

[2022] PBRA 44

## Application for Reconsideration by Hussain

### Application

1. This is an application by Hussain (the Applicant) for Reconsideration of a decision of an Oral Hearing Panel (OHP) dated 25 February 2022. The OHP declined to release the Applicant and did not recommend 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.
3. I have considered the application on the papers. These are the Dossier consisting of 549 pages, the Application for Reconsideration dated 28 March 2022 and the legal representative's submissions following the OH.

### Background

4. The Applicant was sentenced in 2009 to an Indeterminate Sentence for Public Protection. His tariff expired in 2019. This was his first Parole review. The Applicant was convicted in relation to offences of rape and sexual offending. The victims were adults and children. The Applicant was 39 years old at the time of sentence. The Applicant is now aged 52.

### Request for Reconsideration

5. The grounds for seeking a Reconsideration are as follows:
  - (a) The OHP failed to take account of the written final submissions by the Applicant's legal advisor.
  - (b) That too much emphasis was placed on the Applicant's denial of offending.
  - (c) That the OHP suggested the Applicant had made derogatory remarks about a victim and might seek her out, which was not correct.
  - (d) That the panel were wrong and being '*speculative*' to suggest that the Applicant might pose a risk if he were to begin a new relationship.

(e) That there was insufficient evidence that the Applicant's family would not be protective in the future.

(f) That the Applicant was not reluctant to engage in further intervention work. That in any event that work should have been offered and suggested at a much earlier stage.

(g) That it was incorrect to indicate that the Applicant had not been open and transparent about his life prior to sentence.

(h) That the Applicant is a model prisoner and the OHP have emphasised risk reduction work over the possibility of imposing licence conditions and conditions of living in approved premises. That the Applicant is compliant in prison and would continue to be so in the community.

(i) That the OHP failed to properly analyse the Applicant's risk scoring.

(j) That by using the term 'asserts' the panel have implied the Applicant is 'forceful' or 'authoritative' in his manner of speech and presentation, whereas he is polite and respectful.

(k) The panel have placed too much emphasis on the evidence of professional witnesses who did not have direct face to face contact with him.

## Current parole review

6. The OHP in this case considered a referral from the Secretary of State sent in April of 2018. The referral was therefore outstanding for three years. There had been a number of adjournments. The adjournment history was detailed in the decision letter by the OHP. That history indicated that there were concerns about the Applicant's ability to comprehend and understand the hearing which necessitated securing an interpreter. The second noted difficulty was in relation to the setting of hearings during the period of Covid 19 lockdowns. There is no complaint from the Applicant about procedural unfairness in relation to these adjournments and delays. It is of concern that this matter has been so delayed, however the referral came during a unique period of difficulty in relation to the pandemic, which was compounded by the interpretation difficulties, particularly over a video link.
7. The panel hearing took place in September 2019. The Oral Hearing Panel consisted of two independent members. Because of the length of the adjournments the specialist psychology member was required to stand down from the panel. It is noted that no objection was made to the constitution of the panel. The panel considered a dossier consisting of 418 pages. The panel heard evidence from the Community Offender Manager (COM), the Prison Offender Manager (POM) and a prison psychologist. The dossier included a Psychological Risk Assessment written by a prison psychologist.

## The Relevant Law

8. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

### **Parole Board Rules 2019**

9. Pursuant to 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 after an oral hearing (Rule 25(1)).
10. 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 **Barclay [2019] PBRA 6**.

### **Irrationality**

11. 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."*

12. 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.
13. 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**

14. Procedural unfairness is not argued in this case.
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)**, **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 Letter**

16. 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.*"

### **The reply on behalf of the Secretary of State**

17. The Secretary of State made representations upon two matters in this case. The Secretary of State's representatives have spoken, after the hearing, to witnesses relating to the issue of completion of intervention work (which was discussed within the hearing). The evidence adduced by the Secretary of State's representatives is outside the confines of the Oral hearing itself. The position in relation to this Reconsideration is that I must consider the evidence as presented at the hearing itself. It is not appropriate to relitigate issues within representations. In those circumstances I have not taken account of the fresh evidence within the representations on behalf of the Secretary of State. The representations have therefore not affected my decision.

