

[2024] PBRA 164

Application for Reconsideration by Hatton

Application

1. This is an application by Hatton (the Applicant) for reconsideration of a decision (the Decision) of a Panel of the Parole Board (the Panel) dated 3 July 2024 not to direct his release. The Decision was made following the review conducted by way of an oral hearing on 25 June 2024.
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 within the prescribed time limit.
3. I have considered the application on the papers. These are: the application with written representations dated 1 August 2024; the Panel's written decision; the case dossier; and the email message by way of response dated 14 August 2024 from the Public Protection Casework Section (PPCS) of HM Prison and Probation Service on behalf of the Secretary of State (the Respondent).

Request for Reconsideration

4. The grounds for seeking a reconsideration are, in summary, as follows:

The decision was irrational in that it took into account a matter that was not relevant to risk, misinterpreted the effect of a discriminatory comment by the Applicant, erred in its analysis of risk related work available to the Applicant prior to release, and misinterpreted fluctuations in his identified emotional management and thinking skills.

Background

5. On 21 May 2020, the Applicant received concurrent extended sentences of imprisonment in respect of one offence of arranging the commission of child sex offence, three offences of possession of indecent images of children, one offence of breaching a Sexual Harm Prevention Order (SHPO) and one offence of failing to comply with Sex Offender Notification Requirements. The sentences comprised a custodial term of 4 years 8 months and an extended licence period of 3 years. At the same time, a new Sexual Harm Prevention Order of indefinite length was



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imposed together with a requirement for the Applicant to be subject indefinitely to statutory requirements as a registered sex offender.

6. The index offences were identified after the police seized the Applicant's mobile phone following on-line communications with a decoy purporting to be a girl under 16. The Applicant's communication with her was described as '*overtly sexual*' and he attempted to make plans for her to perform oral sex on him and for them to have unprotected vaginal sex. Examination of the Applicant's phone revealed 75 indecent images and indecent videos of children from the age of two ranging from Category A to Category C. The Applicant had used the secrecy mode on his phone during some conversations, thereby breaching the SHPO and he had also breached his sex offender registration requirements by using undeclared pseudonyms.
7. On 11 June 2018, the Applicant received a suspended sentence of 6 months detention in a Young Offender Institution after pleading guilty to making indecent images of children. That sentence was activated on 12 November 2018 after he was found guilty, after trial, of a further offence of making indecent images of children.
8. On 20 August 2019, the Applicant was fined £60.00 by magistrates for failing to comply with sex offender notification requirements.
9. The Applicant was 20 at the time of the index offences. He is reported to have had a traumatic childhood having been exposed to the effects of his mother's mental health issues, her exclusion from contact with him, the complexity of an argumentative life with his father, and bullying at school.

Current parole review

10. The Respondent referred the Applicant's case to the Parole Board by Notice dated 12 July 2022 for the Board to consider whether to direct his release. It was not invited to advise whether the Applicant should be transferred to open conditions in the event that release was not directed.
11. The review was conducted on 25 June 2024 at an oral hearing conducted by way of video-link before the Panel, which comprised an Independent Member as Chair and one other Independent Member. The Applicant, now aged 26, attended and was represented by his legal advocate.
12. The case dossier of 579 pages included a Psychological Risk Assessment Report (PRA) by a Prison Psychologist dated 21 August 2023 and reports from the Applicant's Community Offender Manager (COM) and Prison Offender Manager (POM).
13. Oral evidence was given by the COM, by the POM and by the Applicant himself. The POM then provided a written update in respect of the Applicant's custodial behaviour dated 25 June 2024. Written closing submissions dated 28 June 2024 were provided by the legal representative.
14. It was considered that the Applicant was likely to be suitable for the Kaizen Programme (a training course addressing the use of violence and sex offending), but he refused to be formally assessed because it would involve being transferred



to another prison. In August 2022 he refused to transfer to another prison for a Programme Needs Assessment (PNA).

