[2023] PBRA 21

Application for Reconsideration by Fowler

Application

1. This is an application by Fowler (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 16 December 2022 (the Panel Decision) making no direction for his release.

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 the application on the papers. These are the Panel Decision, the Application for Reconsideration, the email dated 2 February 2023 from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State stating that no representations will be made in response to the Application for Reconsideration and the Applicant's dossier containing 232 pages.

4. The grounds for seeking reconsideration are that:

   (a) the Panel was irrational as there was no "*substantiated evidence*" to support that conclusion and none of the professionals managing the Applicant stated that there was outstanding core risk work for him to complete in custody (Ground 1).

   (b) the Panel acted in a procedurally unfair manner as it could not have made an accurate risk assessment decision on the Applicant's suitability for release without properly considering the evidence presented to the Panel and the Panel's decisions shows that the Panel did not properly consider this evidence. It is contended by the Applicant that "*it is concerning that evidence given at the hearing has been ignored*" with the consequence that the proceedings in front of the Panel were unfair (Ground 2).

Background

5. On 2 June 2017, the Applicant, who was then 31 years old, received an Extended Determinate Sentence of 10 years' custody plus an extended licence period of 1 year for a series of sexual offences against daughter (the victim) of his then partner. Those offences were first, rape; second, assault by digital penetration; third, causing or inciting a girl under the age of 13 to engage in sexual activity; and fourth, causing a child under the age of 13 to watch or look at an image of sexual activity. The offences all relate to incidents which occurred on 13 April 2017 at his partner's home after the Applicant had been

left in sole charge of the victim and her brother. The victim suffered "*severe internal and external injuries"* as a result of the Applicant's offences*,* but the Applicant denies knowingly hurting her.

6. The Panel explained that the Applicant has consistently maintained that the rape was not planned, that he had not formed a relationship with the victim's mother to gain access to the victim, and that he had not been grooming the victim, but that he had become bored and had begun watching pornography on his phone which was something he did frequently. When the Applicant's young victim approached him taking him by surprise, he said that something "*just came over [him]".* The Applicant denies any sexual attraction to children.

7. The Applicant has behaved well in custody and he has been an Enhanced prisoner since March 2018 remaining adjudication-free. Whilst in prison, he has accrued a large number of positive Nomis entries mostly related to the quality of his work and his work ethic. He also had accumulated positive entries for the constructive use of his time, including gaining vocational and educational qualifications as well as for his compliance with his sentence plan.

8. There had been four security intelligence entries since the Applicant had been at, all graded low and the Panel did not attach importance to any of them. In addition, there had been some behavioural concerns about the Applicant's conduct in the early part of his sentence and not surprisingly the Panel did not consider them relevant.

9. There was, however, some important evidence adduced before the Panel relating to the Applicant's sexual thinking and activities in that:

    (a) In April 2016 he was convicted of sending offensive messages, including a picture of his penis to a female neighbour. He believed that this woman was attracted to him. He sent her a series of suggestive text messages over a two-day period.

    (b) Despite not receiving any response from his neighbour, he then sent her a picture of his penis. He cannot give any explanation as to why he did this, except that he must have misread the signals. The woman reported him to the police. After his arrest, the Applicant was sentenced to a 1-year Community Order as well as being subjected to a Restraining Order and ordered to undertake work and to pay costs. It is noteworthy that at the time of his April 2016 offence, the Applicant had been having difficulties in his relationship with his wife and he had been using pornography as a way of coping and this had contributed to him sexualising the friendly behaviour of his neighbour and "*jumping to the wrong conclusions*."

(c) After that conviction and before the index offence, the Applicant was sacked from his job as a bus driver after a complaint about the Applicant's conduct had been made by two 15-year-old girls who stated that after they had boarded the Applicant's bus, he had spoken to them inappropriately and had given them his phone number. The incident was captured on the vehicle's CCTV and he told the Panel that he acted out of concern for the girls' safety but he was unable to explain why this was the case or why he had risked dismissal by giving them his number. He understood that the girls were about 14 and he accepted that others might regard his explanation as "*not plausible*".

