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[2025] PBRA 26

Application for Reconsideration by Patton

Application

1. This is an application by Patton (the Applicant) for reconsideration of a decision of an Oral Hearing Panel (OHP) dated the 20 December 2024 the decision was not to direct release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2024) (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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the dossier now consisting of 479 pages, the panel decision, the application for reconsideration drafted by the Applicant's legal adviser and the representations by the Secretary of State (the Respondent).

Request for Reconsideration

4. The application for reconsideration is dated 10 January 2025.

5. The grounds for seeking a reconsideration are set out below. For convenience, I have listed some of the issues raised by the Applicant's legal adviser as separate grounds.

Background

6. The index offences (which were committed between 2005 and 2011) were sexual touching, rape and assault by penetration. The victim of the digital penetration (A) was aged between 13 and 14. The rape occurred when Victim (A) was aged 15. There was a further rape when Victim (A) was aged 18. Victim (B) was subject to sexual assault (touching over clothing).

7. The Applicant had also been convicted of sexual offences committed (between 1997 and 2004) (different victims) he had been convicted of the rape of a female under 16 years, gross indecency with a child under 14 years of age (2 offences) and an indecent assault upon a female under 16. He is serving an extended sentence of imprisonment comprising of a custodial period of 9 years and 6 months and an extension period of 5 years. He was eligible for parole in March of 2024.

Current parole review

8. The Secretary of State referred this case to the Parole Board to consider whether the Applicant should be released. The Applicant was aged 42, at the time of the oral hearing (OH). This was the Applicant's first review of his sentence.

9. The OHP consisted of an independent chair, a further independent Parole Board member and a psychologist Parole Board member. Evidence was given by the Prison Offender Manager (POM), a prison instructed psychologist and the Community Offender Manager (COM). The Applicant was legally represented.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 20 December 2024 the test for release.

Parole Board Rules 2019 (as amended)

11. 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)).

12. 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)).

Irrationality

13. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined **in Associated Provincial Houses ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene in these words *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

14. In **R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin) a Divisional Court** applied this test to parole board hearings in these words 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."*

15. In **R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin**) Saini J set out what he described as a more nuanced approach in modern public law

which was *"to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied)".* This test was adopted by a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

16. As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in **DSD** was binding on Saini J.

17. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

18. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

19. 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.

20. 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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

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

Error of law

22. An administrative decision is unlawful under the broad heading of illegality if the 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.

23. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Other

24. 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.*"

Reconsideration as a discretionary remedy

25. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Secretary of State

26. The Respondent offered no representations.

Grounds and Discussion

Ground 1

The Applicant's legal adviser heads this ground as "*Irrational approach to the question of antisociality".*

Background

27. This argument relates to the question of the Applicant's triggers and insight into his sexual offending against children. The Applicant's stance in relation to the index offences has consistently been either a position of denial or an indication that the victims' were consenting and that there was confusion over their age.

28. Given this position there was no evidence upon which professionals (and the panel) could decisively explain the triggers and motivation behind the Applicants sexual offences. The basic facts of the sexual offending were clear. The victims were

children and the Applicant was a young adult. An additional factor was that the offending was repeated over a lengthy period of time.

29. In a comprehensive psychological report a prison psychologist recorded his view as to this topic in the following terms:

"*[the Applicant] is unable or unwilling to explain specifically why he sexually offended against pre-pubescent and post pubescent female victims over a 13-year period. Originally, [the Applicant] said he could not recall his offending due to extensive drug use. His stance in interview for the current assessment changed to him stating that the sexual offences "did not occur at all" and maintained that the sexual intercourse he had with victim (aged 14) and the victim (aged 18) were both "consensual". It is possible that [the Applicant] believed he engaged in consenting sex with the victims based within underlying attitudes that condone sexual offending e.g. 'sex comes easy' and unhelpful attitudes towards women. It may also represent a self-protective strategy designed to shield him from guilt and shame. In my view, whatever the specific reason, this situation is likely to remain unchanged, until [the Applicant] accepts more responsibility. In my opinion, [the Applicant's] ongoing denial does represent a challenge for risk reduction and management. A pattern relevant to future risk management is that [the Applicant] knew all his victims and likely engineered ways to access them e.g. becoming a family friend, which possibly relates to the item: 'Psychological coercion in sexual violence'. [The Applicant] has not accepted responsibility for engaging in IPV behaviours against victims [X and Y] and has chosen to place blame on the victims for "attacking" him and viewing his offending behaviour as "self-defence". [The Applicant] has not engaged in any formal intervention to explore such attitudes and most of his relationships have involved conflict, a lack of emotional intimacy and a heavy focus on casual sex with vulnerable women. In my opinion, these areas represent treatment needs which have not yet been addressed and represent an issue for risk and the risk management plan*."