### **Discussion**

#### **The issues**

18. Although the Applicant had listed a number of individual grounds of complaint, the fundamental issue in this case is whether the OHP appropriately applied the test for release to the evidence that was before them. The essence of the panel's decision was that the Applicant had undertaken a limited amount of behavioural work or interventions. This meant that there was insufficient evidence demonstrating that the Applicant's risk of serious harm could be managed safely in the community. The Applicant appeared to accept that he had not undertaken any intensive behavioural work in connection with sexual offending. The Applicant's ability to undertake this work was clearly hampered by the fact that the Applicant himself denied the offences and by difficulties associated with the pandemic.

19. Dealing with the individual grounds raised in the Application:

20.5 (a) – *Failed to consider representations* - the OHP noted in its decision that the legal adviser for the Applicant had prepared and sent in by email representations. The matter had been specifically adjourned to await the representations. Within the decision letter the panel also addressed the issues which were raised in the final submissions. The issue relating to the take-up of intervention courses was addressed by the OHP and

was a matter within the legal adviser's submissions. The OHP made it clear that they had come to the conclusion that the Applicant lacked insight into his offending and the circumstances which led to the offending. They also took the view that appropriate interventions had been recommended. The OHP also addressed the issue raised by the Applicant's legal adviser, namely that the appropriate place to test his risk would be in the community. The OHP rejected that contention. The OHP took the view that core risk reduction work and a demonstration of a lowering of risk was necessary before the Applicant would meet the statutory criteria for release. I therefore reject the contention that the OHP had not taken account of the legal adviser's representations. A substantial part of the representations were a repeat of the evidence (quite properly). The OHP had addressed the evidence within earlier parts of the decision letter. The OHP addressed the fundamental contentions raised by the legal adviser within the conclusion of the decision letter.

21.5 (b) *Too much emphasis on the Applicant's denial* - the OHP in its letter accepted that denial did not necessarily elevate risk. However, they appropriately, in my view, confirmed that denial has the effect of creating difficulty in identifying the factors which led to the commission of the offence and therefore creates difficulties in assessing future risk. The OHP also noted that they were obliged to accept the conviction as being appropriate and correct and therefore had to proceed on the basis that the Applicant had been convicted of serious sexual offences. I am therefore not satisfied that this complaint has merit, because the OHP were obliged to assess risk and apply the statutory test.

22.5 (c) *Derogatory remarks about the victim*. The OHP referred to remarks by the Applicant relating to the victim taking medication and other "derogatory remarks". In the light of the evidence generally, in particular the sentencing remarks by the judge, and the records kept by probation of discussions with the Applicant, I am satisfied that there was sufficient evidence upon which the OHP, on the balance of probabilities, could reach the conclusion that the Applicant had made such remarks. The comments had been part of the Applicants' trial in the case of the sentencing remarks and further remarks had been recorded in probation records.

23.5 (d) - *That the Applicant might pose a risk is speculative*. This was a serious case of violence within a domestic environment. In the light of the Applicant's history and his lack of insight into the offending, I am satisfied again, on the balance of probabilities, that the panel had clear evidence of concerns about the risk that the Applicant might pose to others in a relationship in the future. I therefore do not accept the contention that referring to such a risk was speculative. The reference was based upon a substantial amount of evidence within the dossier itself, in particular the index offences.

24.5 (e) *Insufficient evidence relating to the protective nature of the Applicant's family*. There was a limited amount of information within the dossier as to the view of the Applicant's family as to his offending. I accept therefore that the OHP appeared to rely on relatively limited evidence to reach this conclusion. However, in general terms the role of family members in circumstances such as those set out in this case will be limited. The OHP were also entitled to take account of the fact that within the index offence itself there was evidence that the victim had sought refuge in womens' refuges on more than one occasion. That evidence could have supported the view that there was unlikely to be a great deal of supportive family involvement from the Applicant's family.