(d) It had been suggested to him on a number of occasions by professionals (including most recently by the Prison Psychologist (PP) that it would be beneficial for the Applicant to keep a sexual thoughts diary, but he had not done so, explaining to the Panel that "he did not have any sexual thoughts". According to the Panel, this excuse "*seemed implausible and raised a question about whether [the Applicant] understood the difference between unhealthy and healthy sexual thoughts".*

(e) The Applicant did, however, "*recognise that being in the community would be more challenging for him, with more potential destabilisers since it would be easier access to pornography, contact with women and other external stimuli*."

(f) The Applicant was extremely upset at losing his job of which he was proud as that job had "*provided him with a form of recognition and importance which was a key to his sense of well-being and self-esteem*". He told Ms P that at the time of the index offence, he was "*feeling low*" because he had lost his job and was "*stressed*" about money. He was using pornography and sexual gratification, including regular sexual intercourse with his partner, who was the mother of the victim of his index offence as avoidant coping strategies "*to take [his] mind off things*".

The Views of the Professionals

10. In the Applicant's discussions with, his Prison Offender Manager (POM) since October 2020, the Applicant had been consistent in his description of his offences and he did not offer any insights into his behaviour. His lack of contact with his family was a source of stress as he reported having "*no one on the outside".* The POM confirmed that the Applicant had had no prison visits since 2017 and that he had no personal contacts on his PIN list. The evidence was that the Applicant had no support network in the community.

11. The Applicant completed in 2018 the Post-Programme Review (PPR) and in his evidence to the Panel, he described the programme as an "*eye-opener*". Although the PPR referred to the Applicant as showing much more insight into

the index offence, this was not apparent to the Panel from the Applicant's oral evidence which contained "*elements of minimisation and avoidance".* The Panel concluded that the Applicant "*seemed unable to think beyond acknowledging what he did was wrong and blaming it on his use of pornography and consequent sexual arousal".* He participated in an accredited intervention programme for men convicted of sexual offences and told the facilitators of it that he did not have a sexual interest in children.

12. In her Psychological Risk Assessment completed in November 2022, Ms P accepted that it was important to the Applicant's self-esteem that he used his time constructively which included holding down a job, developing a pro-social network and in the future maintaining healthy intimate relationships.

13. She concluded that the Applicant "c*ould turn to pornography or sexual contact as coping mechanisms if he were suffering emotionally and his self-esteem was low*". She judged that the Applicant's *"sexual interest is predominantly in adult females".* Ms P found on the Applicant's part "*no evidence of a specific sexual interest in pre-pubescent or under-age girls".* In addition, he did not, according to Ms P "*demonstrate enduring or ongoing beliefs condoning sexual violence or sexual offending against children*".

14. She thought that at the time of the index offences "*his level of sexual preoccupation was such, exacerbated by the use of pornography that he was able to overcome all barriers to sexual activity with children".* This approach*" created 'permission giving beliefs' including perceiving the victim as a willing participant in her abuse and mistaking her curiosity as sexualised behaviour".* Ms P thought that*" the earlier offence and potentially the incident with the two 15-year-old girls were similar and had similar root causes [as for the index offences]"*

15. Ms P's conclusion was that:

"although the specified moderate intensity accredited programme "as a strength–based programme [it] had assisted [the Applicant in adopting more helpful problem solving and emotional management strategies it had not addressed the sexual preoccupation in any depth" "She assessed that he had ongoing treatment needs in this area" the Applicant had "the requirement to explore unhealthy sexual thinking"; he had "to develop strategies to manage [unhealthy sexual thinking] if it occurred". She believed that this could best be achieved by continuing the 1:1 work he had been doing with his POM, structured around a non-accredited follow-up programme. The specified moderate intensity accredited PPR had noted that the Applicant "had been unwilling to discuss his index offence openly during group work" the Applicant posed a moderate risk of sexual reoffending if now released into the community. She believed that he would benefit from continued support with self-monitoring, applying his learning, and managing his sexual urges and emotional well-being. In custody "she did not believe he had any remaining

core treatment needs but suggested that the focus should be on the same areas."

16. Mr P confirmed that his assessment of the Applicant's risks had not changed since his PAROM 1 report of September 2021 which stated that the risk of serious harm posed by him to the Public and to Children was High but to known Adults and Staff, the risk was Low. His OGRS3, OGP and OVP scores which related to the probability of re-offending, of non-violent re-offending and of violent re-offending within 2 years was Low in each case. The Oasis Sexual re-offending Predictor scores remained Low for OSP1 (Indecent Image) and Medium for OSP/C (Contact). The Panel agreed with these assessments, but it noted that the OSP scores only took account of convictions and so the Applicant's conduct with the two 15-year-old bus passengers on the bus was therefore disregarded.

