the Parole Board
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[2020] PBRA 145

Application for Reconsideration on behalf of Smith

The Application

1. This is an application by Smith (the Applicant) for reconsideration of a decision by a panel of the Parole Board (the OHP) dated 9 September 2020 not to direct his release, which followed a hearing held remotely on 2 September 2020.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered this application on the papers. These include the application for reconsideration prepared by the Applicant's legal representative, the Decision Letter and the contents of the dossier.

Background

4. The Applicant is now 43 years of age. In August 2003 he pleaded guilty to the attempted kidnapping of a 15 year old girl when in possession of an imitation firearm. In September 2009 having pleaded guilty, he was sentenced to a term of imprisonment for public protection for offences of a sexual nature in relation to two young females. The judge who found that the Applicant's risk would remain unmanageable for a significant period of time, set a minimum term to serve of 1 year and 183 days. That minimum term expired on 20 March 2011.

5. Following an oral hearing in March 2019, before a differently constituted panel of the Board, the Applicant's release was directed and in May 2019 he was released. In August 2019 the police, in accordance with the terms of his licence, made an unannounced visit to the Applicant's home address. During that visit the web browsing history of a device belonging to the Applicant was examined. He was shown to have been viewing multiple so called teen themed pornographic videos which revealed he had a continuing sexual interest in teen and pre-teen females. It was alleged that he admitted to the police that he had been viewing pornography, including that which involved children, during the four nights before the police visit. He was recalled and returned to prison immediately, the view taken by those responsible for his management was that his admitted conduct represented a significant escalation in risk.

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6. The OHP found that the Applicant's criminal history raised concerns regarding his capacity to cause serious harm to young females and that it was an aggravating feature of his case that his prior conviction and sentence had not prevented him from re-offending. As for ongoing risk factors, these were found to include a sexual interest in teenage girls. A critically important consideration for the OHP was the extent to which his protective factors, which undoubtedly were present, were sufficient, given the finding made by the OHP that none of them had prevented relapse into offence paralleling behaviour very shortly after his release on licence.

The Relevant Law

Parole Board Rules 2019

7. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).

8. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on a previous reconsideration application in the case of **Barclay [2019] PBRA 6**.

Irrationality

9. 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."*

10. 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.

11. 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

12. 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

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decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

13. In summary, any Applicant seeking to complain of procedural unfairness under Rule 28 must satisfy me 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.

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

Other

15. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)** and **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must take into account when applying the test are:
    (a) the progress of the prisoner in addressing and reducing their risk;
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

The Applicant's Grounds

16. The grounds for seeking a reconsideration on the basis of irrationality (Ground A) and/or procedural unfairness (Ground B) are set out in considerable detail in a twelve page document dated 17 September 2020. I summarise the submissions as follows:

17. **Ground A: Irrationality**

    (i) The OHP failed to set out adequately and/or sufficiently its reasons for departing from the unanimous recommendation for release put forward by the professional witnesses.
    (ii) The OHP failed to apply the correct analysis relevant to the test for release.
    (iii) The OHP appeared to rely on a piece of evidence regarding something said by the Applicant about which he was not questioned during the oral hearing.
    (iv) Insufficient weight was given by the OHP to the evidence that the police found no illegal pornography on the Applicant's mobile phone.
    (v) The OHP's decision failed to adequately or sufficiently explain how it reached the conclusion that the Applicant had further core risk reduction work to complete before he could be released into the community.
    (vi) The OHP placed too much weight upon the assessment of the Applicant's risk at the point of recall as opposed to his risk at the time of the hearing.

(vii) Any reliance placed upon evidence given to a previous and differently constituted panel at an oral hearing in 2019 was misplaced and irrelevant to the issue of future risk in 2020.

18. **Ground B: Procedural Unfairness**

(i) Relying on the case of **R (On the application of Stokes v The Parole Board and The Secretary of State [2020] EWHC 1885 (Admin)** the OHP failed to provide adequate reasons for its decision.

(ii) The OHP failed to sufficiently explore a possible transfer to open prison conditions.

(iii) The OHP having directed receipt of further important information, received the information which was not disclosed to the Applicant's legal representatives.

