

[2023] PBRA 5

Application for Reconsideration by Truter

Application

1. This is an application by Truter (the Applicant) for reconsideration of a decision, dated 16 November 2022, by a three-member Parole Board Panel, refusing to direct his release.
2. The review was conducted by video conference on 9 November 2022. Evidence at the hearing was given by the Applicant himself, the Prison Offender Manager (POM), the Community Offender Manager (COM) and a Trainee Prison Psychologist. Also present as an Observer was the Supervising Prison Psychologist.
3. I have considered this application on the papers. These comprise of the dossier, the decision of the Panel and the application for reconsideration. I have also listened to a recording of relevant parts of the oral hearing, relating to specific issues raised by the Applicant.

Background

4. On 24 October 2014, the Applicant, at the age of 42, was given an extended determinate sentence of imprisonment on a total of 8 counts of sexual activity with a child under 16, sexual assault of a child under 13 and possession of indecent images of children. There were 3 boy victims of the counts of sexual assault and of sexual activity. Having been convicted after trial, he received lengthy extended custodial sentence expiring, after reduction by the Court of Criminal Appeal, in September 2028.
5. The offences were committed at the Applicant's home over a period of some years, from about 2010 to 2013, at a time when the Applicant had access to the boys through family or friendship contacts and, in some instances, involved a period of grooming by provision of presents or other financial inducements. The Trial Judge had referred to his having played with the emotions of a child, to have had a taste for not only perversion but viciousness in his video entertainment and to be a devious, manipulative and dangerous man. A Parole Board Panel which declined to release him at his Parole Expiry Date (PED)



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spoke of an established pattern of sexual offending against pre and post pubescent boys.

6. At the time of the index offences, the Applicant had only one previous conviction, some years earlier, relating to a drink driving offence to which he had pleaded guilty.
7. Throughout his sentence, the Applicant has continued to maintain his total innocence of the offences and, as a result, to present no risk in the community. Accordingly, he has refused to undertake any risk related offending behaviour work or to engage in any psychological assessment, claiming that he does not suffer from any condition which justifies enquiry.
8. Automatically released on licence on 30 September 2019, the Applicant remained in the community until revocation of his licence on 19 May 2020. He was reported as having complied with the formalities of reporting requirements but to have presented at a level which was considered to be superficial and marked by poor engagement, by a refusal to engage with any support and subjecting requirements to challenge. He had been faced with specific licence conditions imposed, at a very late stage before release, conditions which were subsequently ruled by the Administrative Court, and conceded by the Secretary of State (SoS) to have been imposed unlawfully and, accordingly, unlawful in so far as relied upon by Probation in the application for revocation of the Licence and by the SoS in that revocation. He had remained lawfully subject, however, to standard Licence Conditions embracing the widely drawn requirement to be of good behaviour and not to behave in such a way which undermined the purpose of the licence period, a reason also identified in the SoS's formal notification of revocation.
9. The application for revocation was made following concerns reported by the Police to Probation that the Applicant had made contact by Snapchat, with one of his index offence victims by use of a mobile phone. The Police had visited the Applicant and seized two smartphones and a tablet, the Applicant refusing to provide the passwords for these devices. This conduct was claimed to breach directly some of the "unlawful" specific conditions.
10. Prior to the hearing of the Panel, a substantial number of objections and issues were raised by or on the Applicant's behalf and further delay incurred pending the outcome of separate criminal proceedings alleging breach of a Restraining Order through contact with an index offence witness.

Request for Reconsideration

11. The application for reconsideration comprises an 8-page document, prepared by the Applicant's legal representative.
12. The function of the Reconsideration Assessment Panel (RAP) is limited to the reconsideration of the statutory limbs of challenge of irrationality, procedural unfairness or error of law. The application seeks reconsideration only on the

grounds that the decision was procedurally unfair, it being specifically acknowledged that the decision could not be said to be irrational. No error of law was cited as a separate ground of application. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of procedural unfairness are dealt with below.

13. In general terms the application submits that:

- a. Express procedures laid down by law were not followed in the making of the decision
 - b. The Applicant was not given a fair hearing
 - c. The Panel was not impartial.
- a. **Express Procedures.** That, as laid down in the case of *R(Calder) v SoS (2015) EWCA CIV 1050*, the Panel had a duty to consider whether the recall decision was appropriate and to make a finding as to its appropriateness. In doing so, it must consider all facts available to it, including those not available to the Secretary of State at the time of recall. In view of the SoS's acceptance of having acted unlawfully in imposing the additional conditions and the Applicant's assertion that the standard licence condition had not been breached, recall had not been appropriate. The Panel had failed to deal properly with the issue of recall, commenting only that it was a matter which it would "*take into consideration.*"
 - b. **Unfairness of hearing.** It was unfair for the Supervising Psychologist to attend as an Observer, and a Detective Constable (DC) to give evidence "primarily in relation to the Applicant's acquittal" of the Crown Court case. The request for the Supervising Psychologist to be present had been made only a week prior to the hearing and the Applicant's legal representatives "had not been informed of the PPCS request which was granted on the very same day by the Panel Chair."
 - c. **Impartiality of Panel.**
 - i) Despite an indication by an earlier Panel that the process would be assisted and "ensure that the Applicant received a fair hearing" if there were to be a Judicial Member on the Panel, that had not been done. In addition, the Panel Chair should recuse himself from the Panel given his own previous career as a Police Officer and given that the decision that DC was required to give evidence, but the Panel had declined that application, also.
 - ii) The hearing lasted some 6 hours of which 20-30 minutes was spent questioning the Applicant. The Panel "gave the impression" of having made its decision before the start of the hearing, an "impression strengthened by virtue of the relatively few questions put to the Applicant."
 - iii) The Panel accepted "*without any particular challenge*" the evidence of the professionals over the case advanced by the Applicant and made "*a number of significant errors*" – in particular a suggestion that the Applicant had refused to disclose his citizenship with other countries "*and which made him a significant flight risk.*" The Applicant did not accept that he had refused to disclose his citizenship with

