

[2022] PBRA 159

Application for Reconsideration by Gee

Application

1. This is an application by Gee (the Applicant) for reconsideration of a decision of a panel dated 27 August 2022 (the Panel Decision) making no direction for his release and no recommendation for his progression to Open Conditions.
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. A failure to make a recommendation for progression to Open Conditions is not eligible for reconsideration under Rule 28. So this decision will not consider any further the Panel's decision to refuse to make a recommendation for the Applicant's progression to Open Conditions, but it will focus solely on the application to reconsider the decision to make no recommendations for the Applicant's release.
3. I have considered the application on the papers. These are the Panel Decision, the Application for Reconsideration, the email dated 29 September 2022 from PPCS on behalf of the Secretary of State stating that no representations will be made by the Secretary of State in response to the Application for Reconsideration and the Applicant's dossier containing 498 pages.
4. The grounds for seeking reconsideration are that:
 - (a) the decision not to release the Applicant is irrational in that contrary to the Panel's finding, XY did not state to the Applicant's COM that she and the Applicant had been engaging in sexual activity since 9 June 2021 or thereabouts (Ground 1);
 - (b) the conclusion that the Applicant presented a risk of serious harm to the public is irrational (Ground 2); and that
 - (c) on account of the factors set out in Ground 1, the decision under challenge is procedurally unfair as "*the basis [on which] the decision is based ...is incorrect*" (Ground 3).

Background

6. On 5 March 2009, the Applicant, who was then 36 years old, received a sentence of imprisonment for public protection for an offence of robbery with a minimum period of 51 months to be served ,The Applicant committed the index offence of



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

robbery when he lured *"the victim from his place of employment to a flat where the intention was to rob him"*, The Applicant was armed with weapons and the victim was seriously injured by the actions of the Applicant. The Applicant was sentenced separately for offences of Section 20 wounding/inflicting GBH, aggravated vehicle taking.

7. The Applicant was first released on life licence on 31 October 2016, but his licence was revoked and he was recalled to custody on 27 June 2017 due to allegations that he had committed further offences. He was subsequently convicted of threats to kill and assaulting a family member with intent to cause her actual bodily harm. He duly received a sentence of 13 months' imprisonment.

8. The Applicant was released again on 24 May 2021 and his licence was revoked 1 July 2021 because the Applicant had not been *"open and honest about [him] developing intimate relationship with a vulnerable female with children"*.

9. The reason for that decision was that the Secretary of State was satisfied that the Applicant had breached the conditions of his licence that (a) *"he shall be of good behaviour and not behave in a manner which undermines the purpose of the licence period"*; and that (b) *"he shall notify the supervising officer of any developing relationship with women/men"*.

10. The background to the decision to revoke the licence of the Applicant was that on 10 June 2021, a woman (XY) called the Applicant's COM to report that she was friends with the Applicant. In answer to a question, XY stated that the relationship was not intimate.

11. When the Applicant was asked about this relationship by his COM on the following day, he also stated that it was purely a friendship.

12. Subsequently, a post-recall review of GPS tagging showed that there was "significant contact" between the Applicant and XY's home address that was first identified on 6 June 2022.

13. The GPS tagging evidence was that the Applicant visited XY's address on a daily basis from 11 June 2021 until his recall on 1 July 2021. These visits occurred after school hours and at weekends. This information was passed to Social Services.

14. On 29 June 2021, the police informed the Applicant's COM that there was *"an active investigation"* in relation to XY's family.

15. On 30 June 2021, the Applicant's COM (Community Offender Manager) officer attended the Applicant's AP and examined his phone and *"this showed a series of messages passing between [the Applicant] and [XY] which involved 'sexualised language' and 'declarations of love'"*.

16. The messages included a further sexualised message sent on 19 June 2021.

17. The Panel explained that *"as a result [the Applicant's] licence was revoked on 1 July 2021"*. His phone was seized.



18. On 1 July 2021, the Applicant, who would not then have been aware that his recall had been initiated sent a message to his COM to say that he had got into a relationship with XY *"in the last couple of days"* and that it was not planned.

19. The Applicant's COM spoke to XY who stated that she and the Applicant had known each other for a number of years, but there had not been any sexual relationship between them until 28 or 29 July 2021. It is this conversation which is the basis of Ground 1.

20. XY did, however, accept after she had been told that that the COM had seen the messages between her and the Applicant, that she and the Applicant had been intimate on the day before her disclosure on 10 June 2021. She also explained that that her mother had died on 17 June 2021 and that *"it had been difficult time that month with that and other issues"*.

21. At the oral hearing on 12 July 2021, the Panel was considering the circumstances of the Applicant's recall and whether he could be safely released and, if not, whether the Panel could recommend that the Applicant should be moved to open conditions.

