risk*".

18. In agreeing with the advice of the professional witnesses, the Panel emphasised that it had done its "*own independent assessment of risk*". Adopting the required test as to whether it remained necessary for the protection of the public that the Applicant remained confined, it found that the Applicant still needed to remain in custody and, adopting the test promulgated by the SoS,



his risks had not been so reduced as to justify a recommendation for Category D.

## The Relevant Law

19. Rule 28(1) of the Parole Board Rules (*as amended*) provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair, (c) contains an error of law. This is an eligible case. The Application is for review only on the grounds of irrationality.

### *Irrationality*

20. 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."*

21. 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.

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

23. The decision in **R (Calder) v Secretary of State for Justice [2012] EWCA Civ 1050** made clear that the Parole Board had both the power and the duty to consider a recall decision and that:

- i) The Secretary of State is entitled to recall a prisoner if he/she concludes on reasonable grounds that the prisoner has intentionally breached the terms of his/her licence and that the safety of the public would be at risk if the offender remained on licence;
- ii) That the Panel in reviewing the decision to recall must make its decision in the light of all facts available to it, including those not available to the Secretary of State;
- iii) The Panel must then make an assessment of risk to the public on the basis of all the evidence.

24. 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 in **Barclay [2019] PBRA 6**.



25. 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 uncontested 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.

## Discussion

26. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. It is entirely clear that the Panel, having clearly considered, with care, the documents in the dossier, the evidence both written and oral and submissions gave a clear and reasoned decision and adopted correct tests for its decision. When considering a substantial dossier and detailed oral evidence, the duty of the Panel is not to identify, with particularity, each and every aspect of relevant issues but to show that both positive and negative aspects of a prisoner's case have been examined and a fair decision taken in accordance with the test required. This, I find to have been done. Reconsideration is not a rehearing of factual matters with which an Applicant may not agree.

27. In considering some of the specific matters raised by the Applicant:

- ) Whereas it is arguable that the Applicant's decision not to undertake HSP or to seek admission to PIPE might be considered, from his viewpoint, *"irrational"*, that is not the test for the Panel. Every decision has consequences and, in this case, a consequence is that professional opinion, and that of the Panel, is that risk factors have not been reduced.
- ) Although the application quotes opinions from an Independent Psychologist previously instructed by his Legal Representative, his reports are now some time ago and his recommendations were rejected by earlier Panels to whom he gave evidence. The Applicant has not sought to call up-to-date Independent Psychological evidence before this Panel which, itself, contained a Psychologist Member.
- ) The duty of a Panel is to decide a case on the evidence before it, written and oral. It is under no duty to direct production of specific documents unless it finds that specific viewing is necessary. The Applicant, represented by an experienced Legal Representative, did not himself seek to have the diaries produced for consideration.

## Decision

28. For the reasons that have been given, I do not consider that the original Panel's decision was irrational or unfair and accordingly, the application for reconsideration is refused.

**Edward Slinger**  
**19 April 2023**



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