Neutral Citation Number: [2020] EWHC 1885 (Admin)

Case No: CO/4946/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street Cardiff CF10 1ET

Date: 10/7/2020

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between :

THE QUEEN (ON THE APPLICATION OF STEVEN STOKES)	**Claimant**
- and -	
PAROLE BOARD OF ENGLAND AND WALES	**Defendant**
-and-	
SECRETARY OF STATE FOR JUSTICE	**Interested Party**

Mr Ian Brownhill (instructed by **GT Stewart Solicitors**) for the **claimant**
The other parties did not appear and were not represented

Hearing dates: 2 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 11.30 am Friday 10 July 2020.

HH JUDGE JARMAN QC:

Introduction

1. On 28 April 2020 I gave permission to the claimant to bring judicial review proceedings to challenge the decision made by the defendant dated 16 September 2019. In that decision (the reconsideration decision), the defendant refused the claimant's application to reconsider the recommendation by the defendant's panel (the panel) in a letter dated 24 July 2019 (the oral hearing decision). That recommendation was that the claimant should remain confined to prison for the protection of the public but that he should be moved to open conditions. The claimant seeks an order quashing the reconsideration decision and for the defendant to decide the reconsideration application afresh.

2. The substantive hearing came before me by video platform on 2 July 2020, when Mr Brownhill appeared for the claimant, as he had done on the oral renewal hearing. The defendant and the interested party, the Secretary of State for Justice, indicated at an early stage that they would remain neutral in these proceedings and have not appeared at the permission stage or at the substantive hearing. I am grateful to Mr Brownhill for his thorough yet focused submissions.

3. There are two grounds of challenge to the reconsideration decision. Ground 1 has two sub grounds: (i) the decision failed to address adequately or at all the allegations that the oral hearing decision failed to record accurately the evidence before it and in particular evidence relating to whether the claimant whilst on licence continued to access sex websites after being warned by his offender manager about such conduct; (ii) the reconsideration decision should have recognized that the oral hearing decision failed to give adequate reasons for not accepting the recommendation of all five professional witness who gave evidence before the panel that the claimant should be released on licence, or failed to deal with the concerns of the claimant's offender supervisor that open conditions would not offer the claimant the level of support which he needs.

4. Ground 2 is that the approach taken in arriving at the reconsideration decision was too narrow by focusing entirely on the rationality of the oral hearing decision and failing to consider grounds made in the application for reconsideration as to procedural fairness. It is not in dispute that the application raised both irrationality and procedural fairness grounds. Mr Brownhill made clear that the present challenge is not about the rejection in the reconsideration decision of the irrationality grounds. It is based on the failure to deal with, or alternatively to deal properly with, the procedural fairness grounds.

The reconsideration mechanism

5. The reconsideration decision was made Sir David Calvert-Smith, who has great experience of the defendant's practice and procedure. However, the reconsideration mechanism is a new procedure introduced by the Parole Board Rules 2019 (SI 2019 No 1038) which were brought into force on 22 July 2019. The new rules came in

the wake of the decision of the Divisional Court of the Queen's Bench Division in *R (DSD and others) v Parole Board* [2018] EWHC 694 (Admin). In that case a decision of the defendant to release a prisoner serving an indeterminate sentence of imprisonment imposed for public protection in respect of sexual offences was quashed on the grounds of irrationality. It was also declared that rule 25 of the Parole Board Rules 2016, which restricted publicity in respect of the defendant's decisions, was ultra vires.

6. The explanatory memorandum to the 2019 rules refers to the *DSD* case at paragraph 7.1 as follows:

> "As a result of the High Court verdict in the judicial review of the Parole Board's decision to release John Radford (John Worboys), the 2016 Rules were amended to allow victims and other members of the public to request summaries of Parole Board decisions. Furthermore, the Government consulted on a reconsideration mechanism whereby victims could challenge Parole Board decisions without having to resort to judicial review and also committed to reviewing all the rules to ensure that they were fit for purpose and to identify scope to make further improvements to parole procedures. This instrument is the outcome of that review."

