

[2020] PBRA 92

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision by a Parole Board Panel to conclude his case on the papers by way of a decision, dated 29 May 2020, refusing to direct his release or to recommend that he be transferred to open conditions.
2. The review had originally been listed for oral hearing on 7 May 2020 but was concluded on the papers, under Paragraph 21 of the Parole Board Rules 2019, and notification had been given by a Panel Chair Direction (PCD), dated 23 April 2020, of intention to do so, as current Covid-19 restrictions prevented a face to face hearing taking place. Legal submissions, as to that proposal, were invited and the decision recorded that no representations had been submitted by the Applicant or on his behalf.
3. I have considered this application on the papers. These comprise of the dossier, the provisional decision of the Panel dated 29 May 2020, documents relating to the proposals to conclude on the papers and the application for reconsideration.
4. The Reconsideration Assessment Panel (RAP) further requested, and was supplied with, details of any correspondence or documents relevant to the PCD dated 23 April 2020.

Background

5. On 9 January 2005, the Applicant, having pleaded guilty to a charge of s.18 causing grievous bodily harm with intent and to two charges of possession of a firearm or ammunition without a firearm certificate, was sentenced to an indeterminate sentence of Imprisonment for Public Protection with a minimum term of 3 years and 332 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 6 December 2015.

Request for Reconsideration

6. The application for reconsideration comprises an 11 page document, prepared by the Applicant's Legal Representative, consisting of 29 paragraphs and attaching, in addition, four detailed documents, three of which contained the Applicant's personal response to documents contained in the dossier and a further statement from him relating to the effect on his situation of the current coronavirus restrictions.

7. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below. The application seeks to “*appeal the paper decision of 29 May 2020*” and submits “*the current review remains open until the current restrictions due to Covid-19 are lifted and a face to face hearing can take place.*”
8. The application does not clearly distinguish between submissions relating to the “*appeal*” and the statutory limbs of challenge to irrationality and procedural unfairness and contains a number of passages relating to the Applicant’s concerns as to the decision relating to the refusal to make a recommendation for transfer to open conditions.
9. The function of the RAP is limited to the reconsideration of the statutory limbs of challenge. It has considered the application on the basis that both limbs are challenged.
10. The RAP is unable to consider a submission that the review remained open, no application having been made within the time period granted by Rule 20 (1) of the Parole Board Rules 2019.
11. Any application relating to recommendations as to open conditions is not within the scope of the Reconsideration Mechanism (see **Panasuik [2019] PBRA 2**). The RAP has not, therefore, considered the issues raised in relation to open conditions save in so far as they are relevant to the statutory limbs of challenge. For the avoidance of doubt, however, it is noted that this issue, also, was fully considered by the Panel.
12. In general terms the application submits:
 - (a) *Irrationality*:
 - i. That the Panel failed to follow “the prescribed test.”
 - (b) *Procedurally unfair*:
 - i. That the Panel had not considered “live” evidence from witnesses allowing the Applicant “an opportunity to test the evidence used to assess risk” and denying him “the opportunity to challenge much of the written evidence.” As a result, issues remained unchallenged;
 - ii. That the Panel ought to have awaited the outcome of pending criminal proceedings, set for trial in July 2020, the outcome of which, it was claimed, would have had a significant bearing on assessment of risk relating to a specific allegation of violence and which had formed part of the Panel’s finding that both his behaviour, since the last review in 2018, and his relationship with staff were poor;
 - iii. That the Panel failed to consider the alternatives of a telephone/video hearing following the principles set out in **Osborn & Anor v The Parole Board [2013] UKSC 61**. This submission was made notwithstanding that the Applicant would have challenged the suitability of such an alternative

as opposed to a face-to-face hearing. At any “*oral hearing*” he would have been able to argue that any risk of serious harm was not imminent; and

- iv. That, under Article 6 of the European Convention of Human Rights, the Applicant should have been provided with a fair hearing.

Response from the Secretary of State

13. The Secretary of State (SoS), by e-mail dated 6 July 2020, indicated that no representations were made in response to the application.

