

[2023] PBRA 143

Application for Reconsideration by Richards

Application

1. This is an application by Richards (the Applicant) for reconsideration of a decision of a panel (the panel) of the Parole Board dated 6 July 2023 (the panel decision) making no direction for the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019 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.
3. I have considered the application on the papers. These are the:
 - (a) The panel decision;
 - (b) The Applicant's application for reconsideration of the panel decision;
 - (c) The email dated 26 July 2023 from the Public Protection_Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) stating that they offer no representation in response to the Applicant's application for reconsideration;
 - (d) The link to the recording of the hearing;
 - (e) An email exchange from the Parole Board to the Applicant's solicitors seeking clarification of the Applicant's case and the response both dated 24 July 2023 which are referred to below; and
 - (f) The Applicant's dossier containing 494 pages.
4. The grounds for seeking reconsideration are that in not concluding that the Applicant's risk could be managed in the community and that his release should have been ordered:
 - (a) The panel acted irrationally on the basis that "*there was more evidence to suggest that the Applicant would comply with licence supervision than there was evidence to suggest he would not*" and "*there was also evidence to suggest he understood his risks*" and "*the panel's conclusions were not in accordance with the evidence heard*" (Ground 1).
 - (b) The panel acted procedurally unfairly because first the questioning by the psychologist member of the panel of the prison psychologist "*was, at times, leading*" and the panel failed to adjourn the hearing to direct the attendance of the Community Offender Manager (COM) appointed by the Chiron Community (Ground 2).

Background



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5. On 4 February 2009, when the Applicant was 43 years old, he received a discretionary life sentence with a minimum period of imprisonment of 10 years less 308 days spent on remand for four offences of indecent assault on a female under 16 years of age, two offences of inciting indecency with a child under 14 years of age, three offences of rape of a female child, an offence of rape, three offences of indecent assault of a male under 16 years of age, an offence of incitement to commit rape of a child under 13 years of age and four offences of indecency with a child.
6. The index offences were his first convictions for sexual offending, and they marked a significant escalation in the seriousness of his offending with multiple victims committed over a lengthy period from 1988 to 2002. The Applicant was in a relationship with D who had a daughter F and four other children as well as a daughter with the Applicant.
7. The witness statements from the children when adults describe much sexual abuse against them. There was also much evidence that D and her children were extremely fearful of the Applicant and the sentencing judge concluded that the Applicant was *"manipulative, devious and relentless in [his] cruelty and abuse of children"*. The sentencing judge explained that over many years, he had been involved in many cases concerned with the sexual abuse of children but *"there is no doubt in my mind that this is the [worst] case I have ever encountered...not just in the degree of sexual abuse involved, but the cruelty and bullying that went on of vulnerable, defenceless children."*
8. The Applicant continued to maintain his innocence of all those offences except for those committed against F once she was 16 years old. His evidence on when he started and developed his sexual relationship with F has varied. His previous evidence was that he had started to kiss and cuddle her when she was 14 to 15 years old and that this had led to sexual touching and intercourse which he says was consensual.
9. At the oral hearing, the panel was told that he agreed that the kissing and cuddling had started in 1995 when F was aged about 10. After saying he *"could not remember whether F was 10 at the time"*, he said that *"kissing started before she was 14, but that they did not have sex before then"*. The sentencing judge emphasised that F had been subjected to significant violence describing the Applicant as *"a violent bully"*.

Risk Factors

10. The panel considered the key risk factors identified and concluded that the Applicant's key risk factors (which are those factors which will make the Applicant more likely to reoffend) *"include sexual preoccupation; sexual interest in children; ability to be sexually aroused by a child; issues of power and control; relationships; callousness and cruelty; lack of understanding of the victim perspective"*.
11. A psychological risk assessment of the Applicant completed in 2018 found he had *"borderline, antisocial, narcissistic and paranoid traits which were considered to have underpinned his sexual offending behaviour over the extended period"*. He was also assessed to have *"a number of traits that related*



to psychopathy, including impression management some grandiosity/entitlement thinking, need for stimulation, lying, being manipulative, a lack of remorse, some shallowness of affect, callous/lack of empathy, some poor behavioural control, promiscuous sexual behaviour, lack of realistic long-term goals, some irresponsibility, failure to accept responsibility for his own actions and some criminal versatility”.

