

[2024] PBRA 11

Application for Reconsideration by Moore

Application

1. This is an application by Moore (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 27 November 2023 (the Decision) not to direct the Applicant's release or to recommend to the Secretary of State (the Respondent) that he should be moved to open conditions.
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)) 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:
 - (a) The Decision.
 - (b) The Applicant's application for reconsideration contained in an email from the Applicant's solicitors to the Reconsideration Team dated 18 December 2023.
 - (c) The email dated 28 December 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State stating that no representations will be made by the Respondent in response to the application for reconsideration.
 - (d) The email dated 27 December 2023 from the Reconsideration Team to the Applicant's solicitor and the reply from the Applicant's solicitor to Reconsideration Team dated 8 January 2023 stating that the claim for reconsideration is based on procedural unfairness.
 - (e) The Applicant's dossier containing 898 pages.
4. The grounds for seeking reconsideration are that the Panel acted in a procedurally unfair way when it failed properly to consider the application made on behalf of the Applicant after the evidence had been adduced to then adjourn the proceedings for a neurological assessment and a medical assessment, as to how (a) the Applicant's kidney failure affects his libido and sexual risk and (b) how his brain haemorrhage has affected his recall and his memory function. The application to adjourn was refused.

Background

5. On 31 March 2008, the Applicant, who was then 24 years old, was sentenced to an indeterminate sentence of imprisonment for public protection with a tariff of



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3 years and 215 days for rape, assault by penetration, robbery and assault occasioning actual bodily harm. His tariff expired in November 2011.

6. Prior to committing these index offences, the Applicant had committed, from his late teens onwards, numerous acquisitive offences and offences of violence against younger women, within relationships and people in the workplace as well as failing to comply with obligations and court orders.
7. The index offences were committed about 6 weeks after the Applicant had been released from prison having served a sentence for assault. They were committed by the Applicant when drinking alcohol and when his bad conduct appears to have been triggered after he had tried to kiss a female whereupon he became abusive. He used violence against 3 women by chasing them down the street and spitting in the face of one woman as well as squeezing her throat, restricting her breathing, and then throwing her to the ground, causing her to strike her head before stealing a gold chain from her neck. He also assaulted a man who tried to intervene before continuing to follow the women and head-butting a 16-year-old girl in the face.
8. The Applicant then, later the same day, attacked an 18-year-old woman, who was a stranger to him, by grabbing her from behind, putting his hand over her mouth, threatening to use a knife before pushing her down a set of stairs and pulling out a set of earrings and a nose stud. Having dragged her away from CCTV, he then raped and digitally penetrated her. He then pulled her clothes off and raped her twice orally, twice anally and twice vaginally. After the police had been called, the Applicant fled.
9. The Applicant has explained his attitudes to this conduct and this behavior by saying "*I do what I want*" and "*I can't show weaknesses*". The Applicant has completed many programs, and it was shown that he has the need for further treatment to address sexual preoccupation. In 2019, the Applicant received a diagnosis of dissocial/antisocial personality disorder, but it was said that the Applicant did not agree with this diagnosis.
10. It was recorded that the Applicant's attitudes and behavior during his sentence for the index offences had been "*unstable*" with him making threats of violence. The decision stated that the Applicant had "*serious health conditions*" as he had a "*Stage 5 kidney failure that requires specialist hospital treatment for dialysis*". He is reported to have suffered a stroke in early 2023; it is said that "*he struggled with this diagnosis*".
11. On 5 June 2023, whilst at hospital the Applicant allegedly threatened to assault staff and he was restrained but he was reported to have assaulted a nurse and struck a prison officer's head with his knee. Medical staff have assessed that his behavior is linked to his illness, and he did not have full capacity. The panel explained that it did not place any weight on this incident "*accepting that it was probably related to illness.*"

The Evidence at the Panel Hearing

12. The Applicant's Community Offender Manager (COM), who had started that role in April 2023, stated that she spoke with the Applicant about concerns regarding his thinking skills and understanding of his risk of serious harm. He is said to have told her that he would refuse further work in custody or community, and he saw no benefit in open conditions and so would refuse to go.
13. She explained that she did not recommend release because she needed a greater understanding of the Applicant's risk factors and thinking. Her evidence was that it would be very difficult to manage his risk because there was little insight into the sexual offences or black outs and she could not identify precursors and so she could not know if things were going wrong.
14. The Applicant's COM explained that rigid thinking and inflexibility on the Applicant's part led to concerns about how the Applicant could manage stress if his expectations were not met. Her evidence was that the Applicant had minimal understanding of his risks and he was dismissive about sexual thinking. She considered that it was very difficult to do work with the Applicant as she did not know what his thinking was and how he would behave in the community. She was also concerned about the Applicant's willingness to engage with matters not on the risk management plan. She thought that there might be a benefit in a neurological assessment and other assessments on the impact of kidney diseases on his libido, physical strength, and risk of harm.
15. The Applicant's progress in custody has been poor and although he has completed substantial offending behavior work, specialist and intensive treatment has been assessed as necessary to address personality disorder issues. The panel considered the fact that the Applicant blames his sexual violence on a one-off incident caused by alcohol abuse but explained that a comprehensive understanding of the factors that led to this particular offending remains absent.

