

[2024] PBRA 61**Application for Reconsideration by Lamport****Application**

1. This is an application by Lamport (the Applicant) for reconsideration of a decision by a panel of the Parole Board (the Panel) dated 16 February 2024 not to direct his release. The decision was made following a review by way of oral hearing on 14 February 2024.
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 or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are: the application letter with representations; the decision document; the case dossier; and the email message dated 12 March 2024 from the Public Protection Casework Section (PPCS) of the HM Prison & Probation Service on behalf of the Secretary of State (the Respondent).

Background

4. On 24 November 2017, the Applicant received an extended sentence for the attempted rape of a female over 16, having been convicted by a jury after trial. The custodial term was set at 8 years to be followed by an extended licence period of 2 years. The Parole Eligibility Date (PED) was 31 August 2022 and the Conditional Release Date (CRD) is in May 2025. The sentence and any licence under it will expire in May 2027 (the SED). A concurrent fixed term of 3 years imprisonment was imposed for the associated offence of sexual assault by touching which the jury also found proved.
5. The offences in question were committed on 30 April 2017 when the Applicant was 23 years of age. He had previous convictions dating from 2009 when he was a juvenile, including convictions for battery, threatening behaviour, criminal damage, theft by shoplifting, travelling on a railway without paying the fare, theft from a motor vehicle, possession of a bladed article in a public place and failing to surrender to custody. Sentences varied between supervision orders, fines and a community order. The index offences were committed during the currency of the community order imposed for theft and possession of a bladed article. The Applicant was also in breach of the unpaid work requirement under that order.



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6. The Applicant is reported to have had a troubled and abused childhood, having been placed in the care of Social Services at the age of 7. The pre-sentence report refers to feelings of no self-worth and of inadequacy which impacted on his attitudes to, and relationships with, women. At the time of the index offences, the Applicant was living with his 17 year old partner. Whilst denying allegations that he had been violent towards her, the Applicant admitted to the author of the pre-sentence report that he engaged in frequent arguments during which he would be verbally abusive, and would punch and smash up articles. He would then leave their home to take out his anger on other males by fighting them.
7. At about 11.30pm on 30 April 2017, the victim was walking back from work to the town centre when she noticed him on the other side of the road. He asked her the time, crossed the road and began to walk alongside her. He engaged her in conversation, asking whether she was drunk, what she was doing out late at night, where she worked and whether she had a boyfriend. Feeling uncomfortable, the victim told the Applicant she was going into a car park and said goodbye. The Applicant said he was going that way too and followed her down the entrance passage.
8. The Applicant then grabbed the victim's hair, and dragged her to a corner of the car park. He squeezed her breasts underneath her clothing in a rough manner and when she pleaded with the Applicant, offering him money or her car, he twice replied "*I want you*". He then demanded that the victim kiss him with tongues and forcibly kissed her on the mouth. When she failed to reciprocate, he said "*You aren't playing ball with me*", forced her face towards his by pulling her hair and told her "*You know what I want*".
9. The Applicant then pushed the victim up against a wall, and began pulling her skirt down. The victim jammed her key into his neck and managed to run out to the main road with the Applicant in pursuit. He then watched her attract the attention of a passing motorist and when the car stopped he ran off.
10. On the Applicant's own account, he had spent the day walking round the town with his cousin smoking cannabis and drinking alcohol. He estimated that he had consumed five bottle of wine and two bottles of vodka. There had been an argument some time that day between him and his partner about the extent of his substance misuse during which he told her to "*fuck off*".
11. The Applicant admits that he struck the victim but continues to deny that there was any sexual element or motivation involved in the attack. His denial has restricted the extent of the work available for him to undertake in order to address his offending behaviour.
12. The author of the PSR referred to the minimisation by the Applicant of his conversation with the victim as a "*normal, little conversation*" and not a precursor to his subsequent offending. He insisted that she insulted him by calling him a "*pikey*" and that, in response, he grabbed her from behind and dragged her into the car park. He provided contradictory accounts of his values and attitudes towards women, on the one hand stating that he would never be violent towards them but on the other freely admitting the violent aspect of what he had done.