7. The new reconsideration mechanism is explained in paragraph 7.4 as follows:

> "Rule 28 introduces the 'reconsideration mechanism' which allows both parties (i.e. the prisoner and the Secretary of State for Justice) the opportunity to apply to the Parole Board for a decision to be reconsidered if they believe it was not legally sound. Applications should be received within 21 days of the decision and must be on the basis that the panel's decision was either irrational and/or procedurally unfair. This test is similar to that required to launch a judicial review. The reconsideration mechanism applies to all decisions relating to the release of prisoners serving an indeterminate sentence (life or IPP) and certain determinate sentences where initial release is at the discretion of the Parole Board (including Extended Determinate Sentences and Sentences for Offenders of Particular Concern)."

8. Rule 28, as applied to the oral hearing decision, provides as follows:

> "(1) …a party may apply to the Board for the case to be reconsidered on the grounds that the decision is—
>
> (a) irrational, or
>
> (b) procedurally unfair."

Background

9. The factual background is the claimant was sentenced in 1979 to life imprisonment for murder with a tariff of 15 years with a concurrent determinate sentence for robbery. The victim, a vulnerable lady of 66 years old, was walking down the street when she was set upon by the claimant, then 19, with three other youths. She was beaten strangled and robbed. There was a sexual element in that the deceased victim was then stripped and all four assailants had sexual intercourse with the body before mutilating it.

10. The tariff expired in 1994. However, it took many years for the claimant to accept responsibility for his part in those offences. In 1995 he completed a sexual offending programme. By 2002 it was judged that he had made sufficient progress to move to open conditions where he underwent further sexual offending treatment programmes and made further progress. He was released on licence for the first time 2005. but was recalled 5 months later, having been arrested on suspicion of attempted murder. He accepted that he had put his hand to the mouth of a vulnerable woman with whom he had formed a relationship, saying that he was upset that money he had given her for alcohol was used for drugs and that she was talking about being sexually abused which reminded him of his own childhood experiences.

11. In 2008 he was allowed resettlement overnight stays at approved premises, but these were ended after concerns that he had attempted to hide his friendship with a sex offender. After further progress he was released on licence again in December 2017. However, there were ongoing concerns about his behaviour, including his association with sex workers and registered sex offenders and accessing sex websites. His offender manager reminded him at regular meetings that such behaviour was in breach of his licence conditions but acknowledged that the approved premises where he was staying was located in an area frequented by sex workers and drug users. In April 2018 he became engaged to a woman with learning difficulties. In July 2018 he left the approved premises during curfew because, he said, his fiancée had called him saying she was being attacked by her brother and he went to her home. The police were called, and the brother arrested, but the claimant stayed and did not answer calls from the approved premises staff. He was returned to custody.

12. In October 2018, the claimant started work with a psychologist, Charlotte Purvis, and an occupational therapist. The claimant was found to be motivated and a change in presentation was reported with a prognosis that was not considered to be poor. Dr Purvis could try to maintain contact in open conditions but that would depend on location and such contact was unlikely to be as regular as in closed conditions.

13. As an indeterminate sentenced prisoner, the Secretary of State for Justice in 2019 referred the claimant to the defendant for consideration of re-release. An oral hearing took place on 20 June 2019. The Secretary of State did not submit a written view and was not represented at the hearing. The claimant was present and represented and gave evidence. The panel also heard evidence from three psychologists, Graham Rogers, Charlotte Purvis and Gavin Frost, as well as the

claimant's offender supervisor Myra Baynham and offender manager Kirstin McCormack. Two friends of his, Mr and Mrs Hilder, attended as observers. Each of the professionals recommended release on licence with a risk management plan.

The oral hearing decision

14. The panel then issued a decision letter dated 24 July 2019, which on its face indicated it was provisional for 21 days within which time either party may apply for the decision to be reconsidered on the basis that it is either irrational or procedurally unfair or both.

15. In section 5 of the oral decision letter, the panel dealt with the circumstances leading to recall. It recorded concerns in relation to sex websites as follows:

> "You spent time on sex sites on your phone. You would get approached by people befriending you on Facebook and would continue the contact despite being told that they were not real people but were trying to get you to go to a sex site. Ms McCormack said that at first it seemed that you did not seem to understand that it was not a real person who was contacting you but after you were told about the situation, you continued to access the sites. You told the panel that you did not get on with technology and did not know what sex sites were on the internet to look at."

16. Later on in section 5 the panel referred to the claimant's breach of curfew and said this was potentially a high risk situation where the claimant ignored the advice of staff, which evidenced lack of internal management and willingness to disregard external controls. It also showed that the claimant struggled with honesty to professionals. The panel then added that "Your behaviour on licence also raised concerns that you continued to be sexually preoccupied."

