

[2022] PBRA 139

Application for Reconsideration by Hamilton

Application

1. This is an application by Hamilton (the Applicant) for reconsideration of a decision of an oral hearing dated 29 August 2022 not to direct 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 papers. These are:
 - The Decision Letter;
 - The Application for Reconsideration dated 7 September 2022; and
 - The dossier, which now consists of 353 numbered pages, ending with the Decision Letter.

Background

4. The Applicant is now 53 years old. In 2016, when he was 47, he was sentenced for one count of sexual penetration and 3 counts of sexual assault. He was sentenced to an extended determinate sentence of 13 years, consisting of an 8-year custodial element and 5 years' extended licence.
5. The offence of penetration was against a woman with whom he was alone in the course of his business. He threatened her with scissors and compelled her to perform sexual acts. He apologised and asked her not to report him to the police.
6. The next day he sexually assaulted three further victims over a period of a few hours. He was arrested at hospital, where he had gone with blistered feet from walking round for hours. He characterised his offences as '*a cry for help*'.
7. The Applicant has a relevant history. In 1986 he committed 4 sexual assaults by following women into lifts and pulling down their clothing and underwear. In 2011 he was convicted of racially aggravated threatening behaviour against a woman on a bus. In 2009 he was cautioned after staring at a woman on an escalator and in 2010 he was



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

arrested for touching a woman's skirt, but not prosecuted. Most of his offending has been while he was drunk. There are other convictions, but of less direct relevance.

Request for Reconsideration

8. The application for reconsideration is dated 7 September 2022.
9. The grounds for seeking a reconsideration are as follows:
 - (1) The decision reached is outside the range of reasonable decisions and wholly at odds with the evidence given by all the professional witnesses.
 - (2) The reasons the panel gave for not following the recommendations expressed or implied by the professional witnesses did not provide sufficient detail as to:
 - (a) the nature of the core risk reduction work which the panel believed still had to be undertaken;
 - (b) why it is said that the future risk of serious harm cannot be managed in the community; and
 - (c) the significant unknowns and uncertainties that the panel believed to be present.

Current parole review

10. The Secretary of State for Justice referred the Applicant's case to the Parole Board on 5 March 2021. This was the first review of the Applicant's sentence.
11. The panel consisted of two independent members. The oral hearing started on 25 July 2022 and was adjourned due to insufficient time to hear the evidence. The hearing concluded on 25 August 2022. The panel heard evidence from the Community Offender Manager (COM), the Prison Offender Manager (POM), a psychologist instructed by those representing the Applicant, and the Applicant. The hearings were by video link. The Applicant was represented by a solicitor throughout. His solicitor had the opportunity to question all the witnesses and to make submissions to the panel.

The Relevant Law

12. The panel correctly sets out in its decision letter the test for release.
13. 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 test is automatically set out within the Parole Board's template for oral hearing decisions.
14. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

15. Under Rule 28(1) of the Parole Board Rules 2019 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)).

16. 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)).

17. The only issue raised in the Application is irrationality.

18. 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."

19. 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.

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

21. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in*



my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."

22. 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."

The reply on behalf of the Secretary of State

23. The Secretary of State has indicated that he does not intend to reply to this Application.

Discussion

24. The grounds for the application may, perhaps, best be viewed as a single ground, irrationality, of which (2)(a), (b) and (c) are particulars. However, I will deal first with the sweeping assertion in Ground 1 that the decision is outside the range of reasonable decisions and wholly at odds with the evidence given by all the professional witnesses.

25. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any Risk Management Plan (RMP) proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

26. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions: see **Wells** above.

27. The issue, therefore, is not whether the panel was entitled to disagree with the conclusions of the professional witnesses (it was), but whether the panel's conclusion is justified by the evidence and whether the panel explained its decision adequately.

28. The detailed discussion of the evidence, set out in the Decision Letter, demonstrates that the professional witnesses, while they supported release, took the view that there were significant gaps in their understanding of the Applicant's offending behaviour. The panel expressed its agreement that the proposed RMP imposed stringent external controls, and that the Applicant seemed motivated to comply. However, the panel went on to say, given that monitoring of his emotions and fantasies would rely heavily on his self-report, the panel had concerns about the reliability of this, particularly given

the inconsistencies in his accounts of why he offended against the principal victim and his other victims. The panel also had concerns about the strength of his internal controls and what remained unknown about his sexual interests, his triggers to offending and his risk factors. The panel therefore concluded that the RMP would not be sufficient in managing the future risk of sexual harm.

29. These were conclusions to which the panel was entitled to come on the evidence, and it carefully explained its reasoning. Ground 1 is therefore not made out.

30. As to Grounds 2(b) and (c), again, the panel fully explained its reasoning: it was not satisfied that the RMP would be sufficient to manage the future risk of sexual harm, for the reasons it gave. As to Ground 2(a), there is discussion in the Decision Letter of possible programmes, but it is not for the Parole Board to dictate or recommend suitable programmes. Its sole function is to assess whether a prisoner passes the test for release. This panel did so.

Decision

31. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

Patrick Thomas
10 October 2022