22. In relation to the recall, the Applicant said that his visit to XY's home on 9 June 2021 was the first occasion on which he had gone to XY's home, but that nothing of a sexual nature happened on that occasion. The Applicant still told XY to tell his COM which she did on the following day.

23. The Applicant accepted that he sent text messages on 19 June 2021 that were of sexualised nature to XY. The Applicant denied that there was a hidden WhatsApp chat group explaining that this was a Facebook Messenger group with about 10 members, although he did reply privately to XY.

24. According to the Applicant, his relationship with XY did not start until 27 or 28 June 2021 and that he should not have been recalled on 1 July 2021 for having had a sexual relationship with XY from mid-June 2021.

25. At the hearing, there was an updated security report with three entries relating to letters written by the Applicant on three occasions in the summer of 2021. One dated 6 August 2021 featured a *"I love you"* card with a hand-drawn picture that stated the Applicant *"hearts"* XY with a date of 10 June 2021 and an eight-page letter which says they will be together soon, with the Applicant specifying a maximum period of 2 years.

26. The Applicant's phone was examined by the Police on 30 June 2022 and he confirmed in a witness statement verified by a statement of truth that he had seen a number of sexualised messages passing between the Applicant and XY.

Current parole review

27. A two-member panel of the Board held an oral hearing by at HMP Stocken on 12 July 2022 at which the panel heard oral evidence from:

(a) the Prison Offender Manager (POM).

(b) the Community Offender Manager (COM); and from



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

(c) the Applicant.

28. The Applicant was represented at the oral hearing by his solicitor. The Secretary of State was not represented by an advocate. No victim impact statement was provided. There was no evidence which could not be disclosed to the Applicant.

29. The Panel explained that it had to determine the significant question of when the Applicant and XY first had regular contact, and when their sexual relationship started.

30. The Panel observed that:

(a) the GPS evidence was that the Applicant was at XY's address on a daily basis from 11 June 2021 until his recall on 1 July 2021. These visits occurred after school hours and at weekends

(b) this GPS evidence *"was not challenged by [the Applicant] at the hearing or afterwards, and no suggestion has been put forward as to how, and why, it may be inaccurate"*

(c) *"it [was] more likely than not that [the GPS] was working regularly and that what [the GPS evidence] shows happened was likely what happened(sic)"*.

(d) *"this evidence would be suggestive of a relationship [but] the Panel notes what representations say about the dating or (non-dating) of the messages, accepts that without a clearly defined date, caution must be approached"*

(e) *"However it was not disputed that on 19 June 2021 [the Applicant] sent a message [to XY]" [and] there is no way to read this other than in a sexualised way"*. His message was sent in response to a sexualised message from XY to the Applicant in which she said that she had strong feelings for him

(f) *"in addition, in discussion with XY, she told [the Applicant's COM] that they had been engaging in sexual activity since 9 June 2021 or thereabouts";*

(g) *"this [statement] is not something that [the Applicant] has sought to challenge or explain. It is consistent with the above text message and the GPS tracking data"*

(h) the statement in (f) above *"is also consistent with the 6 August 2021 card which read (in part) Pauly hearts [XY] with a date of 10 June 2021"*. "Pauly" was a reference to the Applicant.

(i) *"the Panel considered that the most sensible reading of that was the two were in a relationship since 10 June 2022"*. That date must have been a misprint for 10 June 2021.

(j) *"the above evidence was more than sufficient to show that it was more likely than not that [the Applicant] had stated sexual relations with [XY] on or before 10 June 2021"* (Emphasis added) and

(k) *"the evidence [the Applicant] gave to the Panel was untrue" and that he "behaved in a knowingly dishonest way towards his COM... this started a matter of weeks after he was released from custody"*.

These observations will hereinafter be referred to as "the paragraph 30 conclusions".

31. On the issue of whether to direct release, the Panel concluded that:

(a) the Applicant *"presents a high risk of serious harm to others"*;



(b) "given [the Applicant's] previous convictions, any further offending is likely to lead to serious harm being caused";

(d) this assessment of the risk posed by the Applicant "took account of the hostility shown [by the Applicant] towards his COM and [Probation)";

(d) "even without [the matters set out in (c) above] that in the light of the dishonesty shown in the recall [namely as set out in the paragraph 30 conclusions] ...there was not sufficient evidence that [the Applicant] would comply with conditions on release"; and that

(e) accordingly, no direction for release was made.

The Relevant Law

Parole Board Rules 2019 (as amended)

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

Other

34. 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;*



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



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

 info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

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.

35. 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 craftsmanship.*"

Procedural Unfairness

36. Procedural Unfairness means that there was some procedural impropriety. In summary an 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.