17. In section 6 of the oral hearing decision letter, the panel set out its assessment of the current risk posed by the claimant. The risk had been assessed as low in terms of general reoffending and violent reoffending but a high risk of serious harm to the public and known adults (his ex-partner). Mr Frost thought that there was a moderate risk of violence which would be likely to be against an adult female but was only partially imminent as the claimant was not then in a relationship. He considered that the claimant may benefit from further programmes or continued work with Dr Purvis. Mr Rogers considered that the claimant is emotionally vulnerable and needs psychological input. He did not agree with Mr Frost that the claimant's behaviour on licence could be indicative of sexual preoccupation. The panel indicated that it did not share this view given that the claimant was "seeking relationships and going onto sex sites."

18. The risk management plan put forward by the professionals, which the panel accepted was "robust," was set out in section 7 and included accommodation in a hostel well away from his previous hostel which was close to what the panel termed

the claimant's "criminal associates." He would receive support from a group called STRIVE and be referred to support networks. He could attend AA meetings, but the panel did not agree that social drinking would not be a problem given that most of his controls were external. The panel accepted that he could a have a GPS tag but noted that he had struggled to charge it in the past.

19. The section then set out the professionals' views as follows:

> "Mr Frost raised concerns about your ability to comply with [licence] conditions if you progressed to open conditions and also problems with accessing treatments: it was this later point that swayed him to recommending release. The panel acknowledged the potential issues with the latter but considered that the first concern would also apply on release. He did appreciate that there were advantages to a move to open. These included the chance for you to be tested in less secure conditions with a closer level of monitoring over a sustained period of time as well as developing your longer term resettlement plan.
>
> Mr Rogers recommended that you be released. He did not consider that open conditions was necessary as you had been there before and that it would be better to get you into the community and give you the opportunity to succeed.
>
> Ms Bayham considered that your risks could be managed in the community if you were open and transparent. She noted that there had been changes in your thinking and that there would be weekly reports from Dr Purvis and the occupational therapist. She had concerns that open conditions would not offer the level of support that you needed. Ms McCormack also recommended your release.
>
> Protective factors include Mr and Mrs Hilder. You have a good working relationship with professionals although Ms McCormack described working with you as 'quite challenging and time consuming.'"

20. After the evaluation of the plans to manage risk the conclusion of the panel was set out at the end of section 7:

> "Although the proposed risk management plan is very robust, the panel did not consider that it would be effective in managing your risks as it was similar to the previous risk management plan, with the exception of the addition of the input form STRIVE and the new location, and when being managed with that plan, you had been close to being recalled every other day."

21. The panel went on in section 8 under the heading "Conclusion and Decision of the Panel" to conclude that it was simply "sheer luck" that the claimant had not been involved in a violent incident during his most recent release when going to his fiancée's home and continued:

> "You showed that your risks in the community are still active and could be imminent in a specific context. You put yourself into highly risky situations. You continue to lack the internal controls that you would need to manage your risks and so are very dependent upon the external controls. If you ignore advice given and are not honest with those managing you, as was the case when you were on licence, that limits the effectiveness of the external controls. The panel came to the view that these concerns outweighed the recommendations of all witnesses that you could be released."

The reconsideration decision

22. On 14 August 2019, the claimant's then solicitors made an application for such reconsideration on his behalf setting out several grounds. Some of these went to the rationality of the oral hearing decision but others went to procedural unfairness, and in particular the failure accurately to record evidence and the failure to give adequate reasons.

23. In the opening paragraph of the reconsideration decision, the application is referred to "on the basis that the [panel's] decision was irrational." The following paragraph refers to both limbs of rule 28(1). Paragraph 5 summarizes the grounds in the request for consideration which summary includes two grounds of procedural unfairness as follows:

> "(a) Evidence concerning the [claimant's] use of the internet was misrepresented in the decision letter.
>
> …
>
> (d) The panel failed to explain properly its decision to reject the recommendations of the 5 witnesses who had supported release."

24. Paragraph 10 is titled "The Relevant Law." *DSD* is referred to as setting out the test for irrationality at paragraph 116 which is then quoted as follows:

> "..the issue is whether the release decision was so outrageous in tis 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"

25. Paragraph 10 then continues as follows:

> "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 was irrational, due defence 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 for 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."