other countries and *"it was clear to all concerned"* that he had *"*****
*****"* citizenship. Specifically, *"he did not refuse and has never refused"* to disclose citizenship with other countries. Other findings unsupported by evidence included matters justifying conclusion that the recall decision was appropriate and findings that the Applicant was *"resistant to supervision"* having stated he would comply with anything lawfully imposed.

Response from the Secretary of State

14. The Secretary of State (SoS), by e-mail/letter dated 15 December 2022 confirmed that an SHRF relating to the Observer Request had been submitted to the Parole Board on 2 November 2022 and that the Applicant's legal representatives were copied into the e-mail and requested to offer a view. hat apart, the SoS had no further response to the Reconsideration Application

Reply to Secretary of State Response

15. By e-mail dated 29 December 2022 the Applicant's legal representatives accepted that they had been copied in to the SHRF as indicated by the SoS but, even allowing for the fact that the Application was submitted only 7 days before the hearing, suggested that a minimum of 24-28 hours should have been allowed for a response prior to the decision to approve the Observer attendance, which was granted on the day of application.

Current parole review

16. The Panel considered a dossier of 588 pages and, in a comprehensive 14 page decision, adopted an earlier Panel's detailed outline of the index offence, set out circumstances of the recall and an extensive list of serious core risk factors together with his failure to undertake any risk reduction work due to his stance of denials of all guilt and his belief in the lack of need for any such work or professional assessment.

17. At the outset of the hearing, the Panel outlined, in detail, its proposed approach to the law relating to its duty and to the background of substantial litigation, including applications during the review, prior to the hearing and since referral to the Board, over two years earlier in May 2020, at the time of recall. Submissions were made, the majority of which echoed the unfinished litigation and prehearing applications, and feature in the current application for reconsideration.

18. The recorded proceedings, in 5 tranches, occupied some 4 hours 15 minutes. written and oral evidence was received from DC, the Trainee Prison Psychologist, and POM and COM. The Observer took no part, whatsoever, in the proceedings. The evidence of DC included information that the Applicant had been charged with a breach of restraining order alleging that he had attempted to contact one of his index victims but was acquitted on direction of the then Trial Judge. The Panel was also told that the Applicant had been the



subject of two further investigations in the community, but no action had been taken, complainants having declined to make statements or support a prosecution. The Panel specifically indicated that the Applicant was given the benefit of the doubt in their assessment of any resulting risk and did not take them into account.

19. The evidence of other professionals emphasised their difficulties in assessing risk having regards to the Applicant's entrenched positions and unwillingness to co-operate in their assessments, but all were clear that they considered that further focussed assessment was necessary and, as found by the Panel, until this were done it would not be possible to identify an appropriate treatment pathway. The Panel, similarly concluded that there remained a "*clear and obvious need*" for such assessment and that risk of further contact and non-contact sexual offending could be imminent on release. It recorded, however, that the Applicant's custodial behaviour was otherwise unproblematic although the POM indicated difficulties in meaningful discussions as he considered the Applicant obsessed with his continuing litigation.
20. The Applicant's recorded oral evidence occupied some 37 minutes during which he was questioned by members of the Panel and by his legal representative. During this evidence he robustly denied his guilt of the index offences and accordingly any risk factors or treatment needs. He maintained that the trial; of the index offences involved lies by the victims, professionals and others. He indicated, however, that if released, he would abide by any licence conditions so long as they were lawful and, for example, met the test of necessity and proportionality. When questioned as to his citizenship of other countries, he accepted that he held such citizenships but was reluctant to discuss the issue in detail saying "****** ***** is one*" but he was unwilling to disclose his citizenship of other countries as "*anything I say is misrepresented*" and "*I've learnt that if I limited the amount of information I give, the limited the amount of damage they can inflict*". He further challenged the appropriateness of his recall, having regard to the situation as it presented at the time, indicating that it would not have been necessarily had alternatives other than recall been considered and if "*due diligence*" had been undertaken as to the information presented to Probation.
21. The Panel's conclusions were that the decision to recall was both lawful and appropriate. It accepted that the allegations made against the Applicant did contribute to the decision to recall as there was "*at least credible evidence to link him to further offending*" and the subsequent acquittal would not have changed the appropriateness at the time the decision was taken "*and what has transpired since.*" It confirmed its agreement as to the Applicant's lack of co-operation and found there to be outstanding treatment needs which could be complex, but which could only be identified by "*essential*" assessments, pending which high risks of further serious harm to children remained. It found him to be resistant to supervision rendering him unlikely to comply with any restrictions with which he did not agree and his refusal to disclose the extent of citizenship rights created a real abscond risk.