Current parole review

14. The Panel considered a dossier of 299 pages and recorded that it disregarded additional statements said to relate to the alleged assault, the subject of the pending criminal proceedings. Updated Offender Manager and Offender Supervisor reports had been provided in April 2020 but, unlike in earlier reports where conditional support had been expressed for a transfer to open conditions, the writers had been unable to make recommendations partly because restrictions imposed by the current lockdown and social distancing prevented meaningful contact and discussions with the Applicant.
15. A recommendation had been made in 2018 that the Applicant be transferred to open conditions, but this had not occurred, despite the SoS initially indicating agreement. The Panel examined dossier reports relating to the circumstances in which the Applicant was said to have remained in closed conditions. In general terms, the Panel considered a range of reports some of which made reference to poor behaviour including incidents involving aggression, threats of violence and assaults on staff members, including the incident leading to the criminal proceedings. It concluded that there had been a deterioration in the Applicant’s behaviour and in his emotional management so that, in the Panel’s view his risks were not manageable on licence.
16. The Panel also considered, in some detail, a psychological report completed in 2016 by a psychologist who, in addition, gave oral evidence to the Panel which, at the Applicant’s last review in September 2018, recommended the transfer to open conditions. The Panel, having adopted the risk factors indicated by that Panel, referring to additional outbursts of aggressive and abusive behaviour as creating difficulties in professionals deciding on your management, added, in addition, a risk factor of mistrust of professionals.
17. The Member Case Assessment Directions, dated 9 September 2019, in directing that the case proceed to oral hearing for the hearing, had indicated that the Applicant suffered from mental related disorders and that the Panel might wish to explore, amongst other matters, the impact of his mental health and emotional wellbeing upon risk. It directed that all witnesses should be present face to face to ensure that the Applicant could fully engage with the oral hearing. The Panel, indicated that on the basis that there were many unresolved and complex issues, concluded that, in fairness to the Applicant, the review should be brought to a speedy conclusion giving him the opportunity to re-engage and demonstrate a period of positive progress before reconsideration of his case. The PCD of 23 April



2020 sought representations regarding the proposal to conclude on the papers and did not specifically ask for the Applicant's representations on what was, clearly, the implied view of the Panel, at that stage.

The Relevant Law

18. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

19. In **R (on the application of 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".

20. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

21. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

22. Under the principles expressed in **Osborn**, the key test is whether the fairness to a prisoner requires an oral hearing, bearing in mind the facts of the case and the importance of the issue at stake. Factors to be considered include:

- Whether the evidence can be considered without the need for it to be tested orally or in person;
- Despite the duty of the Parole Board to provide a swift review, the test is not the likelihood (or otherwise) of release or the need to save time, expense or trouble;
- All evidence must be given the appropriate scrutiny with particular care in relation to issues of fact which may be disputed or open to explanation or mitigation;
- Whether the prisoner wishes to have an oral hearing and the legitimate interest in being able to participate in a decision which has important implications for him;
- The evidential effect of the conclusion of pending criminal proceedings;
- Whether there are psychological issues which need to be tested;
- The decision is not confined to a determination of whether or not to direct release (or recommend a transfer to open conditions) but includes other



aspects, such as comments or advice in relation to the prisoner's treatment or offending behaviour work which may be required, which will, in practice, have a significant effect on his management in prison or on future reviews.

23. The common law duty to act fairly, as applied in this context, is influenced by the requirements of article 5(4) as interpreted by the European Court of Human Rights. Compliance with the common law duty should result also in compliance with the requirements of article 5(4) in relation to procedural fairness. Article 6 is relevant to criminal trials but does not impinge on this duty.

Discussion

24. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered with care the documents in the dossier gave a clear and reasoned decision, on that basis, and adopted a correct test for its decision.
25. In the light of my decision in relation to procedural fairness, it is not necessary to scrutinise further the details of the decision.
26. I find that the detailed complaints made in the Applicant's lengthy application do not affect the rationality of the decision.

Procedural Unfairness

27. I am, however, concerned about the decision of the Panel to conclude this case on paper. I preface my findings, however, by expressing considerable sympathy with the Panel as to the problems which it faced, and which included:
- (a) The decision was made against the backdrop of, then, unresolved problems relating to contact between the Applicant and those responsible for his management and reports.
 - (b) Despite Directions requiring legal submissions, within 14 days from 23 April 2020, the Panel received only confused messages, apparently from the Applicant's parents, as to his wishes with regard to the hearing and no formal submissions were apparently submitted, in circumstances where it would appear from Paragraph 2 of the decision that he appeared to be represented by a named firm, that the identity of the Applicant's Legal Representatives was not clear.
 - (c) Face to face oral hearings were no longer available and the practical arrangements for alternative remote hearings at individual prisons were being finalised. It was unclear when face-to-face hearings could be resumed.
28. The Panel's decision to proceed on the papers was expressly stated as being, in the view of the Panel, in the interests of the Applicant to enable him to "present his best case" once movement between prisons resumed and to give him, supported by his legal representative, an opportunity to apply for an accelerated review when it became known when a face to face hearing might be listed.
29. I find, however, that the Panel's decision to proceed on paper and rejection, in advance of representations, the alternative that the oral hearing be conducted by remote means, deprived the Applicant of the opportunity to present his case, to

challenge factual issues, to make submissions in relation to the effect of a psychological report, made over three years earlier and which had been considered by a Panel recommending transfer to open conditions, and to submit other matters relevant to his potential treatment or future offending behaviour work.

30. The Panel accepted the need for an oral hearing before a final decision could be made but, in indicating that its proposal to conclude on the papers, would give the Applicant the opportunity to address "*the outstanding issues*" and to "*prepare to present his best case to the next review*", gave a clear indication that its decision would be that the Applicant continue to be detained.

Decision

31. For the reasons I have given, I find that there was procedural unfairness, requiring reconsideration of the Panel's decision. Accordingly, I have decided that this application be granted.

Edward Slinger
14 July 2020