17. Mr P was asked if he had heard anything at the hearing to lead him to revise his assessment of the Applicant's risk and in particular the concern expressed in his September 2021 OASys report that the motivations for the Applicant's offending included *"an unacknowledged and unmanaged attraction to pre-pubescent girls".* He confirmed that he had not. Although the Applicant had made some progress, including competing the non-accredited follow-up programme with his POM more work was required on the development of healthy relationships, sexual preoccupation, sexual gratification and sexual interest in children which were areas not covered in programme *"as a strength–based programme".*

18. The Risk Management Plan (RMP) was discussed with Ms D who agreed with its contents. The Applicant would be placed on the Sexual Offenders Register and he would be subject to a Sexual Harm Prevention Order which largely mirrored the proposed licence conditions, but he would be managed by the Police. The provisions in the RMP included provision for initial residence in Approved Premises, a curfew between 19:00 and 07:00 hours, a GPS tag for a period of 6 months, non-contact with the victim's family, notification provisions of any developing intimate relationship together with conditions specifically aimed at preventing contact with children, restrictions on the Applicant's use of the telephone, the internet and devices capable of making or storing images.

19. The legal representative of the Applicant made closing submissions in which she emphasised the Applicant's insight into his offending, his risk factors, his constructive use of his time in custody, his positive conduct as well as the skills he had learned in custody, and his desire to use his new skills in the community. The Legal Representative stated that there was no further core work that he needed to do in custody. She submitted that it was no longer necessary for the protection of the public that the Applicant should remain in custody.

The Approach of the Panel

20. A three-member panel of the Board held an oral hearing by video link on December 2022 at which the panel heard oral evidence from:
    (a) the Applicant's POM ()
    (b) The Applicant's COM ()
    (c) the Prison Psychologist () and from
    (d) the Applicant.

21. 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.

22. The Panel had to determine the significant question of whether it was necessary for the protection of the public for the Applicant to remain in custody.

23. The Panel stated that it was concerned that the Applicant continued to show little insight into his offending behaviour and in particular why he committed the index offences "*beyond being aroused through watching videos".* In addition, the Panel noted that "*his earlier offence, plus the incident with the two 15-year-old passengers, shows a propensity for risk taking and impulsivity, which while it remains not fully explored and understood raises the concern that it could lead to further offending, with the risk of causing serious harm".*

24. The Panel concluded that it believed that there was *"more work that [the Applicant] should do to understand his risks and to acquire and practise the skills to manage them, and that this is best done in a custodial setting, albeit this could be in less restrictive conditions than at present. Consequently, the panel concludes that it remains necessary for the protection of the public for [the Applicant] to remain in custody and does not direct his release".*

The Relevant Law

Parole Board Rules 2019 (Amended 2022)

Irrationality

25. 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."*

26. 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

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

28. 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

29. Procedural Unfairness means that there was some procedural impropriety. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 has to establish 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 fairly; and/or
    (e) the panel was not impartial.

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

The reply on behalf of the Secretary of State

31. PPCS stated in an email dated 2 February 2023 that the Secretary of State was not making any representations in response to the Applicant's reconsideration application.

Discussion

32. 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 their 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.

33. 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.

34. 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.

35. 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.

36. 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

37. This ground is that it was irrational for the Panel to conclude that it remained *necessary* for the protection of the public for the Applicant to remain in custody as there was no *"substantiated evidence"* to support that conclusion.

38. Indeed, there was no further core risk reduction work for the Applicant to complete in custody, but they the professionals did point out that there is more work that the Applicant should do to understand his risks as well as to acquire and practice the skills to manage them. The real issue is whether the Panel was entitled to conclude that at the time when it made its decision that it was necessary for the protection of the public for this work to be done in a custodial setting or whether he could complete it in the community.

39. The Applicant's case includes contentions that it is highly relevant that the Applicant has behaved well in custody, that he has been an Enhanced Prisoner since March 2018, that he has completed the core reduction work required of him, that he has also remained adjudication-free and that he had a necessary and proportionate RMP which was robust.

