

[2022] PBRA 101

## Application for Reconsideration by Cook

### Application

1. This is an application by Cook (the Applicant) for reconsideration of a decision, dated 4 July 2022, by a 2-member Parole Board Panel, refusing to direct his release.
2. The review was conducted by video conference, evidence being taken on 13 June 2022 and adjourned for submission of an addendum Community Offender Manager (COM) report and of written Legal Representations.
3. I have considered this application on the papers. These comprise of the dossier, the decision of the Panel and two separate applications for reconsideration together with a copy of a formal complaint, submitted by the Applicant's Legal Representative, to the Parole Board as to the conduct of a Panel Member during the hearing. I have been supplied with a part recording of the hearing and listened to relevant sections.

### Background

4. On 26 March 2017, the Applicant, at the age of 31, having pleaded guilty to offences of sexual assault on a child under 13, assault by penetration of a child under 13 and encouraging a child under 13 to engage in sexual activity, received an extended sentence of imprisonment totalling 11 years, the last 12 months of which constituted an Extension Period. The Parole Eligibility Date (PED) was 22 January 2022, Conditional Release Date (CRD) is in January 2027 and Sentence Expiry Date (SED) in January 2028.
5. The index offences involved his stepdaughter (YY) who lived with her father but visited her mother and the Applicant during school holidays. They began when YY was 7 or 8 years old and continued for a period of some years, during which, as he admitted, he had touched her sexually, penetrated her vagina with finger and tongue and, on one occasion caused her to masturbate his penis. The Applicant, himself, suggested he had not begun until YY was 10 and that the offending lasted only for 2 to 3 years.



6. The Applicant had no previous relevant convictions although the Panel reported that during the Police investigation of the index offences, his computers were analysed, one being found to contain images of child pornography. The Applicant had denied viewing any pornography and stated the computer was second hand. No prosecution followed this investigation.
7. This was the Parole Board's first review of the Applicant's sentence and the Board was required to consider only the question of release, together with any conditions, in the event of release being directed.

## Request for Reconsideration

8. The application for reconsideration comprises 2 documents, one a 5-page, 36 paragraph, document, prepared by the Applicant's Legal Representative. The second, handwritten by the Applicant himself, comprises 5 pages and, in total, 12 paragraphs.
9. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge of irrationality or procedural unfairness. The application seeks reconsideration on both grounds. It is not necessary to reproduce the applications in full, but all sections have been considered and the aspects relevant to the issues are dealt with below.
10. In general terms the application submits:
  - A. Irrationality:
    - a. Legal Representative
      - i) That all professionals supported release.
      - ii) That the Panel "*cited a Police investigation in their decision, for which [the Applicant] was not prosecuted.*"
      - iii) That the Panel placed "*overly significant weight*" on the fact that the Applicant "*had not had the opportunity to complete any accredited programmes*".
      - iv) That the Panel found that the evidence of progress on the specialised Enabling Environment Wing was not sufficient.
    - b. Applicant himself (under heading "Irrational/ Wednesbury Unreasonable."



- i) That the Applicant had been unable to complete programmes or core risk reduction work due to formal static risk assessment of low.
- ii) That he should have been expected to complete a course, the Horizon programme, for which he had only recently been assessed as suitable and which had been unavailable due to COVID restrictions.
- iii) That, in law, it was "*neither necessary nor sufficient to complete a course in order to secure release.*" The focus should be "*a holistic approach to risk management and reduction*" through the established 7 Pathways model. The Panel had chosen to disregard the risk management model opting to focus on a single factor of completion of a course.

11. In the view of the RAP (Reconsideration Assessment Panel) the Applicant, himself, did not clearly distinguish the separate issues of Irrationality and Procedural Error and, accordingly, the Panel has considered both issues, where appropriate. It also notes that, in effect, in some instances, the Applicant alleges errors of law a potential ground for reconsideration not, at that stage, available to him. The Panel has, however, considered these also on the basis as to whether they raise genuine areas of concern.

