

[2024] PBRA 146

Application for Reconsideration by Bignell

Application

1. This is an application by Bignell (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated 27 June 2024 not to direct his 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the dossier, the panel's Decision dated 27 June 2024 and the application for reconsideration submitted by the Applicant's legal representative in July 2024.

Request for Reconsideration

4. The Applicant submits that the panel's decision to not direct his release is irrational and should be reconsidered. In his view, the decision '*makes no sense based on the evidence of risk that was considered*' and no other panel could have reached the same conclusion.

Background

5. On 17 January 2009, the Applicant received a sentence of imprisonment for public protection following his conviction for a number of sexual offences. Although the Applicant pleaded not guilty at court, he has since accepted responsibility for the repeated and systematic sexual abuse of the victim.
6. At the same court hearing, the Applicant pleaded guilty to five offences of making indecent images on a computer and a breach of a Sexual Offences Prevention Order (SOPO). He received determinate sentences for these offences.
7. The Secretary of State (the Respondent) referred the Applicant's case to the Parole Board in December 2021 for it to decide whether his release could be directed. In the alternative, if the Applicant could not be released, the Parole Board was asked to advise the Respondent on his suitability for a move to an open prison.



8. There was then a delay in the review of the Applicant's case as more evidence was gathered. The oral hearing then took place on 17 June 2024 and the panel heard evidence from the Applicant, his Community Offender Manager (COM), Prison Offender Manager (POM) and a forensic psychologist employed by the prison. The Applicant was legally represented at the oral hearing.
9. During his custodial sentence, the Applicant had completed accredited work on his decision making and his sexual offending. In 2021, he completed a further accredited course on sexual offending. This course was a cognitive behavioural programme undertaken on a 1:1 basis with a therapist. The Applicant engaged well and witnesses at the oral hearing considered that he had completed all necessary core risk reduction work.
10. The psychologist witness recommended that the Applicant be released on licence. As the panel recorded in its Decision, in the psychologist's view he did *'not need a transitional period in open conditions'*. The POM and COM did not support release but did recommend that the Applicant be transferred to an open prison. In their view, there were concerns as to how well the Applicant would cope with direct release after so many years in prison. The POM and COM believed that he first needed *'to demonstrate that he can apply skills learnt in programme work to manage his risks in less restrictive prison conditions and on leaves into the community...'*. The COM *'also expressed concern about [the Applicant's] lack of internal controls and past deceit...'*.
11. The panel noted a number of reports about the Applicant in prison which suggested inappropriate sexualised behaviour. The panel stated that the reliability of the reports were graded as being at a low level but it was mindful of the difference sources of information and determined that it could not ignore them. It concluded, *'on the balance of probabilities, that [the Applicant] had been making sexualised advances towards other prisoners ... some unwelcome, and harassing them to have a relationship with him ...'*.
12. In the panel's view, this behaviour *'suggests a potential ongoing pre-occupation with sex, poor self-control of his sexual desires, and him engaging in underhand behaviour in breach of prison rules. All these are highly relevant to the panel's assessment of the risks he poses and whether he can be safely managed in the community or in open conditions. The panel placed significant weight on it's [sic] finding, given that [the Applicant] committed his index offences whilst on a Community Order and whilst engaging in an offending behaviour programme, and that he will be subject to much less supervision than currently if released into the community or transferred to an open prison. The finding also calls into question his ability to apply skills learnt on the [sexual offending course] in 2021'*.
13. The panel reviewed the release plan that had been produced by the COM and while noting that it was *'wide-ranging and stringent'*, it did not believe that it would be capable of safely managing the Applicant in the community.
14. The panel determined that the Applicant's release should not be directed. The panel raised a number of concerns, including the serious nature of his offending and the background to the index offences. The panel expressed *'concerns about his honesty*



in his evidence at the recent oral hearing. His deceit calls into question how open and honest he will be with professionals managing him in the community ...'.

15. The panel had concerns about how the Applicant would cope with release straight from a closed prison and it believed that there was potential for this to lead to further offending. In its view, there was a need for the Applicant to explore healthy relationships, it noted the lack of support for release from the POM and COM, and it did not direct the Applicant's release.
16. The panel then went on to consider whether the Applicant should progress to open conditions. The panel noted that its concerns about release applied to the potential suitability of the Applicant for a place in an open prison. Although the POM and COM had supported a move to an open prison, the panel found that there were concerns about the Applicant's behaviour in custody. In its view, the Applicant '*needs to demonstrate, over a sustained period, that he can comply with prison rules, not harass other prisoners, and be consistently open and honest with professionals*'. The panel did not recommend that the Applicant be moved to an open prison.

The Relevant Law

17. The panel correctly sets out in its Decision letter dated 27 June 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

18. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
19. 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)).
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. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to



a reconsideration panel when determining an application on the basis of irrationality.

22. In **R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** a Divisional Court applied this test to parole board hearings in these words 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."*
23. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)**, the Judge sets out a more nuanced approach in modern public law which was *"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 regard 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"*. This test was adopted by a Divisional Court in the case of **R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin)**.
24. It must be emphasised that this is not a different test to the **Wednesbury** reasonableness test. The interpretation of and the application of the **Wednesbury** test in parole hearings as explained in **DSD** was binding on the judge in the case of **Wells**.
25. It follows from those principles that in considering an application for reconsideration, the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
26. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Other

27. 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."*
28. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.



The reply on behalf of the Respondent

29. In an email of 22 July 2024, the Respondent confirms that he will not be making any representations.

Discussion

30. The Applicant submits that witnesses at the oral hearing had confirmed that there was no outstanding core risk reduction work for him to complete and that he had engaged in open and honest discussions with them. The COM and POM had recommended that he could be moved to an open prison and the prison psychologist had recommended that he be released. In his view, the evidence demonstrated that he could be released or, *'at the very least'* that a recommendation for his transfer to an open prison should have been made.

31. The Applicant's submissions reiterate much of what the panel had to say in its decision of 27 June 2024. It is submitted that there was no evidence to show that the Applicant has poor insight into his risk factors and that he would be able to continue working with a personality disorder service in the community.

32. Much of the Applicant's arguments focus on why he would be suitable for a move to an open prison, however, the reconsideration application process does not include reviewing a recommendation for open conditions. The only question in terms of reconsideration is whether the decision not to direct his release was irrational.

33. The Applicant submits that the test for release was met in his case and that the panel's decision acted against the recommendations of the professional witnesses at the oral hearing.

34. The Applicant is correct in that the panel disagreed with the recommendations made in his case, however, it was entitled to do so. Importantly, the panel set out why it disagreed and, when reading the entire decision, it is perfectly clear why it disagreed. In my view, there is nothing irrational in the panel's decision, and I do not accept the submission that no other panel could have reached the same conclusion. The Applicant may be unhappy with the decision reached in his case and he may hold an alternative view, but this does not mean that the panel's decision was irrational.

35. It is the panel's responsibility to make its own assessment of the Applicant's risk of serious harm and its manageability on licence in the community. If the panel decide to depart from the recommendations of the professionals, as it did in this case, it must explain its reasons for doing so. On my reading of its decision, I find without hesitation that the panel did just that. Therefore, I find that the panel satisfied its public law duty to provide clearly expressed evidence-based reasons that sufficiently explained and justified the conclusion it had reached to refuse release.

36. In my judgment, this very experienced panel with commendable thoroughness provided a balanced and fair-minded analysis of all of the evidence, information, and material before it. Clearly, the panel was left with real concerns about critically important matters including the Applicant's risk level and his manageability were he to be re-released into the community.



Decision

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

Robert McKeon
07 August 2024