

Application for Reconsideration by Harrison

Application

1. This is an application by Harrison ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 4 October 2022, after oral hearings on 4 October 2021 and 27 September 2022, issued a decision not to direct his release on licence and not to recommend that he should be transferred to an open prison.
2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background and history of the case

3. The Applicant is aged 56. He is serving a sentence of life imprisonment which was imposed on 22 December 1999, when he was aged 34, for two offences of rape (the index offences). His tariff was set at 10 years less time served on remand. It expired on 21 December 2009.
4. Before the index offence the Applicant had accumulated a substantial criminal record which included convictions for causing grievous bodily harm with intent, wounding with intent, aggravated burglary, assault with intent to rob and 3 offences of assault causing actual bodily harm. He had no previous convictions for sexual offences. He had certainly grown up to have anti-social attitudes and associates and has been described as an '*angry, ruminative young man*'.



5. His convictions for causing grievous bodily harm with intent, wounding with intent and aggravated burglary all occurred on the same occasion. He broke into a house at night when two female victims were asleep. When they woke up, he attacked them using a knife and a screwdriver, causing serious facial and head injuries. One victim was caused permanent brain damage. In October 1998, at the age of 22, he received a 14-year sentence for those offences. He was released from that sentence in June 1997.
6. In the early hours of Christmas Day 1997 he had been drinking heavily and became involved in a fight. His aggressive response when arrested by the police resulted in a conviction and sentence for affray (the sentence was imposed at the same time as the life sentence for the index offences and ordered to run concurrently with it).
7. The index offences occurred on 5 December 1998. It is unnecessary to set out the unsavoury details of those offences save to record that the victim was a 20-year old woman (Ms A) who was a stranger to the Applicant and that the Applicant attacked her late at night when she was on her way home from a night out: he dragged her into a quiet location where (in the trial judge's words) he inflicted *'appalling violence and sexual indignities on her, causing her a serious injury.'*
8. The Applicant left the scene after the offences. A body of circumstantial evidence enabled the police and prosecution to identify him as the man responsible. When interviewed by the police he denied the offences and suggested that they had been committed by another man whom he knew. He has continued to maintain his denial.
9. He was convicted of both offences after a contested trial. In passing sentence the trial judge stated: *'It is quite clear to me on the facts of this case alone that you are a perverted, dangerous man and that you are likely to remain so for a long period of time. Even if you had not got a previous conviction of wounding with intent, I would have sentenced you for what you did to this girl that night to a sentence of Life Imprisonment.'*



10. The Applicant has remained in closed conditions throughout his sentence. During that time he has completed several offending behaviour programmes. His security classification remained at the highest level until June 2021 when it was reduced to the next level down. His custodial behaviour has been good for the most part and he has held down a good job for some time.
11. The current review is the seventh review of his case by the Board. On all previous reviews the panel did not direct release on licence or recommend a move to an open prison. On the sixth review, in December 2018, the then panel concluded: *'Given the extreme nature of your sexualised violence, the risks you still pose, and possible risk factors not identified let alone addressed, the panel considered that you must still have outstanding treatment needs.*
12. The current review commenced in September 2019. The oral hearing of the case was initially fixed to take place on 10 May 2021 but was adjourned at the Applicant's request.
13. There was then a full hearing on 4 October 2021, at which time the Applicant was not seeking release on licence but was seeking a recommendation for a move to an open prison. Having heard all the evidence the panel decided that they required further information before they would be able to make a properly informed decision. One of the panel's problems was that, as the Applicant was maintaining his denial, it was impossible to identify any factors which might have contributed to the index offences and might therefore require treatment before he could safely be released into the community.
14. The panel therefore adjourned the hearing for further evidence to be obtained. It was anticipated that on receipt of that evidence the panel would be able to make a decision on the papers.
15. However, when (after some delays) the further evidence had all been obtained, it became clear that a further hearing was required so that that evidence could be explored and the Applicant given an opportunity to respond to it.