(iv) During the remote hearing the link failed more than once resulting on one occasion in the Applicant's legal representative being cut off during part of the evidence of a professional witness

The reply on behalf of the Secretary of State

19. The Secretary of State has made no representations in respect of this application.

Discussion

20. A significant aspect of the Applicant's challenge in respect of both grounds is what is submitted to be an absence of sufficient explanation and justification in the Decision Letter for not following the recommendations of the professional witnesses.

21. The importance of the giving of adequate reasons in the decisions of the Parole Board has been made clear in two authorities heard in the High Court within the space of nine months. The decision in **R (ex parte Wells) v The Parole Board [2019] EWHC 2710 (Admin)** contains helpful guidance on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational. It is a decision I am bound to follow as is the decision in **Stokes,** to which I refer in paragraph 18 (i) above, wherein it was found that the oral hearing panel and indeed the reconsideration panel failed to adequately identify and explain its reasons. The judgment in **Stokes** cited the judgment in **Wells** and also the case of **R (PL) v Parole Board and Secretary of State for Justice [2019] EWHC 3306 (Admin)** in which the High Court quashed a decision of the Board on grounds which included that it had failed to identify concerns about the prisoner's behaviour, re-emphasising that the reasoning of panels must reach an acceptable standard in public law by providing the prisoner and the public with adequate reasons for their decisions.

22. It is suggested in **Wells** that rather than ask the simple question "was the decision being considered irrational", the better approach is to test the panel's ultimate conclusions against the evidence before it and ask whether their conclusions can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.

23. Panels of the Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan.

24. If a panel is going to depart from the recommendations of experienced professionals it is required to explain clearly its reasons for so doing and ensure as best it can that its stated reasons are sufficient to justify its conclusions.

25. In applying the guidance set out in the cases of **Wells** and **Stokes** I am required to examine carefully the reasons expressed by the OHP in rejecting the views of all the professional witnesses that the Applicant's risk could, notwithstanding the facts and circumstances of his recall, be safely managed in the community and that his incarceration was no longer necessary.

26. As I turn to consider the specific grounds I must also bear in mind that the challenges put forward on behalf of the Applicant allege both irrationality and procedural unfairness and so in my appraisal of the OHP's decision I must not lose sight of one at the expense of the other. There is inevitably some overlap and I shall seek to avoid unnecessary repetition.

Ground A: Irrationality

27. (i)First, it is submitted that the OHP's decision is irrational because it failed to sufficiently set out its reasons for not following the unanimous recommendations of the professional witnesses that the Applicant should be released. This ground is repeated in Ground B in support of the claim that the decision was also procedurally unfair. It is convenient to deal with these grounds together, not least because if I were to find in favour of the Applicant whether on the basis of irrationality and/or procedural unfairness that would in effect dispose of this application in the Applicant's favour.

28.The Decision Letter in this case runs to sixteen pages and is careful, thorough and balanced. It records various matters regarding the Applicant's approach to his sentence, his custodial conduct and how he responded to open conditions. All these matters the OHP recognised favoured the application for release that was being made. Against that it found and addressed several matters of concern which included the fact that prior to recall the Applicant was apparently complying with the terms of his licence but at the same time was indulging in what the OHP found to be offence paralleling behaviour which demonstrated the Applicant's ability to camouflage risk related thoughts and behaviours. The Panel found that the Applicant's risk at the point of recall was very high and indeed imminent, and that the evidence showed that the current (that is to say at the time of the oral hearing) risk to children was high, while noting that no further significant work to address re-offending had been done since the Applicant's recall and return to prison. As for the proposed risk management plan, the OHP noted that many of its features were present in the plan that was put in place when the Applicant was released on licence, but which had not prevented the conduct that led to his recall. It observed that the proposed risk management plan was reliant on external controls; however, it was not persuaded that the Applicant had demonstrated that he had the necessary internal controls to play his part in their implementation. It noted that the Applicant's good intentions expressed to the previous panel had not come to pass, or if they had, they had lasted only for a very short time once he was released on licence.

