

[2024] PBRA 68**Application for Reconsideration by Cano****Application**

1. This is an application by Cano (the Applicant) for reconsideration of a decision of an oral hearing panel dated 19 February 2024 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board Rules**) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the oral hearing decision, the dossier (consisting of 434 pages), and the application for reconsideration (dated 24 February 2024).

Background

4. The Applicant received an extended sentence comprising four years in custody with a four year period on extended licence on 20 April 2021 following conviction for attempting to incite a child under 13 to engage in non-penetrative sexual activity. He was also convicted on a further count of attempting to incite a child under 13 to engage in non-penetrative sexual activity (30 months concurrent), arranging or facilitating the commission of a child sex offence (12 months concurrent), attempting to engage in sexual communication with a child (2 years concurrent), failure to comply with notification requirements (6 months concurrent) and breach of Sexual Harm Prevention Order (6 months concurrent). He pleaded guilty to all charges.
5. His parole eligibility date passed in June 2023. His conditional release date is in October 2024 and his sentence ends in October 2028.
6. The Applicant was 29 years old at the time of sentencing and is now 32 years old.

Request for Reconsideration

7. The application for reconsideration has been written by the Applicant but submitted via his legal representative (who added no further comment or argument). It argues that the decision not to release him was irrational. I will refer to the Applicant's submissions in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in August 2022 to consider whether or not it would be appropriate to direct his release. This is the Applicant's first parole review.
9. The case proceeded to an oral hearing on 8 February 2024. The panel consisted of three members. It heard oral evidence from the Applicant, together with his Prison Offender Manager (**POM**), Community Offender Manager (**COM**), an HMPPS psychologist and a psychologist commissioned by the Applicant (the **prisoner's psychologist**). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
10. The panel did not direct the Applicant's release.

The Relevant Law

11. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

Parole Board Rules 2019 (as amended)

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
13. 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)).
14. 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 the previous reconsideration application in *Barclay* [2019] PBRA 6.

Irrationality

15. 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."

16. 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.

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

The reply on behalf of the Respondent

18. The Respondent has submitted no representations in response to this application.

Discussion

19. Professional opinion was divided in this case. Both psychologists considered that the Applicant could be managed safely under the terms of the proposed risk management plan. The Applicant's POM and COM thought otherwise. Although there was little that could be added to the proposed plan, they had doubts about the Applicant's openness, honesty and capacity to be disingenuous.

20. Where there is a conflict of opinion, it was plainly a matter for the panel to determine which opinion they preferred, provided the reasons given are soundly based on evidence, as well as rational and reasonable or at least not so outrageous in the sense expressed above.

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

22. It is clear that the Applicant is disappointed by the panel's decision. However, the thrust of his argument is disagreement with the panel's interpretation of the evidence before it. The panel was entitled to find that the Applicant's account of his offending was not credible. It was entitled to form the view that it was not satisfied with the Applicant's explanations of his offending behaviour. It cannot be said that the panel's decision was irrational simply because there was little that could be added to the risk management plan. To find otherwise would be tantamount to saying that once a risk management plan is as robust as it can be, then every prisoner should be released subject to it. That situation would miss the reality (as in this case) that for some prisoners, even the most rigorous external controls would not be sufficient. External controls are only part of the risk management landscape; a prisoner's internal controls must also be considered. In this case, the panel's view of the Applicant's insight was a key factor, and this was a view that the panel was perfectly permitted to take.

23. Moreover, the panel's decision is logical, evidence-based, and correctly focussed on risk throughout. It gives clear reasons for its conclusion. The legal test for irrationality sets a high bar. This case does not meet it and the application must fail.

Decision

24. For the reasons set out above, the application for reconsideration is refused.

Stefan Fafinski
28 March 2024