15. However, the Applicant had successfully completed New Me Strengths (NMS) at his current establishment by July 2023 and the subsequent PRA concluded that he had an excellent retention of the skills he had learned from it. The author of the report concluded that he should continue to consolidate those skills and associated strategies and advised that this could be undertaken in either closed or open conditions. The Applicant was subsequently transferred to open conditions on 3 November 2023.
16. In her oral and written evidence, the Applicant's POM confirmed that he had been receiving support from the Prison Pathway Enhanced Resettlement Service (PERS) in the light of learning, processing and verbal expression needs arising from his anti-social and borderline personality disorder traits. His mental health had fluctuated and his behaviour was described by the POM as fractious and inconsistent. She referred to his tendency to shift very quickly from viewing a person positively to having intense negative feelings towards them. Having initially lost his job in the charity shop after making a discriminatory comment, the Applicant had settled well into his subsequent employment in the recycling department. He had achieved Enhanced Status under the Incentives and Earned Privileges (IEP) Scheme.
17. Two accompanied day releases (RDR) had been completed in April 2024 and these were followed by one unaccompanied RDR. The Governor had not approved any overnight periods of release on temporary licence (ROR) because of the Applicant's behaviour and compliance issues. This remained the position at the time of the legal representative's closing submissions.
18. Completion of the Choices and Changes workbook had been recommended as consolidation work to be completed whilst the Applicant was in open conditions. However, the POM confirmed that this had only recently begun and was still work in progress.
19. The Applicant assured the Panel that he has acquired more skills to manage his risks, that he now trusts professionals and has a different mindset about being isolated.
20. According to the latest Offender Assessment System (OASys) Report the Applicant's static risk factors place him in the group of offenders whose risk of re-offending generally is medium. The probability of both proven non-violent re-offending (OGP) and proven violent re-offending (OVP) by the Applicant was assessed as medium. He was assessed as posing a high likelihood of both contact and indecent image based sexual offending. The PRA assessed the risk of repeat sexual offending involving children as moderate and pointed out that warning signs might be difficult to see if the Applicant were not open and honest.
21. The risk of serious harm to children, staff and the general public in the event of any reoffending by the Applicant in the community was assessed as high. This means that there are identifiable indicators of such harm, that the potential event could happen at any time and the impact would be serious. The risk to any known adults



was assessed as low. The Panel concluded that, whilst the risk to children remained high, the risk to staff and the general public was low. The author of the PRA considered that the risk of future sexual violence in the community was moderate. The risk of serious recidivism (RSR) based on dynamic or changing factors was assessed in the latest OASys Report as High.

22. The Risk Management Plan (RMP) involved release for an initial period of 6 months to designated premises in a psychologically informed planned environment (PIPE) with probation service monitoring and psychological support. He would remain subject to SHPO and Sex Offender Registration requirements. There were to be licence conditions in force to manage his risks, including restrictions on unsupervised contact with children, keeping away from defined public locations where children were likely to be present, restricting the use of mobile phones/internet devices, having no contact with other sex offenders and polygraph testing. The Applicant would be required to undertake further work in the community to address his sexual offending behaviour. Supervision and licence conditions would continue after he moved on to suitable accommodation.
23. The Applicant would have no family or other support in the community and would initially be reliant upon the support of designated premises staff, the probation service and the Intensive Intervention and Risk Management Team (IIRMS) through the Offender Personality Disorder (OPD) Pathway.
24. There appears to be no issue about completion of core risk reduction work. However, both the POM and the COM considered that there remain concerns about the Applicant's emotional management and thinking skills. Periods of stability have not been sustained. Neither the COM nor the POM supported release at the present time.
25. The Panel concluded that, although the Applicant has completed work to address his risks, his turbulent prison behaviour shows that he does not consistently use the skills he has learned. The Panel agreed with the professionals that he needs time to develop his skills further, demonstrate more consistent stable behaviour, build on his periods of temporary release in the community and start to form relationships with designated premises staff.
26. In the circumstances outlined the Panel concluded that the Applicant's risks are not currently manageable in the community. It was not satisfied that it is no longer necessary for the protection of the public that the Applicant should be confined and accordingly did not direct his release.

The Relevant Law

27. The Panel correctly sets out in its decision dated 3 July 2024 the test for release.

Parole Board Rules 2019 (as amended)

28. 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)).

29. 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)).

Irrationality

30. 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.

31. 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.*"

32. In *R(on the application of Wells) -v- Parole Board* 2019 EWHC 2710 (Admin) Saini J set out what he described as 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).

33. As was made clear by Saini J this is not a different test from the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in Parole hearings as explained in *DSD* was binding on Saini J.

34. 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.

35. 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.

Procedural unfairness

36. 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 focuses on the actual decision.

37.No allegation of procedural unfairness has been made in this case.

Error of law

38. No error of law has been alleged in this case.

Other

39.It is possible to argue that mistakes in findings of fact made by 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 uncontentious 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.

40.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

41.PPCS has confirmed that no representations are offered by the Respondent.

Discussion

42.In their written representations, the Applicant's legal representative highlights a number of sections of the Panel's Decision. I will deal with each in turn.

43.The representations set out paragraph 2.5 of the Panel's Decision. This paragraph refers to the alleged sexual assault by the Applicant on a cell mate which the Applicant denies and in respect of which no further action was taken.

44.I cannot see any reference to show that the Panel has relied on that particular allegation in order to justify the conclusions reached about the Applicant's attitudes or general conduct and in its assessment of his risks.