12.The Applicant denied any sexual interest in children, despite admitting having sex with the victim when she was 14 years old. In the light of the Applicant’s admission that the kissing and cuddling started when the victim was 10 years old, the panel considered that the Applicant *“had a sexual interest in both pre-pubescent (or early pubescent) and teenage children and that his risk extends to both genders”.*

Recent Developments

13.The Applicant has retained his enhanced status. He has been unable to complete the Thinking Skills Programme (TSP) and the Sex Offenders Treatment Programme (SOTP) even though they have been sentencing plan targets. He completed the Becoming New Me (BNM+) programme in which he was assessed to have engaged well and shown a capacity for insight but the Applicant accepted that he was controlling and coercive although he continued to deny using any violence. In spite of the positive progress made by the Applicant, it was assessed that the professionals *“did not have an understanding of the risks around [his] sexual interest, including [his] thinking about sex with children and liking sex with children”.*

14.The Applicant was unable to complete the Healthy Sex Programme (HSP) as he did not accept responsibility for *“his offence-related sexual interest”.* Instead, it was suggested that he could compete one to one work in open conditions and that other benefits of a move to open included New Me MOT sessions monitoring and managing his tendency to allow emotional arousal to cloud his judgment and finally to allow his gradual reintegration into society. The panel sitting in 2020 considered that there was further core risk work to be completed by the Applicant even though he had made some progress in challenging his dysfunctional attitudes and beliefs. It concluded that the further core risk reduction work could be undertaken in open conditions and it recommended that he should be moved there. This recommendation was accepted by the Secretary of State.

15.After the Applicant moved prisons in August 2020 the psychologist who assessed him after the one to one work concluded that *“thinking sex with children was ok was a treatment need that had not been met but did not consider it to be core risk reduction work”.* It was also concluded that the Applicant’s *“outstanding work on liking sex with children could be completed in supervision”.* Intervention was required on the Applicant’s *“attitudes that condone sexual violence, self-awareness and developing his personal support network”* but the psychologist did not consider these matters *“to be core areas of treatment but rather consolidation work”.*

16.The panel was told by the Applicant that he felt that he had been tested as when he was on a train by himself during a day release and he heard children,



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he had no sexual feelings. He no longer masturbates and he could not remember when he last had a sexual thought.

Current parole review

17. A three-member panel of the Board comprising two independent members and a psychologist convened for an oral hearing at the prison on 29 June 2023 at which the Applicant was legally represented. This was his second review.

18. The panel heard oral evidence from:

- (a) the Applicant's Prison Offender Manager (POM);
- (b) the Applicant's Community Offender Manager (COM).
- (c) the prison psychologist (the psychologist); and
- (d) the Applicant.

Risk Assessments

19. A recent Offender Assessment System (OASys) assessment of the Applicant was that he had a low risk of general and violent reoffending while the Applicant's Offender Group Reconviction Scale (OGRS) score *"place[d] him in a group with a low risk of reoffending"*. The OSP indicated that the Applicant posed *"a low [risk] of contact sexual offending and a low risk of image-based offending"*. The Spousal Assault Risk Assessment (SARA) indicated that the Applicant posed *"a high risk of intimate partner violence"*.

20. The panel agreed with the assessed risk of harm and intimate partner violence in the light of the Applicant's offending history, but it considered that the Applicant's risk of further sexual offending was underestimated. It therefore agreed with the COM who explained that if all the Applicant's contact offences had been dealt with separately in court, *"he would have a very high risk of further contact sexual offending"*.

21. The psychologist did not consider that the Applicant's controlling behaviour was a core risk and said that it would be *"better addressed in the community"*. The panel did not accept this view of professionals as it considered that *"the [Applicant's] sexual interest in children and thinking that sex with children is acceptable were core sex factors"*. It concluded that *"[the Applicant's] behaviour in relationships remained an area of risk that needed to start to be addressed prior to release"*.

22. The psychologist recommended that the Applicant *"complete[s] work around relationships... [and] that a polygraph licence condition is included"*. The COM plans to liaise with the Sex Offences Liaison Team and Offender Personality Disorder (OPD) Pathways to develop consolidation work. The Applicant would be supported by Chiron Community Intensive Intervention and Risk Management Service (IIRMS) and *"this would include weekly psychology sessions but is voluntary and cannot be mandated"*.

