

[2022] PBRA 153

Application for Reconsideration by White

Application

1. This is an application by White (the Applicant) for reconsideration of a decision of an oral hearing panel (the panel) dated 26 September 2022 not to direct his release or to recommend his transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are: the written decision reasons dated 26 September 2022; a request for reconsideration in the form of written representations from the Applicant's legal representative dated the September 2022; and the dossier, now numbered to page 647, of which the last document is the written decision.

Background

4. The Applicant is now 58 years old. On 31 August 2001, when he was 36 years old, he received a discretionary life sentence following conviction for three counts of kidnapping and two counts of attempted kidnapping. He also received a determinate sentence of 6 years' imprisonment for robbery. All of his five victims were lone females and the offences were committed at night over two consecutive dates in January 2001. He was subject to licence at the time. He was convicted after trial. His minimum term was set at 8 years and expired in August 2009.
5. The Applicant had previous convictions for possession of an offensive weapon in 1983 and offences of rape, robbery and indecent assault in 1994.
6. The Applicant's case was initially referred to the Parole Board by the Secretary of State in December 2020 and this was the 7th review of his case. At the previous review dealt with by way of a hearing in January 2020, the panel had recommended transfer to open conditions.
7. The Applicant had transferred to open conditions in October 2020. However, during the course of the review, in April 2021, the Applicant was recalled to closed conditions due to concerns about his behaviour towards a female member of staff. The Secretary of State referred the matter for advice from the



Parole Board about the Applicant's continued suitability for open conditions. The review therefore became a combined review to consider both referrals.

8. The oral hearing for this review took place by video link on 14 September 2022. The Applicant indicated that he hoped to be released as a result of the parole review. The panel heard evidence from the Applicant's Community Offender Manager (COM), his Prison Offender Manager (POM), his previous Prison Offender Manager and a psychologist employed by the prison service. The Applicant also gave evidence to the panel. The Applicant was legally represented.

Request for Reconsideration

9. The Applicant's grounds for reconsideration are:
 - i. The decision was irrational in concluding that there remained core risk reduction work to be completed. The Applicant submits that the only work to complete is consolidation which could only be done in open conditions.
 - ii. The decision was irrational because it was at odds with the views from the professional witnesses and disregards aspects of their evidence.
10. In their representations, the legal representative has mentioned further matters at the very end namely, that the panel concluded the Applicant met the test for release but did not direct release due to matters associated with Covid-19 and that an adjournment should have occurred rather than conclusion of the case. These issues do not appear to relate to this case at all and so I do not propose to address them.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 26 September 2022 the test for release and the issues to be addressed when making a recommendation to the Secretary of State for a move to (or remaining suitable for) open conditions.
12. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).
13. 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



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14. In **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."

15. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

17. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, per **R (Wells) v Parole Board 2019 EWHC 2710** and **Stokes [2020] EWHC 1885 (Admin)**.

The Reply on behalf of the Secretary of State

18. The Secretary of State confirmed by way of email dated 10 October 2022 that he did not wish to make any representations in response to the application.

Discussion

19. Although there is some overlap in terms of the grounds, I will try to deal with them in turn.

Ground 1

20. The Applicant submits that it was irrational to conclude that core risk reduction work was not completed and relies on two main points as part of that submission. Firstly, the Applicant submits that it was irrational to infer from the Applicant's behaviour towards the staff member in open conditions that there was evidence of stalking and for the panel to "presume" that this would mean the Applicant would act inappropriately towards females in the community. The Applicant relies on evidence from the POM that there were no concerns around



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female staff in custody and relies on evidence from the Psychologist that the Applicant does not present negative attitudes towards women and there is no evidence of stalking in the Psychologist's assessment (thereby somewhat overlapping with ground two).

