

[2023] PBRA 216

## Application for Reconsideration by Reynolds

### Application

1. This is an application by Reynolds (the *Applicant*) for reconsideration of a decision of a panel of the Parole Board (the *Panel*) issued on 16 November 2023 following an oral hearing held remotely by video on 4 July 2023 and 6 November 2023. The Panel decided not to direct the Applicant's release.
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.
3. I have considered the application on the following papers:
  - an application for reconsideration dated 30 November 2023 (the *application*) submitted by the Applicant's solicitors;
  - the Panel's decision which is undated but was issued on 16 November 2023; and
  - a dossier of 629 pages.

### The reply on behalf of the Secretary of State (The Respondent)

4. The Respondent did not make any submissions.

### Background

5. The Applicant was convicted of the sexual assault of an adult woman who was a stranger to him. He was found guilty after a trial and on 12 April 2010, he was given a sentence of imprisonment for public protection with a minimum term of 18 months less time spent on remand. His tariff expired on 26 April 2011.
6. The Applicant has provided different explanations for the index offence during his sentence raising concerns about his insight into his risk and his honesty.
7. The Applicant has a history of sexual offending. He was cautioned for two indecent assaults on females over 16 committed on consecutive days in July 1996 (incorrectly referred to as July 1997 in the Panel's decision). He was convicted of five offences of indecent assault in 1998 which were committed when he was 17 years old. Over



a period of about five months, he approached lone women and touched them sexually. In 2000, he raped an adult female stranger who was walking home alone. The Applicant was given a sentence of five years which was varied on appeal in 2002, when he was given a sentence of 78 months. The rape was committed three weeks after he had completed a probation order for his 1998 convictions. In 2006, he was cautioned for a failure to comply with sex offender regulations.

### Request for Reconsideration

8. The application for reconsideration is dated 30 November 2023 and was made on the published form CPD 2.
9. The grounds for seeking a reconsideration are as follows:

**Ground 1 - Procedural Unfairness:** it is submitted that the Panel's decision is "*fundamentally and procedurally unfair*" to the Applicant. The application states that (i) the Panel comprised of two independent members and that there was no psychologist panel member; (ii) no prison psychologist report had been directed and a prison psychologist had attended the Applicant's previous hearing in 2021; and (iii) an independent psychologist had been instructed for the current review.

**Ground 2 - Procedural Unfairness:** the application highlights two factual errors in the Panel's decision namely that it refers to 4 July 2023 as the date of the hearing and that the dossier consisted of 401 pages. The application does note that the Panel and the Applicant's legal representative had agreed at the hearing on 6 November 2023 that the dossier contained 629 pages. It is not clear from the application if these issues are being advanced as a separate ground for procedural unfairness but I have treated them as such.

**Ground 3 - Irrationality:** it is submitted that the Panel's decision is irrational because it "*goes against the evidence and the cogency of the arguments put forward by all attending on the day.*" The application states that the Panel's decision "*is in stark contrast, to the point of irrationality, to the evidence heard on the day of the hearing alongside assessment made.*"

10. Among the points made in support of **Ground 3 – Irrationality** are:
  - the community offender manager (COM), the prison offender manager (POM), the independent (or prisoner-commissioned) psychologist (P-C Psychologist), and the New Connections witness (New Connections) were in support of the Applicant's release;
  - all the professionals had made independent assessments that the Applicant's risk was manageable in the community;
  - the Panel placed a disproportionate amount of weight on thought diaries and the Applicant's 'f\*\*k it' schema, and did not feel confident that there would be sufficient warning signs and indicators [of the Applicant's risk increasing] "*even though all the witnesses confirm evidence to the contrary of this*";
  - there was clear evidence from the POM that the Applicant's schema diaries would be continued in the community, and in his evidence to the Panel, the

Applicant said that the schema diaries would form an integral part of his coping strategies;

- none of the professionals working with the Applicant shared the Panel's concerns about the Applicant's openness;
- all the professional witnesses confirmed that there was no further work for the Applicant to do and that it was not essential for him to remain in open conditions;
- New Connections provided detailed evidence about an extensive community support care plan;
- New Connections said it would work closely with the probation service to help the Applicant with resettlement by helping him to secure move-on housing. New Connections said this support service would start a month after release was directed. The POM said it was normal practice for everyone at the prison not to engage in resettlement or to secure move-on accommodation until a direction for release had been made.

### Current parole review

11. This was the Applicant's seventh review. The only referral of the Applicant's case from the Secretary of State to the Parole Board in the dossier is a revised referral dated 4 July 2023. The original referral is not in the dossier.
12. On 22 August 2022, the Applicant's case was directed to an oral hearing. A remote hearing by video took place to review the Applicant's case on 4 July 2023. The Applicant was seeking release.
13. The hearing was adjourned on the day because several of the Panel's directions had not been met fully and the Applicant had only completed two resettlement overnight releases (*RORs*) to approved premises (*AP*), which the POM and the COM said was insufficient to allow them to consider release. The Panel reconvened on 6 November 2023 by which time the Applicant had completed a further two *RORs*.
14. The Panel was comprised of two independent members. At the hearing in July 2023, evidence was taken from the POM and the COM on specific issues relating to the availability of *RORs*. At the hearing in November 2023, evidence was taken from the POM, the COM, the P-C Psychologist, and New Connections. The Applicant also gave evidence to the Panel.
15. The Applicant was in the open estate at the time of this review. During his sentence, the Applicant had completed Core SOTP (Sex Offender Treatment Programme), Enhanced Thinking Skills, Extended SOTP, and work on addressing substance misuse.