The Applicant's problems with his COM

23. Very importantly, the Applicant *"had a problem with his COM after he had visited his mother's home [as] he did not like him speaking to his friend"*. The Applicant then refused to speak to his COM after the most recent Offender Manger's Parole Assessment Report (PAROM 1) was submitted and he has contacted the senior probation officer to seek a replacement. The Applicant also refused to allow his COM to attend a Chiron meeting.
24. The panel then concluded on this issue by stating that *"this raised concerns for the psychologist and the panel as the effective management of [the Applicant's] risk will be dependent upon the early disclosure of any relationship and him effectively working with probation. The management of [the Applicant's] risk would require extensive external mentoring and corroboration of what he was saying"*.

The views of the professionals

25. According to the Applicant *"he is an honest man"*, the psychologist *"pointed out that his oral evidence suggested otherwise"*. The panel agreed with that conclusion noting *"several occasions where he contradicted himself when giving evidence"*.
26. The psychologist concluded that there was *"a very robust risk management plan in place and that it would be robust enough to externally manage risk"*. Crucially *"she had serious concerns about supervision and [the Applicant's] openness in supervision which led her not to recommend release [because] she would wish to see a better relationship [of the Applicant] with the [COM] in order to be able to support release"*.
27. The COM *"shared the psychologist's view that without a well-established relationship [the Applicant] would not come to him if things went wrong and there are no plans to change his [COM] as [the Applicant's] complaint has not been upheld"*.
28. The POM considered that *"[the Applicant's] risk can be managed in the community"* as *"his offending was against family members which impacts on imminence and opportunity"*. The POM believed that the Applicant had *"developed internal risk management strategies in respect of risk factors he accepts"*.

Risk factors

29. The panel took into account in deciding whether to order the release of the Applicant many factors supporting his release, including that:
- (a) the opinion of the POM that the Applicant had *"developed internal risk management strategies in respect of risk factors he accepts"*;
 - (b) the Applicant had maintained enhanced status;
 - (c) there was a robust risk management plan in place;
 - (d) the Applicant has completed eight sessions with a psychologist on relationships, attitudes and beliefs about sex and intimacy and healthy sexual thoughts;

- (e) the Applicant's OGRS score placed him in a group with a low risk of reoffending; and that
- (f) the Applicant "has made some progress by completing *Becoming New Me+*".
30. These factors will hereinafter be collectively referred to as 'the Applicant's positive factors'.
31. The panel concluded that the Applicant needed to remain confined for the protection of the public and his release was not directed.
32. The factors which influenced the panel in reaching that conclusion after taking account of the Applicant's positive factors were in the panel's words that:
- (a) "The index offending was a very serious matter that persisted over many years and against multiple victims which is likely to have had a long-term impact on the victims".
 - (b) "The panel was mindful of the potential consequences were [the Applicant] to behave in a similar way again".
 - (c) "In his oral evidence [the Applicant] lacked insight into risk factors, even for the behaviour he accepts responsibility for".
 - (d) "Although [the Applicant] now accepts that his offending against [victim F] started when she was younger, which he only acknowledged when presented with indisputable facts in the dossier, he does not understand what his risk is in respect of sexual interest".
 - (e) "There are significant differences between a sexual interest in teenage girls and pre/early pubescent children yet the latter is yet to be properly explored given that [the Applicant] only accepted such behaviour for the first time at the oral hearing".
 - (f) "The panel considered that [the Applicant's] sexual interest in children and thinking that sex with children is acceptable were core risk factors".
 - (g) "[The panel] also considered that [the Applicant's] behaviour in relationships remained an area of risk that needed to start to be addressed prior to release".
 - (h) "The management of [the Applicant's] risk would require extensive external monitoring and corroboration of what he is saying. Although [the Applicant] says that he is an honest man, the psychologist pointed out that his oral evidence suggested otherwise. The panel agreed and noted several occasions when he contradicted himself when giving evidence".
 - (i) "[The psychologist] had serious concerns about supervision and [the Applicant's] openness in supervision which led her not to recommend release".
 - (j) "The panel noted that [the Applicant's] attitude towards his [COM] soured when the [COM] did something that upset him. That did not augur well for the effective management of his risk in the community as inevitably the [COM] would have to make decisions which [the Applicant] may not like. The panel agreed with the COM and psychologist that however robust a risk management plan was put in place on release, it would not be strong enough to manage [the Applicant's] risks over time as he was unlikely to disclose important information that would be critical for the management of his risk".



33. These factors will hereinafter collectively be referred to as 'the Applicant's negative factors'.

The Relevant Law

Irrationality

34. In **R (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."

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

Other

36. It is possible to argue that mistakes in findings of fact made by a 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 uncontested 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.

37. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham 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 summarize 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 craftsmanship."