25.5 (f) *That the Applicant was not reluctant to engage in further intervention work. That in any event that work should have been offered and suggested at a much earlier stage.* The OHP addressed the question of the Applicant's engagement with behavioural work. The OHP appear to have been concerned that there was an underlying reluctance on the part of the Applicant to engage in work. The Applicant's position appeared to be that as he had not committed any offences, he would struggle to provide examples which would enable him to embark upon the intervention work. However, there was also evidence that repeated efforts had been made to assist and motivate the Applicant which had been unsuccessful. This was clearly a difficult area for the OHP to reach a final determination. However as was pointed out by the OHP the fundamental issue so far as they were concerned was whether there was a demonstration of a reduction in risk. One of the ways of demonstrating risk reduction would have been the completion of intensive sexual offending behavioural intervention. That had not occurred. The OHP were not directly concerned with the reasons why the work had not been undertaken by the Applicant.

26.5 (g) *That the Applicant has not been open and transparent about his life prior to sentence.* This ground overlaps with Ground 5(d) and 5(f) above. The panel clearly indicated that they were not satisfied that the Applicant had insight into his offending and that there was insufficient understanding of the background and triggers to the sexual offending. Again, it should be noted that the OHP were obliged to accept that the conviction was appropriate. The Applicant's denial of offending, while not necessarily elevating risk, was a factor in creating difficulties in undertaking work and interventions which would enable the Applicant to demonstrate a reduction in risk.

27.5 (h) *That the Applicant is a model prisoner and the OHP have emphasised risk reduction work over the possibility of imposing licence conditions and conditions of living in approved premises. That the Applicant is compliant in prison and would continue to be so in the community.* This ground, with respect, appears to misunderstand the issues in this case. The OHP were not critical of the Applicant's prison conduct. He had engaged in a number of activities both in terms of personal development and in contributing to the support of other prisoners within the prison system. He had good reports. However, the risk that was considered by the OHP related specifically to violence and sexual behaviour within a domestic environment. Thus, however commendable the Applicant's behaviour in prison might be, the OHP were obliged to look beyond compliant behaviour in prison. Whilst compliance and polite and courteous behaviour are clearly a factor to consider in assessing in general terms the risk of an individual, in the case of this Applicant the fundamental concerns were those which were related to the serious index offences. I am not therefore convinced that the OHP underestimated this aspect of the Applicant's presentation.

28.5 (I) *The panel have failed to properly analyse the Applicant's risk scoring.* Within the decision letter the OHP analysed the different scoring systems which had been used in relation to risk. The OHP reflected upon the scoring of the risk tools. The view of the OHP was that the static risk scores did not appropriately reflect the Applicant's risk. This was because there were a number of offences committed over a considerable period of time. The scoring methodology did not reflect the timeframe of the offending. For that reason, the oral hearing panel were cautious about the scorings. However, a specialist risk assessment was applied in the Applicant's case by the reporting psychologist which indicated a medium to high risk of further offences. Having reflected

on the decision letter I am not satisfied that the panel misunderstood or misapplied the risk scoring in the Applicant's case. Inevitably the scoring is an assessment rather than a mathematical calculation. The OHP were entitled to take account of their experience in relation to such risk assessments and scoring when considering their determination.

29.5 (j) *the use of the term "assert"*. My reading of the OHP decision letter does not indicate that the use of the term assert or asserted is deliberately included in a pejorative sense. In my experience of such documents decision writers use the word "assert" in place of the words "told the panel" or "indicated to the panel". A dictionary definition from the Internet indicates that the word is defined as "stating a fact or belief confidently and forcefully". Although the technical use of the word asserts or asserted, maybe contested, I have no hesitation in determining that the use of the word on five occasions in the context of this decision letter had no further meaning than "you told the panel".

30.5 (k) - *The panel have placed too much emphasis on the evidence of professional witnesses who do not have direct face to face contact with him*. This ground also links with ground 5 (h). The OHP fully accepted that the Applicant had "demonstrated a high level of compliance within the category C regime". The fundamental issue within the decision was not in relation to day-to-day relationships with prison staff and others within the prison system. As indicated above the fundamental issue was whether the Applicant's risks have been identified and addressed. The work in relation to risk analysis and risk reduction would be more likely to be undertaken by professionals than by the day-to-day prison staff having contact with the Applicant. For that reason, I do not accept that the panel inappropriately took account of professional advice in the way suggested in this ground.

## General

31. The panel 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. The Applicant was also legally represented throughout. 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.

32. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional or non-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.

33. 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 of the panel. I do not find in this case that there are such compelling reasons.

## Decision

34. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for Reconsideration is refused.

**HHS Dawson**  
**07 April 2022**