### The Relevant Law

16. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The Panel correctly sets out the test for release in its decision. The test is in fact automatically set out in the Parole Board's template for oral hearing decisions.

**Parole Board Rules 2019 (as amended)**

17. Under Rule 28(1) of the Parole Board Rules, the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A)).
18. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are 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)).

**Procedural unfairness**

19. 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.
20. 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; and/or
  - (e) the panel was not impartial.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.

**Irrationality**

22. 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 paragraph 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."*

23. 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.
24. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

### ***Duty to give reasons***

25. The giving of reasons by a decision maker is "*one of the fundamentals of good administration*" see **Breen v Amalgamated Engineering Union [1971] 2 QB 175**. When reasons are provided they may indicate that a decision maker has made an error or failed to take a relevant factor sufficiently into account, hence their importance. An absence of reasons does not give rise to an inference that the decision maker has no good reason for a decision. Neither can it be necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.
26. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in cases such as **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board [2020] EWHC 1885 (Admin)**.
27. 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 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.*"
28. Panels of the Parole Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. If a panel intends to reject the evidence of a witness, then detailed reasons will be required. This is implicitly recognised in the case of **Wells** at paragraph 40:

*"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting."*

### **Discussion**

29. The application submits that the Panel's decision is procedurally unfair and irrational.

**Ground 1**

30. The application submits that the proceedings were “*fundamentally and procedurally unfair*” to the Applicant and refers to the fact that there was no psychologist member on the panel, that a report had not been directed from a prison psychologist “*given that there was once* [I have accepted that the application meant to say “*one*”] *in attendance at [the Applicant’s] previous hearing in 2021*”, and that an independent psychologist had been instructed at this review. The application does not explain why any of these facts result in procedural unfairness.
31. When a case is directed to an oral hearing, one of the matters the member case assessment (MCA) panel addresses is the composition of the panel that will hear the case. This includes deciding the number of panel members and whether a specialist member, such as a psychologist, is required. In summary, the MCA panel will consider whether the expertise of a specialist member could enhance a panel’s approach, and whether a specialist member is needed to provide relevant help in interpreting the information before the panel to make a safe and fair assessment of risk.
32. In this case, the MCA panel decided that the Panel should comprise two members and that the case did not require a specialist member. When the case was considered by the panel chair, the panel chair would have reviewed the MCA panel’s directions and panel logistics. The panel chair decided that the composition of the Panel did not need to be changed.
33. I do not find fault with the panel chair’s decision not to appoint a specialist member or not to direct a psychological risk assessment.
34. The fact that the dossier includes psychological assessments and reports does not mean that a psychologist member is required. All members of the Parole Board are experienced in reviewing risk assessments and questioning expert witnesses, including psychologists. Here, the psychological profile of the Applicant and his progress are comprehensively documented, and the issues to be explored by the Panel have been identified and are well understood.
35. The application incorrectly states that evidence was heard from a psychologist at the Applicant’s hearing in 2021. There was a psychologist at the Applicant’s hearing in 2018 but not in 2021.
36. A report was commissioned on behalf of the Applicant from the P-C Psychologist. A P-C Psychologist has the same duty as a psychologist commissioned by the prison on the direction of the Parole Board, to provide independent, objective, and unbiased evidence and opinions.
37. I note that during the review, the Applicant’s legal representative did not ask the panel chair to consider changing the composition of the panel by adding a psychologist member despite having several opportunities to do so. This could have been done before the hearing in July 2023 or after the hearing had been adjourned. This suggests that the Applicant’s legal representative did not consider the fact the

Panel did not include a psychologist member to be a concern or an issue of procedural unfairness at the time of the hearing in November 2023.

38. I do not agree that any of the matters outlined in Ground 1 resulted in the proceedings being fundamentally flawed and producing a manifestly unfair, flawed or unjust result.

## Ground 2

39. The application suggests that the proceedings were procedurally unfair due to factual errors appearing in the decision. The first page of the Panel's decision refers to 4 July 2023 as the date of the hearing. I note that under the heading "Any other information", reference is made to an adjournment on 4 July 2023 but not to the date the hearing resumed, which was 6 November 2023. In addition, the Panel's decision records the number of pages in the dossier as 401 when at the date of the reconvened hearing, the dossier contained 629 pages. The decision is also undated.
40. These are careless mistakes which should not have been made. The Panel is responsible for making sure that basic factual information in its decision is correct. My view is that the panel chair started to populate the oral hearing decision template when she reviewed the dossier for the purpose of issuing panel chair directions and did not update this information before the decision was issued. While it is poor practice not to have double checked the accuracy of the information before the decision was issued, in relation to the size of the dossier, the application records that the Panel and the Applicant's legal representative agreed at the hearing in November 2023 that the dossier contained 629 pages confirming therefore that the Panel had the same dossier as the Applicant and his legal representative. In my view none of these factual errors or omissions result in the proceedings being fundamentally flawed and producing a manifestly unfair, flawed or unjust result.