#### B Procedurally Unfair.

- a. Legal Representative
  - i) That the conduct of one of the Panel Members (Judge XX) was "*extremely unpleasant and impacted the witness' (sic) ability to give evidence, prompting a formal complaint being made.*"
- b. The Applicant
  - i) That the Panel "*accepted and considered unproven allegations*" as to alleged risk-taking behaviour.
  - ii) That the Panel made reference and gave reliance to the alleged, and unprosecuted internet offending
  - iii) That it failed to carry out the appropriate fact-finding exercise as set out in EWHC case law.
  - iv) That, despite failure to carry out the fact-finding exercise, "*entertained*" disputed and unproven allegations.
  - v) That a reference to the length of time on licence as being lengthy was a matter for Parliament and not a matter on which a view should be expressed by the Panel.
  - vi) That it was procedurally unfair for the Panel to interfere with issues of PED or SED and impose predetermined views as to acceptable period on licence.
  - vii) That the Panel's reference to the Applicant having committed a



- gross breach of trust was a misdirection of law and procedurally unfair to consider "*factors as part of the process which do not apply in this case*", the Applicant not having been convicted of any offence to which the description specifically applied as defined in s.21 of the Sexual Offences Act 2003.
- viii) That, in expressing its concerns that the Risk Management Plan had not provided for a period in Approved Premises on release, the Panel ignored the option of such a condition being imposed.
  - ix) It was both procedurally unfair and "*an unreasonable act*" not to have imposed such a condition "*if such an action would have satisfied the panel that the release test was satisfied.*" The recommendation from all witnesses including Psychologist was for release. The Panel had accepted that the RMP provided the necessary controls to manage risk and that the Applicant was not an imminent or unacceptable risk to the public. It was procedurally "*a flaw*" "*to identify an available measure as required or available yet not to proceed to stipulate that measures use.*"

## Response from the Secretary of State

12. The Secretary of State (SoS), by e-mail dated 2 August 2022, indicated that no representations were made in response to the application.

## Current parole review

13. The Panel considered a dossier of 320 pages together with the written post-hearing submissions, and, in a comprehensive 8-page decision, dealt in detail with the index offence and the Applicant's limited criminal background. The Panel recorded that the Applicant had admitted the historic index offences although he challenged the length of the period attributed to them. He had, however, been unable to explain his motivation saying that he "*wasn't himself*" .... "*wasn't in the room*" and had realised that what he was doing was wrong only when, after some years, the victim had said "*no*". This explanation was viewed with some scepticism as the Panel noted that he had taken care to conceal his offending which occurred in the family home, and he had maintained the victim's silence for many years.
14. The Panel closely examined the evidence of each of the witnesses and acknowledged that all recommended release. It identified, however, aspects of evidence which it judged did not fully support their conclusions including an acknowledgment from the COM that the Applicant needed to develop further his understanding of his risks and that his POM described his attitude towards talking of his sexual offending only as "*becoming more open.*" The Prison Psychologist whilst identifying a number of



areas which, in her view, supported release and thought that external measures could be effective in minimising risk, expressed worries as to his evidence, on the day, in which the Applicant, she judged, appeared disassociated, minimising of his offending and lacking in insight. These views mirrored the finding of the Panel which also found that insight had not been evident in the Applicant's evidence which it, also, judged to be minimising and showing lack of understanding of his offending. The COM had, also, during her pre-report interviews, not discussed the details of the index offences with the Applicant. His behaviour had, the Panel found, been a gross breach of trust and while the Panel acknowledged that no Police action had been taken with regard to the laptop found in his possession it "*raises a potential concern about a wider sexual interest in children.*"

15. In conclusion, the Panel whilst giving the Applicant credit for his "generally good" and compliant behaviour and engagement with some offending behaviour programmes, remained unsatisfied that he possessed internal controls which, it judged, were needed in addition to the comprehensive range of licence conditions. It was not satisfied that release to the home of a family member would provide a sufficiently secure emotional environment and that transition into the community, on release, would require a period in approved premises. A necessary accredited programme remained outstanding and should be completed in the safety of the custodial environment.

## The Relevant Law

16. Rule 28(1) of the Parole Board Rules 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. This is an eligible case.

17. **R (on the application of 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".*

18. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test



3rd Floor, 10 South Colonnade, London E14 4PU



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



[@Parole\\_Board](https://twitter.com/Parole_Board)



0203 880 0885

for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

19. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

## Discussion

20. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered, with care, the documents in the dossier gave a clear and reasoned decision, and adopted a correct test 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. I am fully satisfied that this has been done. Reconsideration is not a re-examination of evidence.