Later in the report it is indicated…

"*I consider that he would be a moderate to high risk of sexual violence and moderate risk of IPV. Whilst [the Applicant] has shown positive insight into his acquisitive crime and antisocial behaviour following engagement in Horizon, he has not shown insight into risk specifically related to sexual offending and IPV*".

In the recommendation section the psychologist reported as follows…

"*I am not recommending release at this point for [the Applicant]. Whilst I consider that his risk of committing sexual violence or IPV is not imminent (based on him not being in an intimate relationship or having access to children currently), in my opinion, risk cannot be managed safely in the community. This is due to him not being able to demonstrate an understanding of why he engaged in repeated sexual offending or IPV and an inability to identify relevant risk factors. Risk could escalate quickly if [the Applicant] entered an intimate relationship or had access to female children, as he has not understood his risk relating to these areas. In my opinion, he could potentially offend in diverse ways against different victim types including general violence, acquisitive crime, and antisocial behaviour. [The Applicant's] denial and minimisation of offending has had a significant impact on professionals'*

ability to identify what risk reduction and management processes need to be in place to monitor and support him in the community."

30. Also later in this report, despite affirming that there was "*no understanding*" as to why the Applicant engaged in sexual offending against children. The psychologist also posited the view the offending was "*opportunistic*" rather than being driven by a sexual preference for children.

31. The psychologist's position, in March 2024, therefore was that there was an absence of understanding of why the Applicant engaged in the sexual offences and a consequent inability to clearly identify risk factors relating to sexual harm and children and by extension an obvious difficulty in managing risk.

32. By the time of the OH (December 2024) the psychologist had changed his position. He told the OHP that he had "*tentatively changed*" his recommendation to one of release. The change, was explained on the basis that the psychologist had assessed that the Risk Management Plan (RMP) was now more detailed with various interventions being suggested in the community. This recommendation was "*with the caveat that [the Applicant] had to remain motivated to engage*".

33. Despite this recommendation the panel reported that (in oral evidence) the psychologist had "'*grave concerns' about the gaps in knowledge (of his sexual offending), both due to [the Applicant's] maintenance of innocence, and his level of minimisation so it was challenging to identify the triggers with confidence."*

34. The panel were therefore presented by the psychologist with a mixed view as to progression and a substantial change in approach between the writing of the report and the presentation of oral evidence at the OH.

35. The Applicant's legal adviser suggests (in the application for reconsideration) that the (sexual) offending was in fact, explained by the professionals as being behaviour associated with personality and with the Applicant's antisocial behavioural traits at the time of offending. It was suggested that the background to all offending by the Applicant (sexual and general violence) was attributed to the fact the Applicant had traits of antisocial behaviour.

36. The argument being that, despite the absence of any explanation from the Applicant, the Applicant's behaviour was therefore understood and explicable and attributable to an anti social personality.

37. It was further argued that the Applicant had behaved in a prosocial manner during his prison sentence, and therefore had demonstrated that the (anti social) triggers and motivations for his behaviour were now apparently addressed.

38. The panel disagreed with this formulation. The panel "*found it more challenging to hypothesise the identical factors solely pertained to the child sexual abuse"*. In essence the panel did not accept the hypothesis that the Applicant's sexual offending directed towards children and adolescents could be explained under the heading of generalised antisocial behaviour.

39. Clearly, committing offences (whether sexual or otherwise) in general terms amounts to antisocial (as opposed to prosocial) behaviour. However, the fundamental issue of the triggers and motivations which led to the sexual offending directed at children, remained unaddressed which, for the panel, was crucial in terms of risk assessment.

40. The psychologist witness (at the OH) was asked about his earlier view (as set out in his report). The psychologist explained to the panel that he had revised his view about risk because there was now a fully formulated risk management plan.

41. The panel, however, were not persuaded by this explanation. The content of the risk management plan did not advance the fundamental concern of the panel (and of the psychologist at the report stage), namely that the triggers and motivations behind the Applicant's sexual offending against children were not understood, and thus had not been addressed in terms of risk management.

42. I am not persuaded that this position, taken by the panel was irrational. There had been a firmly argued position by the psychologist witness in his report. The psychologist was entitled to change his view, however the panel were also entitled, and indeed obliged, to consider whether the revised recommendation and view had substance. The panel clearly concluded that the rationale for the change in view, lacked substance. In simple terms a well drafted risk management plan did not advance the fundamental issue, which was an understanding by the panel and the Applicant of his triggers and risks in relation to sexual offences directed at children. The panel's position in my determination could not amount to irrationality in the sense set out above.