45. The representations next refer to the following extract from paragraph 2.14 of the Decision: *"in April 2024 [the Applicant] lost his job at the charity shop after making a discriminatory comment. This was not considered malicious. [The Applicant] is currently working in the recycling department and is now doing well. He has experienced periods of stability, but these are not sustained."*
46. The representations refer to the Applicant's "significant" overall improvement in his presentation and behaviour, the strength of the risk management plan and his increased ability to engage positively as being indicative of a positive trajectory that *"will inevitably continue upon his prospective release"*. These were all matters to which the Panel applied its thinking in a rational manner.
47. However, the representations go on to refer to the Applicant's further work in custody since the hearing and his *"recent arrival [into open conditions], where he accesses weekly ROTLs to complete tasks and access shops and amenities"*. This is not evidence which could have been assessed by the Panel as the events had not occurred before the Decision was made. It is accordingly irrelevant to the reconsideration application.
48. The representations deal next with Paragraph 2.17 of the Decision. This states: *"Overall [the POM] can see that [the Applicant] learns from mistakes he makes and his resilience has improved. However, (the POM) did not support release and he needs to use his time before his Conditional Release Date (CRD) to build on his resettlement plans and his relationship with Approved Premises staff (if granted ROR)."*
49. It is submitted that the Panel erred in its analysis of this evidence because of the possibility mentioned by the COM at the hearing that the Applicant could engage with professionals prior to release by telephone or Purple Visits. It is submitted that the Applicant therefore did not require further time in custody to establish these relationships.
50. That submission is illogical because the Panel determined that it would not be safe in terms of public protection for the Applicant to be released before the consolidation work was completed. In the light of the evidence before the Panel and its correct application of the test for release, the analysis of the evidence in paragraph 2.17 was not irrational.
51. The representations go on to consider paragraph 2.19 of the Decision which states: *"However, as there have been further concerns regarding his emotional management and thinking skills [the COM] no longer supports release, agreeing with [the POM] that the test for release is not met. [The Applicant], in her view, needs to show consistently stable behaviour."* It is submitted that the behavioural fluctuations observed in the Applicant are not linked to risk but are a reflection of his desire to progress, coupled with a possible lack of understanding of the administrative delays that can be experienced in open conditions including access to releases on temporary licence.
52. It is further submitted that the witnesses and the Panel placed disproportionate weight on the evidence presented, specifically in relation to security intelligence



entries. As set out in the legal representative's closing submissions in advance of the Panel's Decision, these entries included: reference to the discriminatory remarks, an allegation of theft which was never proved; the Applicant keeping for himself some new items made instead of putting them up for purchase; his request to be removed from the servery food list; approaches to several staff members about his ROTLS; and an opinion that it is highly likely the Applicant does not want to engage with professionals.

53. I can find no evidence in the Decision to support the contention that the Panel found these entries per se to be indicative of risk. The Panel adopted a balanced approach to its analysis of the Applicant's overall behaviour. As the legal representative sets out in the submissions, paragraph 4.4 of the Decision states: *"However, balanced against this are concerns that [the Applicant's] custodial behaviour continues to reflect poor coping which can lead to verbally aggressive behaviour. He only has professional support on release and needs time to build on his resettlement transition into the community."*
54. The legal representative submits that the support available to the Applicant would be more than sufficient to manage risk. That is in essence a repetition of the argument put forward in support of the release application. There is nothing in the Decision to indicate that the Panel failed to take this into account. It did so in a balanced and rational way.
55. In essence these representations mirror those put forward in the post hearing submissions. They were acknowledged and taken into account by the Panel before making its decision. It is not argued that the Panel failed to apply the correct test for release. The test is clearly set out at the beginning of the decision document and there is nothing in the reasons to suggest that the Panel lost sight of it.
56. The Panel adopted an entirely objective approach in its analysis of the Applicant's risks, the protective factors in place and the effectiveness of risk management in the community were he to be released.
57. In its Decision, the Panel carefully considered all the points raised in the Applicant's closing submissions and dealt with all of them in a logical manner. It expressly took into account the seriousness of the Applicant's index offences, his previous offending history, the assessed levels of risk, the identified risk factors, the Applicant's inconsistent custodial behaviour, and the opinions of the professionals about release. The fact that professional witnesses have expressed an opinion about the imminence of a prisoner's risk and their suitability for release does not mean that a Panel has to accept them. In this case, the Panel applied its own objective and critical analysis in reaching the conclusion that it agreed with them.
58. Having read the written case material, heard all the oral evidence, and considered the closing submissions, the Panel clearly applied its own independent judgment. It has done so in this case consistently, objectively and logically and it applied the correct test for release.

Decision



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59. For all the reasons I have given, I do not consider that the Decision was irrational, nor has there been a material error of fact. The application for reconsideration is therefore refused.

HH Judge Graham White
29 August 2024