13. He repeatedly expressed rigid negative views regarding individuals who commit sexually motivated offences. In the assessment of the PSR author, this would be a significant barrier to acknowledging a sexual motive for the offences and was likely to remain the case. The current Decision refers to the Prison Psychologist's acceptance, after questioning by the Panel, that sexual gratification was a likely contributor to the index offences and could have been the initial attraction. In her view however, as it was not the main offence driver and there having been no previous evidence of this being an issue, it would not be core work.
14. This was the Applicant's second review. The panel conducting his first review in April 2021, on the papers, declined to direct his release. It identified his risk factors as including targeting a vulnerable individual, sexual gratification, poor attitudes towards women, power and control within relationships, poor emotional management leading to violence and aggression, lifestyle and associates, drug and alcohol misuse, mental health issues from past trauma and poor decision making. The Applicant had engaged positively with the DARTS team in respect of substance abuse issues and there had been a general improvement in his motivation and his interaction with others. He had not yet demonstrated any reduction in his risk but had been assessed as suitable for intensive programme work.
15. By the time of the current review, the Applicant had completed the Kaizen Programme which is designed to address the criminogenic needs of adult males who are a high or very high risk, including those convicted of sexual and generally violent offences. Despite concerns about his attendance on a programme with men convicted of sexual offences and his initial hesitancy, the Applicant is said, in the post programme report, to have gained insight into the triggers for his previous behaviour and developed New Me thinking.

Request for Reconsideration

16. The application for reconsideration was submitted by the Applicant's Solicitors on 29 February 2024 and contains detailed representations.
17. The grounds for seeking a reconsideration are that the decision was irrational because the Panel placed improper reliance on the fact that (i) the Applicant maintained his innocence of the index offences; (ii) his account differed from that contained within the documents (iii) no risk reduction work had been completed around his sexual offending such that little was known of that element. Furthermore, insufficient reasons had been given for departing from the unanimous recommendation of the professional witnesses.
18. The Applicant's Solicitors further submit that there was an error of law by the Panel because it took into account an irrelevant consideration and/or failed to take into account a relevant consideration, namely the fact that the Applicant maintains his innocence.

Current parole review

19. The Respondent referred the Applicant's case to the Parole Board in September 2022 to decide whether to direct his release.

20. The case dossier included a recent assessment report by a Prison Psychologist, and updated reports by the Applicant's current Community Offender Manager (COM) and by the Prison Security Department. It also contained the post programme report in respect of the Applicant's positive engagement in Kaizen.
21. Oral evidence was given by the Applicant's Prison Offender Manager (POM), by the author of the psychological report, by the COM and by the Applicant himself. Submissions were provided by the Applicant's legal representative. No submissions were made by or on behalf of the Respondent who was not represented at the hearing. It was common ground that there had been no significant changes in the Applicant's good behaviour, that he continued to be employed and that he had maintained Enhanced Status under the Incentives and Earned Privileges Scheme.
22. The Risk Management Plan (RMP) prepared by the COM provided for release, in the first instance, to designated premises under the management of the probation service. The Applicant had been accepted by way of a deferred admission. There would be enhanced supervision and monitoring, ongoing risk assessment and support would be given in securing suitable move-on accommodation.
23. The Applicant had been assessed as suitable to undertake the Horizon Programme in the community to be followed by participation in New Me MOT. The COM considered that his continued discriminatory attitudes towards those who had committed sex offences would need to be challenged through pre-group work.
24. The OASys Report dated 31 January 2024 assessed the probability of both violent and non-violent re-offending by the Applicant to be medium. The OGRS3 static assessment placed him in the category of offenders whose likelihood of general re-offending is high. His sexual contact re-offending risk was assessed as high and his dynamic risk of serious recidivism over a period of two years (RSR) was assessed to be medium at 4.53%. The risk of serious harm to the public in the event of any re-offending in the community was assessed as high. The risk of such harm to children and any known adult was assessed as medium and such risk towards staff, including probation staff was assessed as low.
25. The Prison Psychologist concluded that the Applicant presented a moderate-high risk of future general violence and a moderate risk of future sexual violence in the community. It would not be imminent on release but, should an offence be committed in the future, sexual violence could escalate quickly. Reactive violence would be likely to occur against any potential victim and this could cause serious physical and psychological harm.
26. In the Psychologist's opinion, the Applicant would benefit from undertaking trauma counselling/trauma-stabilisation work utilising a psycho educational and skilled development approach. The aim would be to provide him with practical and "in the moment" skills to help him cope with trauma related experiences, particularly following any move into a different environment.
27. Both the POM and the Prison Psychologist supported release. The COM initially expressed the view that the Applicant should first spend time in open prison conditions. In her latest report, she expressed the view that it was unfortunate that the Applicant had not had the opportunity to progress to Category C or open prison



conditions. In her professional opinion such progressive move would allow further insight into his behaviour. However, at the hearing, when informed by the Panel that its terms of reference did not allow for such a recommendation, she said she would recommend his release.