Ground 2

43. It is argued, on behalf of the Applicant, that one particular factor addressed by the panel in its decision. Namely "*his (the Applicant's) capacity to be aroused by very young children*" was irrational as the psychology witness had specifically recorded (in his report) that the Applicant was not thought (in the opinion of the psychologist) to be sexually attracted to children.

44. Whilst this may have been the psychologist's position, the panel in my determination were at liberty to look at the index offences themselves and the recorded convictions and to reach a contrary view. I do not find that the panel acted irrationally in reflecting upon the factual evidence of the convictions and reaching a conclusion contrary to that of the psychologist. Particularly in circumstances, as noted above, where the psychologist had accepted that an understanding of the triggers and motivations of this offending was seriously hampered by the Applicant's denial and thus an absence of explanation from the Applicant. The panel were entitled to rely upon the fact that the index offences involved rape and digital penetration perpetrated against children aged between 13 and 15, (and earlier offences had involved younger children) and thus to conclude, on balance, that the Applicant had "*a capacity to be aroused by very young children".*

Ground 3

45. The Applicants' legal adviser submits "*what is unclear however, is why the panel considers that the good understanding of [the Applicant's] general offending behaviour is not enough to manage his risk in the community, and that there is a need to identify specific factors pertaining to [the Applicant's] (sexual) offending*".

Discussion

46. This submission can be addressed shortly. A fundamental of risk assessment is an understanding of the triggers and motivation which are thought to have led to any offending behaviour. In the case of sexual offending against children that need for understanding is clearly heightened in the light of the potential harm. I am not persuaded that the panel were irrational in seeking to clearly understand the background to this aspect of the Applicant's offending.

Ground 4.

47. The Applicant's legal adviser submits that the Applicant has "*spent more than 10 years in custody. His antisocial attitudes have shifted to prosocial attitudes and have sustained over a considerable period of time*". Despite this, it is argued (on the Applicant's behalf) that the panel's conclusion, "*that risk could rise rapidly because of his antisocial attitudes and emotional instability is present*", is irrational.

Discussion

48. The panel (in its concluding remarks) indicated as follows ….

> "(*the panel) agreed with professionals that [the Applicant] is assessed as a high risk of serious harm to known adults and children. The panel remained concerned about the significant challenge of the rapid identification of anti-social warning signs, when the RMP relies in part on his self-report and it is not persuaded that [the Applicant] has the necessary internal skills to manage his risk. It was not reassured that [the Applicant] had sufficient insight, coping strategies and could deploy appropriate risk management strategies in the community where he will be exposed to the inevitable challenges that he would face. He is largely focused on avoidance at this stage. It considered his anti-social attitudes and emotional instability were unpredictable and could rapidly escalate risk. It was not persuaded that the RMP could respond sufficiently quickly to manage risk at this stage. It considered that [the Applicant] was unrealistic about his expectations of his support network and his evidence was, at best, naïve, but the panel formed the view that this is a further indication of a lack of awareness and prioritising his own needs over others."*

49. I am not persuaded that the Applicant's view about the elevation of risk was irrational in the light of this explanation by the panel.

Ground 5

Other witnesses

50. Although not specifically argued by the Applicant, I have considered whether the support of the COM and POM for release was also addressed by the panel. The

position of those witnesses was that release was recommended. The COM and POM took the view that no further behavioural work was indicated in custody, and a view that the Applicant's positive behaviour in prison indicated that he would adhere to the conditions and requirements of the risk management plan.

51. Again I am satisfied that the panel recorded their concerns in this regard. The panel accepted that the RMP was robust. They were not however persuaded that the Applicant had a full understanding of his risk. The panel noted as follows "*(the panel were) concerned that [the Applicant] had limited insight into his own risks and the reasons for the necessity and proportionality of the proposed licence conditions. The RMP relies in part on self-report and based on the panel's assessment of his oral evidence at the hearing, it had reservations about his level of openness and transparency with professionals at this stage and this directly linked to his risk of serious harm".*

52. The panel in this case had the advantage of an extensive dossier of reports and other material. They had the advantage, too, of seeing and hearing the Applicant as well as the witnesses. 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, an intervention by way of reconsideration is not appropriate.

53. It is well understood that 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 assessment 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.

54. However, if a panel were to make a decision contrary to the opinions and recommendations of all the professional witnesses, it is important that it should explain clearly its reasons for doing so and that its stated reasons should be sufficient to justify its conclusions, **per R (Wells) v Parole Board 2019 EWHC 2710.**

55. Where a panel arrives at a conclusion, exercising its judgement based on the evidence before it and having regard to the fact that 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.

56. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. Nor is it a mechanism where I should be expected to substitute my view of the facts as 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.

57. I am satisfied that the panel clearly explained its reasons in this case. The panel were not satisfied that the Applicant's risk in relation (in particular), to children was fully understood and thus manageable in the community and therefore the panel concluded that Applicant did not meet the statutory test for release.

Ground 6

58. The Applicant's legal adviser submits that it "*is irrational for the panel to now say that the RMP is significantly undermined by the fact that it relies in-part on self-report".*

Discussion

59. This ground is extensively argued in the submission. The panel, in its decision accepted that the RMP was broadly drafted and robust. However (as is accepted by the Applicant's legal adviser) all such plans rely substantially upon self report. The panel accepted that in general terms, the witnesses who had assessed the Applicant took the view that he was '*open and honest'* in his dealings with professionals. Again however the panel were clearly obliged to address the issue of risk to children and the Applicant's denial of the serious offending against children. The Applicant was entitled to maintain his stance, however the panel were obliged to accept that the Applicant had been convicted of a number of offences involving children. The Applicants' openness and honesty was therefore qualified by the fact of the denial. It was this area that concerned the panel. The panel's view was that the Applicant lacked both acceptance and insight into his risk to children, as a result self report would be an obvious barrier in this aspect of managing risk. I do not find irrationality in the panel's approach.

Ground 7

60. It is submitted that the panel unfairly concluded, on the basis of the Applicant's apparently negative response to a single question, (about a project called the Challenge Programme) that he did not appreciate the necessity and proportionality of the licence conditions.

Discussion

61. At paragraph 2.37 of the decision the panel noted as follows "*The panel recognised [the Applicant] is currently motivated to engage with probation and that the future external management of his risks is undertaken with the knowledge of his previous behaviour".*

62. I am not therefore persuaded that the panel reached an unfairly negative conclusion. The panel accepted that the Applicant was motivated to engage.

Ground 7 – Procedural unfairness

63. The panel "*cherry picked*" evidence - The Applicant's legal adviser submits the following "*In choosing to focus on the specific factors behind [the Applicant's] offending behaviour, the panel has overlooked the position of the professionals, that the understanding of the generic factors was enough to manage [the Applicant's]*

risks. The panel did not explain why they have exercised this preference in such a manner and have thus cherry-picked the evidence."

Discussion

64. As noted above the panel's role was to consider the totality of the evidence and to reach their own independent conclusion upon that evidence. The panel were entitled to rely on upon evidence which they considered to be credible and to reject evidence to which they attached less weight. The panel were also entitled to accept or reject professional's views. The panel's legal obligations are clearly enunciated above and below. The panel in this case explained the basis of their decision and that explanation was supported by credible evidence. I am not persuaded that the panel failed to address the evidence in the manner required by the decisions set out below.

Ground 8

Maintenance of innocence as a bar to release

65. The Applicant's legal adviser submits that the maintenance of innocence was, in this case a bar to release.

Discussion

66. The panel in this case appropriately indicated that denial of offending cannot of itself amount to a bar to release. However, as is evidenced in this case, that does not mean that denial does not create an issue in relation to the assessment of risk. The panel were obliged to assess the Applicant's risk in relation to (in particular) children. The Applicant's denial of the offending in relation to children meant, in reality, that both professionals and the panel were left to speculate as to the triggers and motivations. The denial also meant that the Applicant was unlikely to have insight into the triggers and motivations which might lead to risk to children. The panel in this case were bound to focus upon the Applicant's insight and understanding of his risk in relation to children. The panel in my determination appropriately addressed the nuances which inevitably impact upon a prisoner who is maintaining denial of offences which have led to court convictions. I am not persuaded that this amounts to irrational behaviour, or procedural unfairness.

General

67. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed, and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.

68. The reason for requiring adequate reasons had been explained in a number of decisions including:
    - **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
    - **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**

- **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;**
- **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**

69. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene: without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by Reconsideration or judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

70. I have carefully considered whether the panel in this case adhered to the decisions listed above. The panel in my view, gave a clear explanation as to their reasons for the decision. Those reasons, in my determination were supported by credible and persuasive evidence within the dossier and the oral evidence received at the hearing. For these reasons, I do not order reconsideration.

Decision

71. For the reasons I have given, I do not consider that the decision was irrational and or procedurally unfair and accordingly the application for reconsideration is refused.

HH Stephen Dawson
31 January 2025