26. Paragraphs 11 to 15 are tiled "Discussion," the first two of which say:

> "Misrepresentation of the alleged use of the "sex sites." The applicant's case was that he had been accessing a social networking website and had been targeted by person who had tried to tempt him into using sites of concern.
>
> The panel's real concern concerned relationships with real people and the risks to them if such relationships were not closely monitored and the person(s) concerned were not aware of the [claimant's] previous history. It is clear that the concern expressed by the panel was more for those with whom he might seek a relationship and who might be at risk of physical harm as a result. There was ample evidence with or without the internet, to suggest that the [claimant] wished to form a new relationship"

27. Paragraphs 13 and 14 refer to the grounds going to irrationality and then at paragraph 15 this is said:

> "Failure to explain why the panel rejected the recommendation of 5 professionals that the [claimant] be released. There is nothing in this ground. The reasons are clearly set out at the conclusion of paragraph 7 and in paragraph 8."

28. The ultimate paragraph, paragraph 16 under the heading "Decision" says:

> "While it is easy to understand the disappointment of the [claimant] at the decision and it is possible that a different panel might have come to a different decision, it is impossible to characterize the decision letter its reasoning and conclusions as 'irrational' within the definition set out above."

29. In the request for reconsideration, the claimant's solicitor indicated that their notes

of the hearing before the panel did not indicated that Ms McCormack gave evidence that the claimant continued to "access sex sites" but rather than he continued to access Facebook. Accordingly, it was said that the significant weight which the panel placed on such access, linking them to wide preoccupation with sex was unfair and inappropriate.

30. It is not clear whether the chair or panel members took notes of the evidence before it, although it is to be expected that such notes were taken, or whether such notes were before the decision maker in making the reconsideration decision. In the pre-action protocol letter, the claimant's solicitor pointed out that there was no suggestion that a request for such notes was made by the decision maker and the response does not deal with the point.

Ground 1(i)

31. Mr Brownhill accepts that there was a reference to misrepresentation of evidence in paragraph 11 but submits that that was in the context of irrationality and in any event, there appears to be no conclusion on the issue. I shall come on to deal with the broad point as to the context when considering Ground 2. However, I do not accept that the reconsideration decision failed to come to a conclusion on this particular issue. In paragraph 12, the point was made that the panel's real concern was with the claimant's relationships with real people and the risks involved. In my judgment, the phrase used in the last sentence of that paragraph, "with or without the internet," shows that it was considered that even if the claimant's evidence on that issue were accepted, there was still ample evidence to suggest that the claimant wished to form a new relationship.

32. I accept that the panel placed weight on its understanding of the evidence on that point in referring to concerns that the claimant continued to be sexually preoccupied. However, when setting out its decision in section 8 as to which concerns outweighed the recommendations of the professional witnesses, the concerns listed were that the claimant had put himself in highly risky situations, that he continued to lack internal controls to manage risks and to be dependant on external controls, and that the effectiveness of such controls would be limited if he ignored advice given and was not honest with those managing him.

33. In my judgment it was permissible to conclude in the reconsideration decision that even "without the internet" there was ample evidence to suggest that the claimant wished to form a new relationship. I am not satisfied that that aspect of ground 1(i) is made out.

Ground 1(ii)

34. Mr Brownhill submits that there is no proper explanation in paragraph 15 of the reconsideration decision as to why the reasons given by the panel for not accepting the recommendations of the professional witnesses were considered adequate. Just as there was an obligation on the panel to give sufficient reasons, so too was there such an obligation upon reconsideration.

35. The duty of statutory bodies to give reasons was summarized by Lord Carnwath in

the Supreme Court case *Dover District Council v CPRE Kent* [2017] UKSC 79 as follows:

> "51. Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *R v Higher Education Funding Council, Ex p Institute of Dental Surgery* [1994] 1 WLR 242, 263A-D; *De Smith's Judicial Review* 7th ed, para 7-099). *Doody* concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:
>
> "To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view…" (p 565G-H per Lord Mustill).
>
> It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review."