16. The adjourned hearing eventually took place on 27 September 2022, at which time the Applicant was seeking a direction for release on licence, though in closing submissions provided after the hearing his solicitor stated: *'Mr Harrison concedes that a recommendation for open conditions may be considered by the panel to be the more realistic option.'*

17. This was clearly a sensible concession in the light of the fresh evidence obtained since the October 2021 hearing and the opinions expressed by the professional witnesses at the September 2022 hearing.

The fresh evidence

18. The fresh evidence included witness statements taken by the police during their investigation into the index offences.

19. One witness (Ms B) had been in contact with the Applicant when he had been in prison serving his previous sentence. They had a short-lived sexual relationship after his release from that sentence. She described him being very sexual to her from the moment they met in person. She also described his frequent viewing of pornography which including showed scenes of deviant sexual behaviour. That behaviour was similar to his non-consensual behaviour towards Ms B on a number of occasions during their relationship, and to his behaviour towards Ms A during the index offences.

20. Another witness (Ms C) stated that she was dating Mr Harrison for two to three months around Christmas 1997. She described him as having been obsessed with watching pornographic films and often sitting watching them and masturbating for hours at a time. Ms C described one occasion when the Applicant repeated the same deviant sexual behaviour which Ms B described. She did not like it.

The opinions of the professional witnesses

21. At the October 2021 hearing four professional witnesses gave evidence. None of them supported release on licence but they all supported a move to open conditions. The witnesses were:



- The official standing in for the one responsible for supervising the Applicant in prison (who was unwell);
- The official prospectively responsible for supervising him in the community if he was released;
- A prison psychologist who had carried out a structured assessment of his risk to the public; and
- An independent psychologist who had also carried out a structured assessment of his risk to the public.

22. At the September 2022 hearing the same witnesses gave evidence except that the official responsible for supervising the Applicant in prison was able to attend in person so no stand-in was required.

23. At that hearing the position remained that none of the professionals was supporting release on licence: the independent psychologist was still supporting a move to open conditions but the other three professionals were now of the opinion that, in the light of the fresh evidence, the Applicant should remain in closed conditions.

The findings of the panel on the fresh evidence

24. It is clear that the panel gave very careful consideration to the fresh evidence and the Applicant's responses to it. The panel correctly stated that, by virtue of the decision of the Court of Appeal in the case of ***R v Pearce [2022] EWCA Civ 4***, it could only attach weight to the allegations made in the fresh evidence if it was able to find on balance of probabilities that they were true. That was the finding which the panel made, for reasons which they explained in their decision and which will be discussed below.

25. In the light of that finding (and for other reasons explained in their decision) the panel decided not to direct the Applicant's release on licence and not to recommend a move to an open prison.



26. The panel's decision was issued on 4 October 2022 and on 24 October 2022 the Applicant's solicitor submitted this application for reconsideration.

The Relevant Law

The test for release on licence

27. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

28. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) a decision is eligible for reconsideration if (but only if)

- (1) it is a decision that the prisoner is or is not suitable for release on licence and
- (2) one of more of the following three grounds is established:
 - it contains an error of law
 - it is irrational
 - it is procedurally unfair.

29. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by

- a paper panel (Rule 19(1)(a) or (b)) or
- an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- an oral hearing panel which makes the decision on the papers (Rule 21(7)).

30. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. It is made on both grounds (irrationality and procedural unfairness).

31. The panel's decision not to recommend a move to an open prison is not eligible for reconsideration. That is because the decision whether to transfer a prisoner to open conditions is the Secretary of State's and not the Parole Boards and any representations at this stage that the prisoner should (contrary to the



panel's recommendation) be transferred to open conditions should be addressed to the Secretary of State.

The test for irrationality

32. In **R (DSD and others) v the Parole Board** [2018] EWHC 694 (Admin) (the "Worboys case"), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at paragraph 116 of its decision:

"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."

33. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

34. 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 Board in making decisions relating to parole.

35. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

The test for 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 from the issue of irrationality which focusses on the actual decision.



37. The kind of things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
 - (b) A failure to conduct the hearing fairly;
 - (c) A failure to allow one party to put its case properly;
 - (d) A failure properly to inform the prisoner of the case against him or her; and/or
 - (e) Lack of impartiality.