40. The Panel having seen and heard the Applicant concluded that it remained necessary for him to remain in a custodial setting for the protection of the public for him to do more work to understand the risks, to acquire and practice the skills to manage them. After considering all the submissions put forward on behalf of the Applicant, I have concluded that that the Panel was entitled to reach that conclusion.

41. This conclusion can be justified on all or many of the substantiated findings in the Panel Decision which show the risk of further offending by the Applicant at the time of its Decision and in particular that:

(a) Ms P noted that while the accredited intervention programme had assisted the Applicant in adopting more helpful problem solving and emotional management strategies, "*it had not addressed his sexual preoccupation in any depth. She assessed that he had ongoing treatment needs in this area, along with the requirement to explore unhealthy sexual thinking and to develop strategies to manage this if it occurred*".
(b) Ms P concluded that the Applicant "*could turn to pornography or sexual contact as coping mechanisms if he were suffering emotionally and his self-esteem was low" (emphasis added).* The index offences were sexual contact offences and this conclusion identifies a crucial posed by the Applicant in the community.
(c) Mr P stated in his evidence to the Panel that the motivations for the Applicant's offending still included at the time of the Panel hearing *"an unacknowledged and unmanaged attraction to pre-pubescent girls" and "more work was required on the development of healthy relationships, sexual preoccupation, sexual gratification and sexual interest in children"* More work was required to understands and to manage the Applicant's interest in these matters especially in the light of the challenges facing the Applicant in the community.
(d) In relation to those challenges, the Applicant "*did recognise that being in the community would be more challenging for him, with more potential destabilisers since it would be easier access to pornography, contact with women and other external stimuli."*
(e) As for the risk posed by the Applicant, Ms P concluded that the Applicant "could turn to pornography or sexual contact as coping mechanisms if he were suffering emotionally and his self-esteem was low" (emphasis added). The index offences were sexual contact offences and this conclusion identifies an important risk posed by the Applicant in the community.
(f). The Applicant had no family or support in the community as protective factors as he was reported as saying he had "*no one on the outside".* Ms D confirmed that the Applicant had had no visits since 2017 and that he had no personal contacts on his PIN.

(g) In his discussion with Ms D, the Applicant was "*offering no new insights into his behaviour*".
(h) Mr P confirmed that the risk of serious harm posed by the Applicant to the Public and to Children in the community was high and this was accepted by the Panel as being High.

42. These statements show that Panel was entitled to conclude that it remained necessary for the protection of the public for the Applicant to remain in custody as in the light of his record he was likely to resort to impulsive serious offending as he had serious treatment needs which had not been investigated or understood as well as having no protective factors.

43. Indeed, for those reasons the Panel was entitled to refuse to release the Applicant the reasons which it gave, namely that:

"[His] earlier offence [with the neighbour] plus the incident with the two 15-year-old passengers, shows a propensity for risk taking impulsivity which while it remains not fully explored and understood raises the concern that it could lead to further offending with the risk of causing serious harm".

44. The word "i*mpulsivity*" is significant and it shows the immediacy of the danger posed by the Applicant in, among other locations, the community. Indeed, the index offence, the episodes on the Bus and with the Applicant's neighbour to which I have referred in paragraph 9 above were all impulsive decisions.

45. If which is not the case, I had doubts about this conclusion, I would have reached it for the additional reason 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 and in particular on assessments of risk.

46. For these reasons, Ground 1 fails.

Ground 2

47. This Ground is that the Panel acted in a procedurally unfair manner as it could not have made an accurate risk assessment decision on the Applicant's suitability of release without properly considering the evidence presented to the Panel and also that the Panel's decisions shows that the Panel did not properly consider this evidence. It is contended by the Applicant that "*it is concerning that evidence given at the hearing has been ignored"* with the consequence that the proceedings in front of the Panel were unfair.

48. This ground relies on essentially the same matters as those adduced under Ground 1. No relevant evidence has been ignored. In any event, due deference has to be given to the expertise of the panel in determining what factors were relevant to all aspects of its decision and in particular on the assessment of

risk, Therefore, this ground fails for similar reasons because as has been explained, the Panel considered the evidence and the Applicant's case justly.

Conclusion

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

Sir Stephen Silber.
6 February 2023