21. So far as the specific complaints are concerned:

- a. Recommendation of Professionals. It is the duty of the Panel, having given careful consideration to a common view, to make the final decision in accordance with the required test for release. In this case the Panel identified concerns about aspects of the recommendations and came to a rational decision.
- b. Citing of Police investigation which did not result in prosecution and entertaining disputed and unproven allegations. It is not necessary for there to be a prosecution/successful prosecution for circumstances surrounding an investigation to be considered. The investigation was, it would seem, part of the wider enquiry which resulted in prosecution of the index offences and it is not for the Panel to speculate as to the reasons why this further matter was not pursued. In this case, the Panel does not suggest that the Applicant was guilty of any offence, merely that his possession of a laptop containing inappropriate material was a potential future risk – a perfectly proper conclusion. It is, also, not a matter of procedural unfairness.
- c. Placing of undue weight on non-completion of accredited programmes and decision that evidence of progress on specialist Wing was not sufficient. Reconsideration is not a re-assessment of weight of evidence, which is entirely a matter for the Panel and, unless, clearly unjustifiable, is not to be considered irrational. It is, also, not a matter of procedural unfairness.

## 22. Procedural unfairness

So far as other specific complaints are concerned:

### A.

- i. Failure to carry out "appropriate fact-finding exercise". As indicated above, it is the view of the RAP that appropriate aspects have been shown to have been considered and set out in the Panel's decision.
- ii. Reference to "gross misuse of trust". It is not suggested, in the decision, that this case may fall within one of the specific Sexual Offences Act offences which requires a position of trust as a constituent element of the offence. Breach of trust is, however, a feature properly to be taken into account both by a Sentencing Judge (as is stated by the Judge to have been done in this case) in assessing the seriousness of the offending, and, therefore, of potential risk.
- iii. Length of Time on Licence and "acceptable time on licence." These are legitimate matters to be considered by a Panel and cannot be said to be matters of procedure.
- iv. Option of condition of period in Approved Premises. This is not a matter of procedure, nor of rationality once the Panel had formed a view as to extent of risk.

### B. Conduct of Panel Member.

This allegation has caused considerable concern in that Parole proceedings are required to be conducted fairly both in common law and under the provisions of European Human Rights legislation. This requires not only that the presiding body should not be biased but, also, that a fair-minded and informed observer would conclude that there was no possibility of such bias. The allegations made against Judge XX, if upheld, would, in the view of the RAP, impinge upon those standards and, dependent on its extent, could justify the directing of a rehearing before a different Panel.

The RAP has been supplied with the available recording of the hearing. Unfortunately, it is not complete and appears to have failed to record the evidence of the POM and the initial evidence of the Applicant prior to questioning by the Panel. The recording is, however, clear and contains, amongst other matters what appears to be the full questioning by Judge XX of the Applicant himself, the Prison Psychologist and the COM – sufficient to be able to assess any justification for the complaint.

The RAP considers the complaints against Judge XX to be unjustified. In the context of the limited time available for Parole hearings, he closely, and entirely properly, questioned the witnesses, including the Applicant, in particular, and highlighted discrepancies and matters of legitimate concern. The questioning was conducted with



courtesy and he himself, described the quoted choice of words to deal with the Applicant's actions as "colloquial." The RAP can find nothing to justify the amplified description in the complaint letter. The Applicant came across as articulate and intelligent and able to deal, on his terms, with all questions put to him. There was no indication that his ability to "present fair evidence" had, in any way, been affected other than by the acknowledged normal stress of a Parole hearing.

It should, also, be borne in mind that the Applicant had the benefit of experienced legal representation by an advocate who would be aware of her professional duty to raise, during a hearing and in written submissions, any legitimate concerns as to matters affecting her client. In this case there is no evidence of any concern being shown during or at the conclusion of the hearing and the written closing submissions are silent as to these matters.

## **Decision**

23. For the reasons that have been given, the RAP does not consider that the Panel's decision was irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

**Edward Slinger**  
**5 August 2022**

