

[2024] PBRA 179

Application for Reconsideration by Kwavalskie

Application

1. This is an application by Kwavalskie (the Applicant) for reconsideration of a decision of a Parole Board panel (the Panel) dated the 11 August 2024 not to direct release and make no recommendation for open conditions (the Decision).
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 consist of the Decision, the usual dossier relating to the Applicant (now consisting of 588 pages and of 563 pages before the Panel), the written application and representations dated 19 August 2024 on behalf of the Applicant (the Representations).

Request for Reconsideration

4. The grounds for seeking a reconsideration are essentially as follows: the Decision was irrational and procedurally flawed since it failed to follow the written and oral evidence from the professionals involved, namely the Community Offender Manager (COM), Prisoner Offender Manager (POM) and the Prison Psychologist (PP) to the effect that while further treatment needs remained outstanding, the Applicant's risk was manageable in, at least, conditions of lesser security.

Background

5. The Applicant was convicted and sentenced on 7 December 1993 to life imprisonment with a minimum 7-year tariff for the offence of manslaughter. He was then aged 31 and is now aged 62. His tariff expiry date (TED) was 6 November 1999. He is thus almost 25 years over tariff which in itself makes this a concerning case.
6. The offence in respect of which he was sentenced (to which he pleaded guilty by reason of diminished responsibility) involved the killing of his 6-month-old daughter. Whilst changing her nappy she began to cry, and he could not stop her. In order to try and stop her crying, he shook her and hit her head and body on the floor many times until she stopped. Her condition was discovered when his then partner



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returned home and they took her to hospital where she was diagnosed with a fractured skull and died the next evening without recovering consciousness. The trial judge described him as “*an extremely dangerous man*”.

7. Prior to this index offence the Applicant had many previous convictions including an assault on his then partner’s 4-year-old son. Added to this had been reports of unconvicted domestic abuse.
8. His history of release and recall may be summarised as follows:
 - a. He was first released in March 2005 following a Parole Board hearing and recalled in August 2008.
 - b. He was then released again in September 2020 again after a Parole Board hearing and recalled again in September 2021.
9. Both recalls followed a similar pattern:
 - a. The first recall followed the discovery of large amounts of indecent images of children on the computer of a female friend with whom he had been staying (the discovery was made by her). He was prosecuted and found guilty of 1 charge of possession of an indecent photograph of a child and 9 charges of making indecent images of children. The police who examined the computer found 590 images.
 - b. The second recall followed the discovery by his COM following a routine inspection of his phone that it had been used to view indecent child pornography prior to his having received permission to buy an internet-enabled phone.
10. His excuse in relation to the first recall was that he had accidentally seen the images while looking for adult pornography. In relation to the second he claimed the images must have been on the phone when he purchased it.
11. Between the two recalls the Applicant completed a Sex Offenders Treatment Programme and Thinking Skills Programme. He had completed no further offending behaviour work since his second recall though had conducted some 1:1 workbooks on risk management with the POM.
12. His conduct had been mainly positive, demonstrating a willingness to complete further offending behaviour work (preferably, according to him, in the community), he was assessed as mostly honest with a tendency to minimise. He had various health needs requiring medication. He appeared to be somewhat of a loner, preferring his own company with all his visits being from professionals.

Current parole review

13. The three-member Panel, consisting of two independent members (including the chair) and a psychologist, convened on 29 July 2014 and conducted the hearing by video link. They considered the dossier and heard evidence from the POM, COM and PP (a forensic psychologist in training whose work, as usual, was overseen by a fully qualified registered supervisor who also attended the hearing as an observer), plus, of course from the Applicant himself who was legally represented throughout.



Following conclusion of the hearing the Panel were also provided with detailed written submissions on the Applicant's behalf.