Procedural Unfairness

38.A party seeking to complain of procedural unfairness under Rule 28 has to establish 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 fairly; and/or
- (e) the panel was not impartial.

39.The overriding objective is to ensure that the Applicant's case was not dealt with unjustly.

The reply on behalf of the Respondent

40.PPCS stated in an email dated 26 July 2023 that the Respondent makes no representations in response to the reconsideration application by the Applicant.

Discussion

41.In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the reconsideration mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

42.The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

43.Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they 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.

44.Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

45.Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.



The grounds for seeking reconsideration

Ground 1 - Irrationality

46. It is contended the panel acted irrationally on the basis that:

- (a) *"the panel's conclusions were not in accordance with the evidence heard"* (Claim A);
- (b) *"there was more evidence to suggest that the Applicant would comply with licence supervision than there was evidence to suggest he would not"* (Claim B); and
- (c) *"there was also evidence to suggest he understood his risks"* (Claim C).

47. Claim A fails for the following reasons. First, the panel having heard the evidence and seen the witnesses was entitled to refuse to release the Applicant on account of the Applicant's negative factors.

48. A second or alternative reason why claim A must be rejected is that the Applicant has failed to show why the panel could not rely on all of those negative factors or indeed any of them to justify the decision to refuse to release the Applicant.

49. Further or alternative reasons why claim A must be rejected are that:

- (a) Due deference must be given to the expertise of the panel in making decisions relating to parole; and/or that
- (b) it has not been shown that the release decision reaches the threshold of irrationality as being *"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"*.

50. Claim B must also be rejected for the following reasons. First there was much evidence to show (as the COM and the psychologist explained) that *"however robust a risk management plan was put in place on release, it would not be strong enough to manage [the Applicant's] risks over time as he was unlikely to disclose important information that would be critical for the management of his risk"*.

51. A second or alternative reason why claim B must be rejected is that even if, which is denied, there was more evidence to suggest that the Applicant would comply with licence supervision than there was evidence to suggest he would not, it was not irrational to accept that evidence as:

- (a) The panel was obliged to appraise the evidence and was entitled to reach its own conclusion and not merely to accept the view of the majority of witnesses;
- (b) due deference must be given to the expertise of the panel in making decisions relating to parole;
- (c) it has not been shown that the release decision reaches the threshold of irrationality as being *"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."*



52.Claim C cannot succeed as there was also much evidence that the Applicant did not understand his risks and this evidence was included in the Applicant's negative factors and:

- (a)The panel was entitled to attach importance to those risks the Applicant did not understand; and/or,
- (b)due deference must be given to the expertise of the panel in reaching its conclusions relating to the Applicant's understanding of his risks; and/or,
- (c) it has not been shown that the panel's conclusions on the Applicant's understanding of his risks reaches the threshold of irrationality as being *"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."*

Ground 2 - Procedural unfairness

53.It is contended that the Panel acted procedurally unfairly because:

- (a)The questioning by the psychologist member of the panel of the prison psychologist *"was, at times, leading"* (Claim D) and,
- (b)the panel failed to adjourn the hearing to direct the attendance of the COM appointed by the Chiron Community (Claim E).

54.On 24 July 2023, the Parole Board team raised queries with the Applicant's solicitors relating to the Applicant's application for reconsideration of the panel decision and the Applicant's solicitors replied on 24 July 2023.

55.Claim D must be rejected because (as accepted by the Applicant's solicitors in their reply of 24 July 2023) the panel member was *"entitled to ask such questions as they consider appropriate and in a way they consider appropriate"* and the panel was entitled to attach such weight to the answer as they considered appropriate.

56.Further or alternative reasons why claim D must be rejected are first that due deference must be given to the expertise of the panel in reaching its conclusions relating to the Applicant's understanding of his risks; and second, this ground (even if correct) does not show that the Applicant was treated unjustly as to amount to procedural unfairness.

57.As to claim E, this claim must be rejected as

- (a)The panel has no obligation or duty to direct the attendance of witnesses, such as the COM appointed by the Chiron Community especially when the Applicant's legal representative did not seek the attendance of those witnesses;
- (b)even if the panel had such a duty or obligation, nothing has been alleged, let alone established as to what the COM appointed by the Chiron Community could state which would have assisted the Applicant's case;
- (c) due deference is owed to the panel on matters such as who can be called as a witness; and,



(d) this ground (even if correct) does not show that the Applicant was treated unjustly as to amount to procedural unfairness.

Conclusion

58. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
11 August 2023