22. Accordingly, whilst acknowledging that a prisoner could normally expect to serve this stage of such a sentence in the community, it concluded that, in accordance with the statutory test, the Applicant still needed to remain confined.

The Relevant Law

23. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair, (c) contains an error of law. This is an eligible case. The Application is for review only on the grounds of procedural unfairness.

24. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair. As submitted by the Applicant's legal representative, it 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 a decision was made) are entirely separate from the issue of irrationality which focusses on the actual decision. In summary, an Applicant seeking to complain of procedural unfairness must demonstrate that:

- a. Express procedures laid down by law were not followed in the making of the relevant decision;
- b. The Applicant was not given a fair hearing;
- c. The Applicant was not properly informed of the case against him/her;
- d. They were prevented from putting their case properly and/or;
- e. The Panel was not impartial.

25. The overriding objective is to ensure that, viewed objectively, the Applicant's case was dealt with justly.

26. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

27. The decision in *R (Calder) v Secretary of State for Justice [2012] EWCA Civ 1050* made clear that the Parole Board had both the power and the duty to consider a recall decision and that:

- i) The SoS is entitled to recall a prisoner if he/she concludes on reasonable grounds that the prisoner has intentionally breached the terms of his/her licence and that the safety of the public would be at risk if the offender remained on licence;
- ii) That the Panel in reviewing the decision to recall must make its decision in the light of all facts available to it, including those not available to the SoS;



- iii) The Panel must then make an assessment of risk to the public on the basis of all the evidence.

28. There is no rule or policy which automatically prevents a prisoner who maintains innocence from being released. The Parole Board must, however, take as its starting point the assumption that the prisoner was rightly convicted and the reasons for any decision must focus on risk factors and not the denial and an assessment made as to whether the risks indicated by the conviction have been reduced to an acceptable level.

Discussion

29. In my judgment, the decision to refuse release cannot be said to meet the test of procedural unfairness. It is entirely clear that the Panel, having clearly considered, with care, the documents in the dossier, the evidence both written and oral and submissions gave a clear and reasoned decision, and adopted a correct test for its decision. When considering a substantial dossier and detailed oral evidence, the duty of the Panel is not to identify, with particularity, each and every aspect of relevant issues but to show that both positive and negative aspects of a prisoner's case have been examined and a fair decision taken in accordance with the test required. This, I find to have been done.

30. As the Reconsideration Panel (RAP), I find to be without merit, any objection to the Observer – such an Observer oversight is common in many hearings as part of the training of both observer and witness and had no effect on the conduct of the proceedings. I come to a similar conclusion with regard to the objections to the Chair on the basis of his earlier career and the decision that DC should give evidence. All Parole Board Panel members are suitably qualified and trained for their respective roles and, in the absence of evidence supported objection to a specific member, it is inappropriate for objection to be taken only on the basis of an objectively unsustainable objection to a general background. The decision to call DC to give evidence, in addition to his written evidence, was entirely appropriate and, indeed, offered the Applicant the opportunity to raise any specific issues with which he did not agree.

31. I find that the requirements of the Calder decision were fully met in the Panel's consideration of the recall and a clear finding made that the recall was justified on the basis of the information then known to Probation and the SoS. It is not the function of the Panel to enquire as to the lawfulness of the declared basis for recall.

32. I find the Panel to be fully aware of the sensitivity of the case and its background, and with not infrequent reminders of the history of a variety of issues being taken to higher tribunals, itself took great care, prior to taking oral evidence, in setting out, subject to submissions from the Applicant and his experienced legal representative, its proposed approach to matters of law and the evidence. I handled a difficult case with care and sensitivity and, at all stages, treated the Applicant with courtesy. The Applicant and legal representative were given the opportunity to question the evidence of all



witnesses and to give his own interpretation of all relevant matters. The Applicant is clearly a man of high intelligence with fixed, rigid views which he is unwilling to have challenged or investigated. He is not to be held back from demonstrating his knowledge of relevant case and statute law and, indeed, at the conclusion of the hearing when invited to speak finally to the Panel, did so in such detail as to prompt his legal representative to indicate that his own intended submissions had largely been made. The submissions largely mirror those that had already been raised at various stages of the review. I find that an objective observer would have been left in no doubt as to the fairness of the proceedings and the impartiality of the Panel.

Decision

33. For the reasons that have been given, the Reconsideration Assessment Panel does not consider that the original Panel's decision was procedurally unfair and, accordingly, the application for reconsideration is refused.

Edward Slinger
05 January 2023.