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29. I have set out above only by way of a summary, parts of the detailed analysis provided by the OHP in its decision. It is clear to me that they considered with very considerable care all the evidence before them, the submissions made on behalf of the Applicant, the serious nature of his offending, his criminal record, his generally good custodial behaviour and his levels of engagement. They took into account the risk assessments at the time of recall and those presented to them at the hearing. Weighing up all relevant factors, the OHP were unable to find that the Applicant was no longer sexually preoccupied with young females and accepted the evidence that he was properly assessed as remaining high risk which was not yet manageable. I am entirely satisfied that the OHP clearly and fully stated its reasons which were, on a reading of the decision as a whole, sufficient to justify the conclusions it reached.

30. (ii)Secondly, it is submitted that the OHP "*failed to properly apply the correct analysis to the public protection test for release*". At the outset of the Decision Letter the OHP properly set out the appropriate test which in my judgment they applied. It may be, that unless I have misunderstood it, this submission is more directed to specific aspects of the evidence which are addressed below.

31. (iii)Thirdly, it is submitted that the OHP erred in apparently relying upon a remark allegedly made by the Applicant to the police in August 2019 when his home was searched, and the search history of his telephone was examined. The remark amounted to an admission that he knew he had done wrong and carried out searches of internet sites while not permitted to do so by the terms of his licence. What he said to the police is referred to in the Decision Letter without comment. It was said to have been made after the police had found a large number of visits had been made to concerning web sites and in particular one. The complaint appears to be that the Applicant was not asked about his admissions during the oral hearing. It should be borne in mind that he was represented throughout. He could have been asked about it by his own counsel, but it seems he was not. In my judgment, nothing seems to have turned on this peripheral piece of evidence. The remarks made to police were simply a part of the narrative of events leading to his recall that could not have impacted upon the OHP's ultimate decision.

32. (iv)Fourthly, it is submitted that the OHP gave insufficient weight to the fact that "*no illegal pornography was found on the Applicant's mobile telephone*". This submission seeks to draw a distinction between what it describes as *"illegal risk related pornography"* and *"adult pornography with a risk related theme"* [Application for Reconsideration, paragraph 14 (iii)]. In my judgment, the real point here, going to the issue of future risk, was that the Applicant had been searching online for a particular kind of material. Whether he found that or other material less concerning is not to the point. In his evidence, the Applicant told the OHP that 50% of the pornography he admitted accessing featured age appropriate adults. I have already referred to what was recovered by reference to search items. It speaks for itself. The conclusions reached by the OHP upon the discovery of this material I have found to be wholly justified. The Applicant accepted in his evidence that his recall was justified. I do not accept that the matter raised on the Applicant's behalf could amount to a point in favour of his case which was given "insufficient weight" by the OHP. In my judgment it comes nowhere close to the irrationality threshold.

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33. (v)Fifthly, it is submitted that the OHP failed to explain how it was able to conclude that the Applicant had further core reduction work to do. It will be remembered that the OHP had a psychologist member. From a careful reading of the decision it is in my judgment very clear that the OHP had paid careful attention to this issue. It had, as I have already mentioned, noted the work done by the Applicant on offending behaviour and noted the position following recall. It is submitted that the OHP re-formulated its conclusion in the face of the available evidence. I do not agree. The conclusion it reached and the impact of it on its overall view was in my judgment both logically and evidentially justified.

34. Sixthly (vi), it is submitted that too much weight was placed upon the risk assessment at the point of recall as opposed to the risk assessments at the time of the oral hearing. It was in my view entirely appropriate, indeed essential, for the OHP to reach a view if it could, upon the level of risk at the time of recall not least because it was obliged to consider whether recall was justified. It then went on to consider the period between recall and the oral hearing and considered, amongst other factors, what work if any had been done that could have impacted upon an updated assessment of future risk. The evidence it received from a psychologist was that the risk to children at the time of the hearing was high. I do not accept that inappropriate weight was given in the conclusions of the OHP to the position at the point of recall.