The overriding objective is to ensure that the case was dealt with fairly.

The request for reconsideration in this case

38. In his concise and helpful representations, the legal representative has advanced two arguments:
- (a) that the panel erred in finding on the balance of probabilities that the unproven allegations were true; and
 - (b) that the Panel favoured the evidence of the prison instructed witnesses over the case advanced by the independent psychologist and the Applicant.

The Secretary of State's position

39. By e-mail dated 18 October 2022 the Public Protection Casework Section ('PPCS') on behalf of the Secretary of State stated that he offers no representations in response to the application.

Documents considered

40. I have considered the following documents for the purpose of this application:
- The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 1486 and includes a copy of the panel's decision letter;
 - The representations submitted by the Applicant's legal representative in support of this application; and
 - The e-mail from PPCS stating that the Secretary of State offers no representations in response to this application.



Discussion

41. I will consider in turn each of the submissions advanced by the Applicant's solicitors.

The submission that the panel erred in finding on the balance of probabilities that the unproven allegations were true

42. If correct, this submission would certainly justify reconsideration on the ground of irrationality. However, I am not persuaded that it is correct.

43. The allegations referred to were those made by Ms B and Ms C in their statements made during the course of the investigation into the index offences. They were never the subject of criminal charges and are thus correctly described as unproven. They were completely denied by the Applicant when they were put to him at the September 2022 hearing.

44. In assessing a prisoner's risk of serious harm to the public a panel of the Board is bound to consider any factors which may be relevant to his risk and in particular everything that is known about his offending. This is why it is appropriate (and indeed necessary) for the panel to obtain and evaluate evidence of any unproven allegations which may be relevant to that exercise. There was nothing procedurally wrong or unfair about the panel investigation the allegations made by Ms B and Ms C: on the contrary they were duty bound to carry out that exercise.

45. As the panel recognised, at the time of its decision in this case the law as laid down by the Court of Appeal in ***Pearce*** meant that, having carried out the exercise, they could attach any weight to the unproven allegations if they panel could find on balance of probabilities that they were true (in other words that they were more likely to have been true than untrue). This is an entirely different standard of proof from the one which applies in a criminal trial. It



applies in parole proceedings because they are regarded as civil proceedings, in which the 'balance of probabilities' test is applicable.

46. The decision in **Pearce** is currently being appealed to the Supreme Court but this the present application has to be approached on the basis of the law at it was at the time of the decision. As a matter of interest, though it is not relevant to my decision, any change in the law is likely to be less favourable to prisoners than that laid down in **Pearce**.

47. In the light of the legal position as described above, this complaint of irrationality could only succeed if it could be shown that the panel failed to give adequate and defensible reasons for their conclusion that that the evidence of Ms B and Ms C was more likely than not to be true.

48. So far from that being the case, the panel's reasons for that conclusion were entirely persuasive and set out with admirable clarity. They were as follows (redacted as necessary for the purpose of this decision):

- *The statements from both [Ms B and Ms C] were incredibly detailed. They included matters which were private and also which must have been embarrassing and upsetting including things which had happened which did not paint them in the best light.*
- *The statements had similarities to each other about [the Applicant's] behaviour and sexual interests which in turn reflected specific aspects of the index offence for which he was convicted.*
- *The statements were from two separate women and were made within days of [the Applicant] being charged [with the index offences]. There was no evidence of them being friends and no suggestion from [the Applicant] that they could have colluded.*
- *Despite [the Applicant's] attempts to criticise the women and bring up their past mistakes, there was no evidence at all before the panel which would suggest they were not credible witnesses.*
- *The statements were made after the police had charged [the Applicant] when they already had significant evidence against him. They did not need to bolster their case and the suggestion that they sought out two women*



and convinced them to lie or embellish their stories to the level of detail they gave (including the parts the panel is sure they would not want in the public domain) is not plausible.