The Relevant Law

28. In its 16 February 2024 decision document, the Panel correctly sets out the test for release, namely that the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out in the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

29. Under Rule 28(1) of the Parole Board Rules 2019, a decision concerning whether the prisoner is or is not suitable for release on licence 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)). This case concerns the decision of an oral hearing panel after an oral hearing.

30. 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)). The present case falls under Rule 28(2)(b).

Illegality

31. An administrative decision is unlawful under the broad heading of illegality if a panel:

- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

Irrationality

32. 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."

33. 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.
34. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

35. 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.
36. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy the reviewer 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.

37. The overriding objective is to ensure that the Applicant's case was dealt with justly.

38. No issue of procedural unfairness has been raised or arises in this case.

Other

39. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

40.No mistake of fact has been alleged in this case.

41.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 Respondent

42.PPCS has confirmed that no representations are offered by the Respondent.

Discussion

43.In deciding not to direct the Applicant's release, the 2022 Panel had concluded that there remained core risk reduction work to be completed and that Kaizen had been identified as suitable. The Applicant has now completed that programme. All three professional witness at the latest hearing agreed that there remained no further core risk reduction work necessary for the Applicant to undertake.

44.The Applicant's solicitors submit that he was not a persistent offender and that the Panel determined the case by reference to one factor, namely a denial of guilt related to lack of knowledge around his risk and lack of treatment. Although all witnesses identified a number of "protective factors" likely to reduce the Applicant's risk, some of these were not mentioned in the decision document or little weight had been put on them.

45.The decision document clearly shows that, whilst the Panel placed considerable weight on the Applicant's denial this is not given as the inherent reason for concluding that he did not meet the test for release. An explanation is provided as to the effect of that denial on his insight and the indication that there were likely to be untreated risk related needs regarding sexual entitlement and sexual arousal. It did not accept the Applicant's account that the index offence was purely violent in nature.

46.Whilst not setting out a list of protective factors, the decision document specifically makes reference to the submission on the Applicant's behalf that he had demonstrated learning from Kaizen, could describe his risk factors and had insight into them and was compliant. The Panel accepted that his custodial behaviour had not been a cause for concern. However, it went on to conclude that his risk could not be safely managed in the community.

47.It is further submitted that the Panel took too narrow a view of the Applicant's progress. It is argued there was little indication in the decision document to indicate that "*evidence of the proposed change in lifestyle and work completed*" was a factor which the Panel considered in reaching its decision, despite these being central points which needed to be addressed.

48. However, the decision document does refer to the progress which the Applicant has made and the submission that there was a good risk management plan. It explains why other factors outweigh these.

49. It is further submitted that the Panel gave insufficient reasons for departing from the unanimous recommendation of the professional witnesses and for concluding that the further work which needs to be done by the Applicant must be done in prison rather than in the community as recommended by the professionals.

50. On the contrary, in its concluding section, the Panel gave a detailed explanation of why further work was needed to address outstanding matters of concern. Because it had concluded that there remained significant areas of risk to be explored the Panel decided that he did not meet the test for release, namely that the risk to the public of serious harm in the community still required him to be confined.

51. The Applicant's solicitors suggest that, in rejecting the professional's opinions for effective risk management in the community, the Panel had been significantly influenced by the stance he had taken in respect of the attack and, as such, had concluded that work needed to be done in relation to the sexual element. The solicitors suggest that before making a decision, the Panel had the opportunity to adjourn for a further assessment of risk.

52. However, the Panel was entitled to take into account the Applicant's expressed views about the nature of the index offence and his current attitudes. That is an important feature of an oral hearing. Attitudes and insight are relevant considerations in respect of offences involving sexually motivated violence and violence involving a sexual element.

54. It is submitted on the Applicant's behalf that inadequate reasons were given for the Panel's decision.

54. On the contrary, very full reasons were provided and set out in detail in the Panel's conclusions.

55. The Panel acknowledged that the professional witnesses supported release, albeit in the COM's case with some reservations. However, in view of the outstanding issues of concern requiring further exploration and resolution, the Panel was unable to conclude that the test for release had been met.

56. A panel should always take account of the opinions expressed by professional witnesses, particularly where they have been directly involved in the management and supervision of an offender, as both the COM and the POM have been. However, it should exercise its independent judgment, taking into account all the evidence before it and may properly reach a different conclusion. It is apparent that in this case some of the opinions expressed by witnesses were not without reservation.

Decision

57. In my judgment, the Panel carefully assessed and weighed in the balance all the evidence received and submissions made before making an objective and well-reasoned conclusion. For the reasons I have given, I do not consider that the



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decision was irrational, nor was it illegal, and accordingly the application for reconsideration is refused.

HH Judge Graham White
22 March 2024