36. The importance of adequate reasons in the decisions of the Parole Board where the liberty of the subject is at stake has been emphasized in two authorities handed down since the reconsideration decision. In *R* (*Wells) v Parole Board* [2019] EWHC 2710 (Admin) Pushpinder Saini J said this at paragraphs 38-41:

> "I accept that the Panel was not bound by the expert evidence before it but I consider that the extent of the reasoning given by the Panel for coming to conclusion that the risks posed by the

> Claimant could not be managed in the community fell below an acceptable standard in public law…
>
> 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. I also consider that departure from an earlier reasoned recent decision from another Panel required some explanation.
>
> I accordingly conclude that the Panel's decision failed to reflect the evidence before it or to explain in more detail why such evidence was being rejected."

37. The other case was also one where a decision of the Parole Board was quashed because the panel did not properly explain why the view of professionals was rejected. Mr Steven Kovats QC sitting as a deputy judge of the High Court in *R(PL) v Parole Board and Secretary of State for Justice* [2019] EWHC 3306 (Admin) dealt with a decision not to release a prisoner serving an indeterminate sentence of imprisonment. The decision was quashed on grounds which included that the defendant failed to identify concerns about the claimant's behaviour and did not explain how its concerns were cemented.

38. Mr Brownhill accepts that the panel in the present case was entitled not to accept the views of the professional witnesses and that respect must be recorded to the panel as a panel of experts. Nevertheless, he submits that here too the reasoning of the panel that the risks posed by the claimant could not be managed in the community fell below an acceptable standard in public law.

39. It is clear in my judgment that the reasoning of the panel in coming to that conclusion as expressed in the oral hearing decision letter rested upon the behaviour of the claimant during two periods of release into the community on licence, the last of which ended just under a year before the oral hearing.

40. However, the panel heard evidence in the meantime that the claimant had started work with Dr Purvis and an occupational therapist, that the claimant was motivated in this regard and showed a change in presentation, that the therapeutic prognosis was not poor, that his relationships with Dr Purvis and professionals was good, that upon release into the community there would be weekly reports from Dr Purvis and the occupational therapist, and that Dr Purvis and other professions had concerns that the level of support needed would not be available in open conditions. These were significant developments since the last recall which the professional witnesses relied upon in recommending release.

41. Whilst the panel made some comment on this evidence when noting it in section 7 of the oral hearing decision, in the conclusion and decision of the decision at section 8, none of these factors were expressly or implicitly put into the balance. In my judgment the claimant is entitled to know why the panel took the view that these factors did not deal either at all or in part with the risks referred to by the panel, if indeed that was the panel's view. In my judgment in this regard the reasoning of the

panel as to why the risks posed by the claimant could not be managed adequately in the community fell below the acceptable standard in public law.

42. It follows that so too did the reasoning in the reconsideration decision in rejecting the challenge to the reasoning, which it did in very brief terms by saying there was nothing in the point and that the reasons were clearly set out in sections 7 and 8 of the oral hearing decision letter. In my judgment, for the reasons given, they were not. I am satisfied that ground 1(ii) is made out.

Ground 2

43. That leaves the criticism that the reconsideration decision did not deal adequately with the procedural unfairness challenge. Having set out the second limb of Rule 28 at the outset of the decision, and expressly summarized the procedural unfairness grounds, it would be somewhat surprising if the decision did not then go on to deal with them. I have already rejected the submission that it did not do so in respect of the evidence as to accessing sex websites.

44. However, it is difficult to draw from paragraphs 10 and 15 that in the end the decision did consider procedural unfairness as a separate ground to irrationality. Paragraph 10 dealing with the law gives references concerned only with the latter and not the former. This is despite the fact that in the *CCSU* case sited Lord Diplock dealt with a third head of judicial review namely procedural impropriety at page 411A as follows.

> "I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

45. Moreover, in the ultimate paragraph setting out the decision there is reference only to irrationality. The decision must be read fairly as a whole, but it is difficult to read the concluding part as appraising the open hearing decision letter from a point of view or procedural fairness as well as irrationality. I have come to the conclusion that that part of the challenge was lost sight of when the final conclusion was formulated. Accordingly, I am satisfied that ground 2 is made out as well.

Conclusion

46. Grounds 1(ii) and 2 (and ground 1(i) insofar as procedural unfairness is not consideration as a separate head) involve significant failings and in my judgment the reconsideration decision cannot stand and must be quashed. The reconsideration must take place again.

47. Mr Brownhill indicated that the only costs order sought was for assessment of the claimant's costs for legal aid purposes, and in my judgment that is appropriate.