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

The reply on behalf of the Secretary of State

38. PPCS stated in an email dated 22 September 2022 that the Secretary of State was not making any representations in response to the Applicant's reconsideration application.

Discussion

39. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.



40. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

41. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

42. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

43. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

Ground 1

44. This ground is that the decision not to release the Applicant was irrational in that contrary to the Panel's finding, XY did not state to the Applicant's COM that she and the Applicant had been engaging in sexual activity since 9th June 2021 or thereabouts. It is alleged that what XY stated to the Applicant's COM was that nothing sexual occurred between them until 28th or 29th June 2021.

45. XY did not give evidence, but the truth of anything she said about her relationship with the Applicant has to be considered against the background that she would have been aware that if the Applicant were to be released, her children would then be referred to Social Services. It is reasonable to assume that this is a conclusion that XY would have sought to avoid as it might have meant that her children would be removed from her home. I will assume for the purpose of this decision that contrary to what appears in the decision, XY did state to the Applicant's COM sexual activity did not start till 28th or 29th June 2021 and that she did not state that they had been engaging in sexual activity since 9th June 2021 or thereabouts.

46. indeed, in any event even if XY said to the Applicant's COM that sexual activity with the Applicant started as late as 28th or 29th June 2021, it would not have been irrational for the panel not to accept that evidence and to have held instead that the sexual activity between the Applicant and XY started soon after 9 June 2021 bearing in mind:

- (a) the powerful cogent evidence in support of the conclusion that the sexual activity started soon after 9 June 2021 and which is set out in the paragraph 30 conclusions which were based on the consistent contemporary evidence such as the GPS material, the 6th August 2021 card and the sexualised message; and
- (b) that in the light of that evidence it would have been perverse and irrational for the panel to have concluded that the Applicant's sexual activity with XY did not start till 28th or 29th June 2021.



47. There are further or alternative reasons why the Panel's conclusion on this issue should not be reconsidered on this ground even if the Panel erred in finding that XY did state to the Applicant's COM that she had been engaging in sexual activity with the Applicant since 9 June 2021 or thereabouts and those reasons are that:

(a) as explained in paragraphs 39 above, reconsideration should not be ordered unless it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel. In this case, apart from the Panel's alleged error, there was an immensely powerful case in support of the conclusion that sexual activity between XY and the Applicant started soon after 9 June 2021 and which is set out in the paragraph 30 conclusions which were based on the consistent contemporary evidence including but not limited to the GPS material, the 6th August 2021 card and the "sexualised message" and /or in any event.

(b) due deference has to be given to the expertise of the panel in making its decisions under challenge (including in deciding what weight if any should be given to the paragraph 30 conclusions) and/or in any event.

(c) both decisions under challenge did not meet the test for being irrational, namely that that they are "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." Again the paragraph 30 conclusions provide powerful and clear support for finding that the Applicant and XY had been engaging in sexual activity since 9 June 2021 or thereabouts.

Ground 2

48. The ground is that the Panel's conclusion that the Applicant presented a risk of serious harm to the public is irrational.

49. The Panel explained why it reached that conclusion including that:

(a) the sentencing judge imposed an indeterminate sentence for the index offence on the Applicant and that indicates his finding that the Applicant was dangerous; and that

(b) there was no challenge to the OASys assessment adopted by the Applicant's POM that the Applicant posed a high risk of serious harm to known adults and children; and the (c) the Panel had found that there was insufficient evidence that the Applicant would comply with the conditions of his licence if released especially in the light of its finding in the light of the paragraph 30 conclusions that the Applicant had been dishonest in his evidence relating to when his sexual relationship with XY started.

50. Nothing has been put forward to show why the Panel was not entitled to reach those conclusions. In any event, there are further reasons why reconsideration should not be ordered in that:



- (a) due deference has to be given to the expertise of the panel in making its decisions under challenge (including in deciding what weight if any should be given to the conclusions in paragraphs 30, 31 and 49 above) and/or in any event
- (b) the decision under challenge did not meet the test for being irrational, namely that that they are “*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*”.

Ground 3

51. It is contended on account of the factors set out in Ground 1, the decision under challenge is procedurally unfair as “*the basis [on which] the decision is based ...is incorrect*”. The Ground 1 complaint does not relate to the procedure adopted, but instead to the totally different issue of the alleged irrationality of the panel’s decision. This complaint cannot be pursued as a procedural unfairness ground.

52. In any event, this ground does not raise any issues not covered by the other Grounds and nothing further has been put forward under this Ground to justify ordering reconsideration especially in the light of the paragraph 30 conclusions.

Conclusion

53. For all these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber
7 November 2022**