35. Seventhly (vii), it is submitted that the OHP erred in placing any reliance upon evidence given to another panel in 2019. The decisions of previous panels invariably appear in dossiers. They form a very useful part of the background to the current hearing. They are assumed to accurately record the evidence that was given, which of course is, or may be relevant to the evaluation and assessment of evidence being given to a different panel. Frequently, as happened in this case, matters of earlier evidence are referred to which are to the benefit of the Applicant. Conversely, something said on an earlier occasion may be highly relevant in considering evidence given subsequently. It is all part of the history of a prisoner's sentence. To characterise that material as "misplaced and irrelevant" is in my judgment regrettable and a mis-statement of its true nature and status. There can be no doubt that the OHP was perfectly entitled to refer to, and if appropriate rely upon, things said by the Applicant on an earlier occasion.

Ground B: Procedural Unfairness

36. Ground B (i) First, it is submitted that that the OHP failed to provide adequate reasons for its decision. I have dealt with the failure to give reasons in some detail when dealing with Ground A. I have of course borne very much in mind the different nature of a claim of procedural unfairness and the matters about which I would have to be satisfied before I could find such a claim to be justified.

37. Ground B (ii)Secondly, it is submitted that the OHP failed to "sufficiently explore" a transfer to open conditions. It is important to remember that a decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by a decision of an earlier reconsideration application in the case of **Barclay [2019] PBRA 6.** Notwithstanding, I shall deal with this submission simply by pointing out that in my judgment the OHP set out accurately the test for a move to open conditions on page 1 of the decision and on pages 15 and 16 set out in sufficient detail their reasons for not recommending such a progression.

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38. Ground B (iii)Thirdly, it is submitted that the OHP considered material not seen by the Applicant's legal representatives. As I understand it, from my consideration of the material, and from enquiries I have directed, the position is as follows. At or near the conclusion of the oral evidence the Panel Chair directed that two further steps be taken prior to the OHP providing its decision. First, the panel requested it be provided with a note from the police following examination of the Applicant's phone on which he had accessed the internet. The second matter was that the panel requested final submissions from the Applicant's legal representative to be submitted in writing. The communication from the police was by way of email and was dated 2 September 2020 and timed at 14.14 pm. Its relevant content is quoted at page 12 of the Decision Letter. That email was uploaded onto a particular part of the Parole Board database system on the same day. I understand that a prisoner's legal representative does not have access to that part of the database system and relies on the material being uploaded to the dossier. The legal representative was aware of the fact of the prospective communication from the police. He submitted his final submissions at 16.17 pm on 2 September 2020. In the accompanying email the legal representative made reference to the fact that a communication from the police via the Offender Manager was expected and he anticipated making some further submissions upon it once they had received it. The Panel Chair assumed that the legal representative would see the police communication not least because the hearing timetable indicated that the representative was able to access at least some parts of the Parole Board database system. I have seen the legal representative's final written submissions dated 2 September 2020. They make no reference to the police communication regarding the content of the telephone's internet search history.

39. The complaint here is that the OHP received and relied upon a document unseen by the Applicant and his representatives. I accept that there could be circumstances where a finding of procedural unfairness would follow when a panel is shown to have acted on information which it alone had seen, and about which the prisoner and/or his lawyers were unaware. However, that in my judgment would not be the automatic result. It must depend upon the facts and circumstances of a particular case, the nature of the material, whether the relevant parts of the unseen material were already in evidence, its possible impact upon the ultimate decision and finally whether in any particular case unfairness had resulted.

40. After very careful consideration of all the facts and circumstances I have come to the sure conclusion that there has been no procedural unfairness with regard to this communication justifying reconsideration of the OHP's decision. I shall explain.

41. It is crucially important to note the precise contents of the communication from the police, which I am prepared to accept was not seen by lawyers for the Applicant prior to them sending their final submissions to the Board at 16.17 pm on 2 September 2020.