14. The Panel correctly identified the task and legal tests imposed upon them (below) and identified the concerns about the Applicant's historical capacity to cause serious harm to children and of domestic abuse to partners. They also identified major historical risk factors as including a willingness to resort to violence, a sexual interest in children and inappropriate pornography use, poor problem-solving skills and lack of victim empathy.
15. The POM noted, as recorded in the Decision, further treatment work remained outstanding, that the risk management plan (RMP) was robust, and that the Applicant could be safely managed while undertaking that work even though it may be some time before that happened. She accepted however that there was no evidence when last in the community that he had sought help when he required it, that he presented a low risk of absconding if in open conditions but had difficulty in making a formal recommendation.
16. The Applicant himself, according to the Panel, identified his main risk factors, again as noted in the Decision, as including bad relationships, lack of support and help (particularly in managing his sexual urges), and boredom. He accepted he looked at adult porn sites. He was willing to undergo outstanding further behaviour work in the community but thought that open conditions would be a waste of time. There was some discussion in the evidence of his internet search terms (with specific examples set out in the Decision) which he ascribed to curiosity. The Panel, however, took the view that the Applicant was looking for specific pornography involving children.
17. The COM, in her evidence to the Panel as they noted, had concerns about his interest in children and what was age appropriate and also subscribed to the view that there were outstanding treatment needs amounting to core reduction work based on his sexual interest in children. While she believed the RMP would identify when he was struggling, she was not sure this would prevent and manage his risk without this further treatment needs being met. Also, while recommending open conditions, if he was to be released there would be a time when external controls would be reduced which was a concern.
18. The PP identified the Applicant's treatment needs and felt that this did not amount to core risk reduction work and could be met effectively in the community and recommended release.
19. The Panel also considered the most recent risk assessments within the dossier and in the main accepted them. They considered and accepted that the RMP was robust but felt it was not capable of managing the Applicant's risks in the community or in open conditions for the reasons summarised below and accordingly refused release and did not recommend open conditions.
20. In substance the Panel found and concluded that having regard to the concerns, risks, history and evidence outlined above:



- a. the Applicant's internet searches demonstrated to the Panel "a clear continued deviant sexual interest in children" which remained an outstanding area of risk. He had limited insight into his own risks, and a limited understanding of age-appropriate content and material. They felt that if he was released those risks would be imminent, that there were concerns over his lack of openness with professionals and he had insufficient internal controls to manage his risks at the present time.
- b. they preferred and accepted the evidence of the COM over that of the PP that core risk reduction work remained outstanding which the Panel felt should be completed in closed conditions having regard to the Applicant's conduct on release in the past and his lack of responsivity to previous treatment, following which further treatment he should then be further re-assessed.
- c. the proposed RMP was too heavily reliant on external factors and unmanageable in the community or open conditions where he would have access to the community when on periods of release on temporary licence (ROTL).

The Relevant Law

Parole Board Rules 2019 (as amended)

21. 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)).
22. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are, as here, 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)).
23. 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 a previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

24. 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 MR 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.
25. 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."

26. In **R(on the application of Wells) -v- Parole Board [2019] EWHC 2710 (Admin)** the judge 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)**.
27. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not and cannot substitute its own view of the evidence for that of the panel who heard the witnesses.
28. 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

29. 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.
30. 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;
 - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
 - (f) the panel was not impartial.
31. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Other

32. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the



correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

33. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham CJ 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.*"

Reconsideration as a discretionary remedy

34. 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 Secretary of State (the Respondent)

35. The Respondent, via the Public Protection Casework Section, indicated she did not wish to make any representations on this case.

Discussion

36. This is a concerning case not least due to the length of time the Applicant has spent in custody past the TED as well as his age. I am also much indebted to the Representations on the Applicant's behalf.

37. At the end of the day, however, the central submission on behalf of the Applicant was that the weight of the evidence favoured release or a recommendation for open conditions. On analysis, and as recorded by the Panel, however, the professional evidence (aside perhaps from that of the PP) was more cautious as is apparent from the foregoing. It is fair to say the gist of this evidence was that the RMP was robust (duly accepted) but concerns as to risk, the lack of insight by the Applicant, and a need for further treatment remained. The Panel had the advantage of seeing, hearing, and reading a great deal of evidence, not least from the Applicant himself, and having that evidence tested.



38.I mean no disrespect to the cogency or detail of the submissions made on the Applicant's behalf when I say that in my judgment there is no indication that the Panel dealt other than fairly with the Applicant and the evidence before them. As previously stated, the Panel is not blindly bound to follow the evidence of professionals even if all one way (if so there would seem to be no need for a panel). It is up to them (with appropriate and proper reasons) what evidence they accept, or to which they afford weight, and what they reject. They must form their own conclusions and judgment on the matter. In not accepting the evidence of the PP it must be remembered that the Panel also included a specialist, psychologist, member. They set out their reasons for disregarding the recommendations of the PP and those parts of the evidence of the other professionals they chose not to adopt. There was plainly material before them justifying their conclusions. It was not irrational according to the tests outlined above. There was no injustice in the result. Their reasons and reasoning in refusing release or any recommendation for open conditions was logical, rational and far short of being in any way unreasonable in the circumstances as set out by them.

Decision

39.For the reasons I have given, I do not consider that the Decision was irrational nor procedurally unfair and accordingly the application for reconsideration is refused.

40.I merely add a postscript having regard as I have said to the Applicant's age and length of time beyond his TED to the effect that I would urge his recommended treatment to be undertaken constructively and positively as soon as reasonably possible in the difficult conditions currently prevailing in our prisons and that this should be followed by a thorough and careful re-assessment on completion which in turn might lead to a further review before a Parole Board Panel.

HH Roger Kaye KC
13 September 2024