The Application to Adjourn

16. After all the witnesses including the Applicant had given evidence, the legal representative for the Applicant made an application to adjourn the proceedings for a neurological assessment and a medical assessment as to how (a) the Applicant's kidney failure affects his libido and sexual risk and (b) how his brain haemorrhage has affected his recall and his memory function.
17. The application was made on the basis first that the COM had said that a neurological assessment might help in determining how probation could work with the Applicant as suggested by the OPD Pathway (a regime to help people recognise and deal with their problems) psychologist and second that such an assessment might impact on the assessment of risk. So, it was said that fairness required the grant of an adjournment.
18. The application was refused because the panel accepted that whilst a neurological assessment might assist in sentence planning, the Applicant was clear that he was unwilling to engage in work with Chiron/IIRMS (Intensive Intervention and



Risk Management Service) in custody and this is a requirement for consideration of continued support in the community. Bearing in mind that the Applicant's evidence was coherent and consistent with other evidence, the panel concluded that they did not require a neurological assessment to make *"their assessment of need and risk or discharge the referral."*

The Panel's Conclusion

19. The panel noted that neither the Prison Offender Manager (POM) nor the COM recommended release as both of them explained that there was a need for the Applicant to complete further core risk reduction work in closed conditions and they assessed that he posed a high risk of serious harm to the public through physical and sexual violence. The panel considered that his risk of reoffending was *"at least moderate and would escalate quickly to become high and imminent if he misused alcohol or became emotionally unstable."*
20. It noted that there were identified core risk needs and proposals that had to be addressed, but they had been *"rejected by [the Applicant]"*. The panel appreciated that the Applicant had been guilty of *"poor behavior largely related to compliance"* and they were not confident that this would change if he were released into the community. Indeed, the panel was not persuaded that in the community the Applicant would be compliant and concluded that it remained necessary for the protection of the public that he is confined and so his release was not directed.
21. No recommendation for the transfer of the Applicant to open conditions as he had made it clear in evidence that he did not wish to transfer to open conditions and that he saw no benefit in such a move with the consequence that his risk of absconding has increased to moderate. A further reason why a recommendation for a transfer to open conditions cannot be made is that the Applicant has not made sufficient progress in reducing risk to the public to qualify for such a transfer.

The Relevant Law

Procedural Unfairness

22. A party seeking to complain of procedural unfairness under Rule 28 must establish that either:
 - a) express procedures laid down by the 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.
23. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The reply on behalf of the Respondent

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24. The Respondent stated in an email dated 28 December 2023 that they will not be making any representations in response to the Applicant's original reconsideration application.

Discussion

25. In dealing with the grounds for reconsideration, it is necessary to stress one matter of basic importance, which 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.

Ground of Challenge

26. This ground is that the Panel failed to consider properly the application to adjourn for further assessments, specifically a neurological assessment and medical assessment of (1) how the Applicant's kidney failure affects his libido and sexual risk and (2) how his brain haemorrhage has affected his recall and memory functions.

27. I have concluded that after considering the reasons given in the decision for refusing the adjournment which are set out above and the matter of basic importance set out in paragraph 25 above, the assessments sought on the application to adjourn would have been likely to have provided highly relevant evidence on different aspects of the issues to be resolved by the panel and so the application for adjournment should have been acceded to as the refusal of an adjournment meant that the Applicant's case was not considered justly for the following reasons.

28. First, the task for the panel in deciding whether to release the Applicant was to assess his risk of sexual offending in the community especially as he had been convicted of serious repeated sexual offending. In that regard, medical evidence on the effect of these medical conditions on his present sexual risk and his libido would have been very helpful, if not essential.

29. Second, the COM had said that a neurological assessment might help in determining how probation could work with the Applicant as suggested by the OPD Pathway.

30. Third, a medical report would shed light on the impact of the Applicant's very recent brain haemorrhage and his ability to engage in risk reduction work and this is important part of the Board's risk assessment particularly because adjustments for his conditions might be required. Without this information, the panel could not accurately assess his suitability for release.

31. Finally, no representations have been made to argue that the decision to refuse the adjournment was correct and that the grounds for reconsideration set out above are flawed.
32. For all these reasons and after taking account of the panel's reasons, this application for reconsideration must be granted.

Sir Stephen Silber
11 January 2024