42. The email from the police quoted in the Decision Letter reads as follows:

"When the material was examined there were a number of search terms that indicated he may be looking at illegal material. These were search terms indicating he was wanting to look at a particular theme. However, when assessing the material that was viewed it

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showed that the persons in that particular theme were age appropriate and therefore no offences were disclosed.
The themes that he has been searching for were of grave concern to us which is why we had the items examined and the amount of visits he made to the websites in the lead up to his recall indicated his sexual pre-occupation was through the roof. We have no doubt in my mind that by recalling him you have prevented imminent offending.
If / when released from prison he will be managed as a very high nominal who will be subject to intense monitoring"

43. None of the matters contained in this email that were relevant to the issues before the OHP were unknown to the Applicant or his representatives. The email is in effect a police officer's personal opinion and therefore carries no evidential weight. The suggestion in the second paragraph that officers were *"gravely concerned"* and that the number of visits made to websites were *"through the roof"* were matters only of comment as was the officers' view that by recalling the Applicant further *"imminent offending"* was avoided. In fact it was always going to be and indeed was part of the evidence presented by the professional witnesses that the Applicant's risk was very high and imminent at the point of recall, and it was believed by the professionals who gave evidence that there were clearly grounds for very serious concern. As for the view expressed in the third paragraph as to the level of management required in the event of an eventual release, again that suggestion could have come as no surprise to the Applicant or his representatives because that was, in effect, exactly what was proposed in the risk management plan put before the OHP for consideration and which was rejected by them as insufficient.

44. The Applicant and his lawyers knew that a document was on its way to the OHP. It is surprising that there was no mention of it in any further written submissions that were sent to the Board. From all the material I have seen, the only other mention by the Applicant's representatives of this particular aspect of the matter was not until the 17 September 2020 when it is referred to in paragraph 21 of the written submissions made on the Applicant's behalf in support of this reconsideration application.

45. I readily accept that the Applicant and his legal representatives should have been sent this communication from the police. It should have immediately been uploaded to the dossier to which the Applicant's representatives had access. Steps should have been taken to ensure they had seen it before reference to it found its way into the Decision Letter. If the OHP could not be sure that it had been seen by the Applicant and his legal representative, then it would have been better not to have included it in the Decision Letter. I recognise that it may have been discomforting for the Applicant and his lawyers to see it for the first time on receipt of the Decision Letter. However, there is nothing in the Decision Letter itself to indicate that the OHP placed any particular reliance on the content of this email. In fact, it is very hard indeed to see that they could have placed any reliance on it as in my judgment it adds nothing at all of any evidential value to the body of material and evidence that the OHP already had to consider. In my judgment the content of the email was in all important respects well known to the parties via other evidence and could not in my view have played any material part in the OHP's reasoning.

46. Ground B (iv) Fourthly, it is submitted that failure of communications during the oral hearing rendered the proceedings unfair. The complaint here is that recurrent loss of sound, and at one point the loss of contact with the Applicant's representative was

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such, that no fair minded observer would conclude that the hearing had been conducted fairly.

47. I have directed enquiries to be made of the Panel Chair who has responded by email. It is recognised that this hearing was subject to technical difficulties regarding communication. Connections were lost from time to time. Connection with the Applicant's lawyer was also lost more than once. The panel chair at one point had to summarise some of the evidence (in fact in support of the Applicant's case) for counsel who had not heard it. As I understand it, counsel for the Applicant raised no objection to this course being taken. No application was made to adjourn the hearing itself at that point and, neither was there any mention of this issue in the written submissions made immediately following conclusion of the hearing on 2 September 2020.

48. Since the termination of face to face hearings in prisons as a result of the Covid outbreak I understand that a very large number of remote hearings (in excess of three thousand) have been conducted nationwide. This and other measures have enabled what would otherwise have been unacceptable delays in prisoner's hearings to be avoided. Inevitably, difficulties will occur during a hearing conducted remotely. All participants are alive to this, and each will and have played their part in overcoming them appropriately.

49. The submission made now but not at the time in this case, is that during the hearing the difficulties were such that an unfair decision was the result. I am satisfied that there is no evidence before me to support that submission.

Decision

50. Whether considered individually or taken together, the matters put forward on behalf of the Applicant in support of his application for a reconsideration of this decision have failed to satisfy me that this case meets the legal test for either irrationality and/or procedural unfairness.

51. In those circumstances and for all the reasons given this application is dismissed.

Michael Topolski QC
9 October 2020

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