## Ground 3

41. The application submits that Panel's decision is irrational because it "*goes against the evidence and the cogency of the arguments put forward by all attending on the day*" and "*is in stark contrast, to the point of irrationality, to the evidence heard on the day of the hearing ...*"
42. In considering the arguments advanced in the application, I have taken account of the matters set out below.
- (a) The reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be interfered with lightly. Is it also not a means by which the member carrying out the reconsideration is entitled to substitute his or her view of the facts for the view of 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.
- (b) When deciding whether the Panel's decision was irrational, due deference has to be given to the expertise of the Panel in making decisions relating to parole.

- (c) Where the Panel arrives at a conclusion, exercising its judgment 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.
- (d) 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.
43. The application states that the professionals confirmed that the Applicant had completed all core risk reduction work. The Panel does not disagree with this position as it sets out in paragraph 4.6 of its decision.
44. The application submits that the Panel places a disproportionate amount of weight on thought diaries and the Applicant's 'f\*\*k it' schema. I do not accept that this is the case as is evident from the wide range of reasons given by the Panel for its decision not to direct release (see below). The Panel's reasons are properly focused on the factors that are relevant to the manageability of the Applicant in the community taking account of the fact that he is serving an indeterminate sentence and that the Panel must consider the management of his risks over a significant period.
45. The application argues that the Panel did not feel confident that there would be sufficient warning signs and indicators of the Applicant's risk increasing "*even though all the witnesses confirm evidence to the contrary of this*". The Panel's concerns arise from the fact that the warning signs referred to by the POM, the COM, and P-C Psychologist are an increase in sexual preoccupation, indications of sexual entitlement, and a mistrust of women. The Panel points out that to a large degree, these warning signs are dependent on the Applicant being truthful and transparent. The Panel considers that the Applicant's "*significant pattern of serious sexual offending*", his previous admissions about sexual motivation, and evidence of his past sexual preoccupation mean it will be important that he can be open and honest about his sexual thinking with those supervising him and that they are able to discuss and challenge his thinking. The Panel states that when it questioned the Applicant about his sexual thinking, his responses were vague and unconvincing leading to the Panel having misgivings about the Applicant's willingness to discuss his sexual thoughts with the COM and others in the community. The Panel concludes that it has reservations about the Applicant's willingness to disclose and discuss his sexual thoughts.
46. The application states that the POM, the COM, and the P-C Psychologist were in support of the Applicant's release. The Panel's decision records the evidence of each of the professional witnesses and is even-handed and fair in setting out the reasons each professional provides for supporting release. The Panel does not consider that the Applicant meets the test for release, and in accordance with its duty to give reasons for its decision, it explains in detail why this is the case (often giving examples by way of illustration) and why it disagrees with the professionals.



47. In paragraphs 4.5 and 4.13 and other parts of its decision, the Panel acknowledges the progress that the Applicant has made since the review of his case by a panel of the Parole Board in 2021. The Panel then outlines its concerns about the manageability of the Applicant's risk in the community and the robustness of the proposed risk management plan including:

- a lack of confidence in the ability of the Applicant to apply his learning and internal controls consistently and 'in the moment' particularly if he is feeling low, under pressure, or struggling to manage his emotions;
- that the Applicant's better insight into his schemas and improved ability to employ alternative schema talk are relatively recent developments;
- that there is an over-reliance on external risk management measures;
- that the Applicant's protective factors are not sufficiently developed;
- that there has been insufficient testing of the Applicant in the community;
- the Applicant's tendency to push boundaries and become complacent leading to non-compliant behaviour;
- a lack of confidence that the Applicant can manage his schemas, his behaviours, and his sexual thinking;
- a lack of confidence that the Applicant will be open and honest with all the professionals managing his risk;
- deficits in his insight into his sexual offending and a lack of confidence that the Applicant will be open and honest about his sexual thoughts;
- that there may not be warning signs of the Applicant's risk increasing and that warning signs are dependent to a significant degree on the Applicant's openness and honesty which may not be forthcoming;
- in light of his impulsivity, which is still evident at times, that the Applicant's risk of sexual violence could become imminent without warning;
- that the Applicant has often required significant support from professionals and has benefitted from the structure and routine available to him in the open estate. The Panel notes that it is unclear how this supportive environment will be replicated as part of the risk management plan after his residence at the AP ends;
- that the plans for move-on accommodation and employment in the community are not adequately developed.

48. I consider that the Panel has given full and cogent reasons to justify its decision to depart from the views of the professionals and to conclude that the Applicant does not meet the test for release and therefore its stance is not an irrational one.

## Decision

49. For the reasons I have given, I do not consider that the Panel's decision was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

**H Emrys**  
**21 December 2023**