21. The Applicant also relies on the POM's and the COM's evidence that all core risk reduction work had been completed and relies on the COM's evidence that the work left to do was consolidation work which could be done in open conditions, including "social areas of work" which could only be done in open conditions. Further, the Applicant relies on the Psychologist's assessment which was similar to the COM in that all core risk reduction work was completed and the remaining work was consolidation work and the Psychologist's opinion that the Applicant did not meet the definition for stalking behaviour.
22. In its written reasons for its decision, the panel did note that the Applicant had completed an accredited programme to address sex offending but had done so based on his 1994 conviction and not the index offences. The panel articulated its concern about this given the sentencing judge was clear that the index offences had a sexual motive, a matter which the Applicant denies (he maintained that it was a coincidence that all the victims were female) and the index offences involved two child victims. The panel also noted that, although the 1994 conviction was explored, features of that offence were not covered including the threats to harm the victim in a specific way and the threats to kill the victim. The Applicant also said in evidence that he had not explored sexual frustration during the work he had completed, even though that had been an issue during his earlier offending.
23. It was after completing this work and after transfer to open conditions, when the further allegations regarding his inappropriate behaviour towards a female member of staff occurred. The Applicant accepted in his evidence that he had asked the female member of staff if she was single and told her she looked gorgeous. He denied other aspects of the allegations and maintained it was her who had instigated most of the conversations. The previous POM told the panel in evidence that the history of conversations with the female member of staff, and the interactions, developed over "*weeks if not months*" and there was no reason for that member of staff to lie. The previous POM said that the Applicant's explanation of his interactions with the staff member was implausible. Whilst the panel did not specifically set out its findings with regards to the allegations from open conditions, the panel did make it clear that it found the Applicant to be unreliable in his evidence and that there had been intimate and personal remarks made to a female staff member which caused the panel considerable concern given they had been made whilst still in prison and so there was potential for it to happen again (or go further) when he was not under immediate observation. The Applicant argues that this is an "*assumption*" or "*presumption*". During any assessment a panel has to consider what might happen if someone is released, that is the very nature of the legal test it applies. The important question to ask is whether such a conclusion about what might happen is irrational. Here the concern was founded in the evidence provided, namely the behaviour towards a female in open conditions, some of which was admitted by the Applicant. The POM's evidence of a lack of concern around his



behaviour towards females appeared from the decision to be regarding the Applicant's current establishment, especially given the evidence provided by the previous POM. Consequently, I cannot see how it would be irrational to conclude that inappropriate behaviour recently exhibited in prison may also be displayed in the community.

24. The panel for each review conducts a fresh risk assessment, taking into account all of the evidence and any developments since the last review. The panel is not bound by the conclusions drawn by a previous panel, although I would concede that if a panel disagreed with a previous panel, it would need to set out clear reasons why, and base the different conclusion on evidence. Here the panel set out that the previous panel had reached its conclusion to recommend open conditions without some of the evidence this panel now had, including the developments in open conditions.
25. The panel set out clearly in paragraphs 4.2 to 4.5 of its decision why it remained concerned that there was still work for the Applicant to complete, namely points from his own evidence regarding still thinking about sex a lot and the lack of exploration into sexual thoughts and feelings in the work he had completed. The panel was concerned that those working with the Applicant had not given sufficient weight to the sexual elements and "*stalking*" behaviours in the index offending and that aspects of his offending had been ignored in risk formulations and scenarios. The panel therefore did articulate why it was now coming to a different conclusion to the previous panel and disagreed with the recommendations of the witnesses.
26. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that it saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. I have set out the conclusions the panel came to after assessing the evidence and I cannot see any reason for me to conclude that any of those conclusions are irrational. Accordingly, this ground fails.

Ground 2

27. In addition to the points raised above where the panel disagreed with the evidence given, the Applicant makes the point that the COM supported a progressive move back to open conditions and the Psychologist assessed the Applicant as having good insight into his offending behaviour and the skills to manage himself in the community. Therefore the Applicant submits that the decision went against professional opinion. The Applicant particularly highlights that it was irrational for the panel to conclude that the risk management plan was reliant on external controls which was not sufficient when this was at odds with the Psychologist's evidence of insight and internal controls.
28. Within its written reasons, the panel set out the opinions of the witnesses. Due to a recent change in the Parole Board rules, formal recommendations were not given but witnesses were clearly asked about the test for release and the different limbs of the 'test' for open conditions. The current POM did not think



that the Applicant was ready for release but did appear to accept that the Applicant met the test for open conditions, in that the POM did not consider there to be core risk reduction work left to do, assessed there to be a low risk of abscond and thought that he needed the opportunity to consolidate his learning and demonstrate compliance in open conditions. The Psychologist had not been recommending release in their written report and addendum report and was asked about that recommendation in evidence. From what is recorded in the written reasons, the psychologist had not changed their assessment or opinion. The COM remained supportive of transfer to open conditions. Therefore, it was clear that none of the witnesses were in support of release as stated in paragraph 3.3 of the decision. Thus, it cannot be said that the panel's conclusion not to release was against the recommendations resulting in it being irrational. As noted above, the recommendation with regards to open conditions is not within the remit of reconsideration however, the panel made it clear that its concern was that the assessments from professionals did not give adequate weight to the sexual element in the index offending, a conclusion the panel was entitled to reach as indicated above, and the panel gave reasoning within its conclusion as to why the Applicant did not meet all of the relevant elements for transfer back to open conditions.

29. With regards to the risk management plan, whilst the Psychologist did assess the Applicant to have some internal controls, there was no support for release under the plan. The panel took into account the Applicant's past offending on licence, his behaviour which saw his return to closed conditions (as discussed above) and its own assessment of his evidence in concluding that a plan based entirely on external controls was not sufficient to protect the public and the Applicant he did not have the necessary internal controls at this time. Given the evidence as set out by the panel in the written decision, I see no reason why this conclusion could be said to be irrational and so this ground also fails.

Decision

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

Cassie Williams
1 November 2022