- *[The Applicant] now accepts that [the instance of deviant sexual activity involving Ms C] occurred as she described though he said this was 'her idea'.*
- *There was no evidence that the media had published significant details of the index offences at that point to include such matters as the [particular deviant activity described by Ms B and Ms C] as having occurring during the index offences. Therefore, there was no evidence to suggest either [Ms B or Ms C] knew that [that particular deviant activity] was a particular modus operandi of the attacker.*
- *Both women had been in relatively short relationships with [the Applicant] before the index offence. Neither were in a relationship with him at the time of the index offence and he had already moved on to a different relationship. He never reported having any particular issues with these women until the allegations came to light during this review.*
- *[The Applicant] in his evidence could not point to anything he had done wrong towards these women so as to create any particular need for revenge on their part. He had a tendency in his evidence to the panel to repeat his criticism of their past behaviour instead, and to attempt to deflect from the allegations about him. Therefore, the Applicant's contention that both of these women must bear a grudge from him ending these relationships, so as to make up these 'lies', did not seem plausible to the panel.*

49. The Applicant's solicitors make three points in support of their complaint about the panel's findings. I am afraid none of them carries any real weight when set against the powerful points made by the panel.

50. The first point is that the evidence of Ms B and Ms C was available at the time of the Applicant's trial for the index offences. That is correct but the fact that it was not relied on by the prosecution has little (if any) relevance for present purposes. That is because:



- (a) There is no evidence to suggest that the police or prosecution regarded the evidence of Ms B and Ms C as being anything other than entirely true;
- (b) The issue in the trial was the identity of the man who committed the index offences: the prosecution had already overwhelming circumstantial evidence to show that that man was the Applicant;
- (c) It is doubtful whether the evidence of Ms B and Ms C would have been regarded by the judge as admissible to support the prosecution case and, if it was, it would not have added much to the already overwhelming evidence;
- (d) It would have put Ms B and Ms C through an unnecessary, embarrassing and humiliating experience.

51. The second point is that the Applicant was never charged with or interviewed about the behaviour described by Ms B and Ms C. I do not find that all surprising. The police were investigating very serious offences involving non-consensual sexual activity. If the Applicant was convicted of those offences it was almost inevitable, since he had previously been convicted of the grievous bodily harm and wounding offences referred to above, that he would receive a life sentence. Whilst his behaviour as described by Ms B and Ms C was unpleasant and unwelcome and indicative of concerning attitudes towards women, they appeared to have put up with it at the time and it was far from clear that criminal charges would have succeeded.

52. The third point is that the Applicant's then partner Ms D was interviewed by the police in relation to various matters as part of their investigation and made a statement in which she said nothing about pornography or deviant sexual practices. This is hardly surprising and does little (if anything) to cast doubt on the evidence of Ms B and Ms C. Ms D was after all his partner at the time, and it would have been embarrassing for her to reveal that she had remained with a man who did the kind of things described by Ms B and Ms C.

53. In all these circumstances I cannot accept that there is any substance in the complaint that it was irrational or procedurally unfair for the panel to make the findings which they did, and this ground must fail.



The submission that it was irrational for the Panel to favour the evidence of the prison instructed witnesses over the case advanced by the independent psychologist and the Applicant.

54. This ground overlooks the fact that the independent psychologist was in complete agreement with the other three professionals that the Applicant did not meet the test for release on licence. It is only the decision not to direct release on licence which is eligible for reconsideration and thus the subject of this application. That decision accorded with the views of all four professional witnesses. The only person who supported release on licence (though acknowledging that it was more realistic to ask for a recommendation for a move to open conditions) was the Applicant himself. There is no conceivable basis on which I could agree that it was irrational for the panel to prefer the evidence of the four experienced professionals to the Applicant's own evidence. Indeed, if it had done so the panel's decision would in all probability have been the subject of a successful reconsideration by the Secretary of State.

55. It follows from the above that the difference of opinion between the independent psychologist and the other professional witnesses about the Applicant's suitability for a move to an open prison is irrelevant for the purposes of this application and I do not need to express any view about it.

Decision

56. For the reasons explained above I am bound to conclude that the panel's decision not to direct release on licence was in no way irrational or procedurally unfair, and this application must be refused.

Jeremy Roberts
21 November 2022

