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[2022] PBRA 8

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision of an oral hearing panel dated 2 December 2021 not to direct 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 Decision Letter dated 2 December 2021.
   - The reconsideration representations, undated and without paragraph or page numbers, received by the Parole Board on 21 December 2021.
   - A letter dated 5 January 2022 from the PPCS (Public Protection Casework Section) Reconsideration Team on behalf of the Secretary of State for Justice.
   - Additional reconsideration representations dated 6 January 2022, by way of a response to the Secretary of State's letter, accompanied by a copy of an urgent Webmail dated 10 June 2021.
   - The dossier, containing 1185 pages, the last document being the Decision Letter.

Background

4. In May 2005, when he was 32, the Applicant was sentenced to life imprisonment for murder, with a minimum term that expired in November 2018. He is now 50 years old.

Request for Reconsideration

5. The application for reconsideration is undated but received within the time permitted by the *Parole Board Rules* 2019. The Reconsideration Representations cover just over 17 pages.

6. The grounds for seeking a reconsideration are, as I understand them, as follows, using the numbering in the Representations:

   A. Procedural unfairness

   (i) The dossier contains a transcript of a telephone conversation the Applicant had with a friend on 15 May 2021. The brief part of the recording of that conversation considered relevant was served on the

Applicant's representatives before the hearing. The Reconsideration Representations complain that neither the Applicant nor his legal representative have heard the full recording. They suggest that the Decision Letter indicates that the panel did listen to the full recording and not the limited version served on the Applicant. The independent psychologist instructed on behalf of stated in her Addendum Report that she would wish to hear the full recording.

(ii) The panel found on the balance of probabilities that the Applicant had sent distressing images of the scene of his index offence to one of his relatives. The complaint is not that the panel was not entitled to make such a finding, but that it failed to indicate it was going to do so and did not challenge the Applicant *"at length"* about it.

(iii) The hearing was initially face-to-face, not remote. It was adjourned to a second day when the evidence was not completed on the first day. At the adjourned hearing one of the three-member panel attended by video link for personal reasons. Complaint is made that the Applicant's representative's views about this were not canvassed in advance. The nub of this ground for asserting procedural unfairness is that that panel member could not see the independent psychologist during her evidence.

B. Irrationality

(iv) The decision of the panel to disregard the evidence of the independent psychologist was irrational.

(v) The conclusion of the panel that further core risk reduction work is necessary is irrational.

(vi) The panel incorrectly applied the assessed risk of psychological harm.

(vii) There are a number of factual errors in the decision letter.

7. There is a further complaint, not numbered, and therefore perhaps intended to be subsidiary, but which I will deal with. The complaint seems to be that the panel did not contain anyone with experience or expert knowledge of autistic spectrum disorder (ASD).

Current parole review

8. The Secretary of State referred the Applicant's case to the Parole Board on 18 April 2019, for consideration of release, suitability for open conditions and whether he should be returned there, and continuing areas of risk that need to be addressed. This was the Applicant's third parole review.

9. The panel, consisting of three members of the Parole Board, including a psychologist, met initially, on 25 February 2020, for a hearing at an open prison. The panel decided that a psychological risk assessment was required and adjourned the case. Partly as a result of his response to that decision the Applicant was transferred to closed conditions. On 15 June 2021 the Applicant's legal representative asked for an adjournment to enable both the representative and the independent psychologist to listen to the tape of the telephone conversation referred to above. The panel granted the request. The hearing resumed on 20 October 2021 and was concluded on 25 November 2021.

10. The Applicant was legally represented throughout. His representative asked questions of the witnesses and made submissions at the end of the evidence. The Secretary of State was not represented and made no submissions. The panel considered the dossier (then 1164 pages, including two handwritten statements by the Applicant), and heard evidence from the Applicant, his Prison Offender Manager (POM), a Speech and Language Therapist (the SaLT), the prison psychologist, the independent psychologist, and the Community Offender Manager (COM).

The Relevant Law

11. The panel correctly sets out in its decision letter the test for release (whether it was satisfied that it is no longer necessary for the protection of the public that the Applicant be confined) and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions, weighing the benefits to the Applicant of such a move against the risks.

Parole Board Rules 2019

12. Under 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 whether it is 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)).

13. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

14. 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."

15. 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.

16. More recently, in **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law is 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 respect 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."

Procedural unfairness

17. 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.

18. 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; and/or
    (e) the panel was not impartial.

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

20. Justice must not only be done but be seen to be done and so procedural unfairness includes not only an unfairness of process, but also the legitimate perception of unfairness (for example, failure to deal with the arguments or evidence advanced in an appropriate manner or not at all).

Other

21. 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.

22. 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**, where the Court 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.

23. The Applicant submits *that "some of the reasons advanced by the Panel are unlikely to have been concluded by a different panel of the Parole Board."* That is not the test I, dealing with an application for reconsideration, must apply. The test for me is whether the panel's overall conclusion can be safely justified on the basis of the evidence the panel heard.

The reply on behalf of the Secretary of State

24. The Secretary of State, in his letter dated 5 January 2022, responds as follows:

(1) The POM has confirmed that the recording was sent to all parties, including the Applicant's legal representative, on 20 August 2021. The POM also confirmed that a transcript of the full phone call was provided to all those who attended the oral hearing and that the Applicant's legal representative did not ask to attend the prison to hear the entire phone call.

(2) The POM has confirmed that the mobile phone found in the Applicant's cell was found when he was in a closed, not an open, prison. This appears in the POM's report at **p566** of the dossier.

(3) The prison psychologist's report containing her recommendation is in the dossier at **p901** and the Decision Letter contains discussion (at **p8**) of her recommendation.

(4) There is evidence in the dossier of the Applicant causing psychological harm. The COM assessed him as posing a high risk of causing others psychological harm in the community.

(5) Information relating to Release on Temporary Licence (RoTLs) completed is in the dossier at **p85**.

Discussion

25. I will discuss the complaints in the order in which they are presented.

26. Did the panel listen to a full recording of the phone call on 15 May 2021? The basis on which it is asserted that the panel did so is that the Decision Letter states *"The Panel also listened to a recording of a telephone conversation you had with another man on 15th May 2021. No documentary evidence received by the Panel was withheld from you."* This appears at **p2** of the Decision Letter, where the panel sets out the material it considered and the witnesses from whom it heard.

27. This is not evidence to show that the panel listened to the full recording. There is no evidence whatsoever that the oral hearing panel listened to any more material than was available to the Applicant and his legal representatives. It is argued that there was frequent reference during the evidence and the submissions to the fact that only a part of the recording was available, though a full transcript was supplied.

If the panel had had access to more, it would unquestionably have said so. The use of the word "documentary" cannot sensibly be read as implying that the panel considered some non-documentary material withheld from the Applicant.

28. The panel states at **p7** of the Decision Letter, when discussing the evidence it received, that it has re-read the transcript. It is apparent that the panel based its decisions with regard to this part of the case on what, according to the transcript, was said in that telephone call, not on listening to any full recording.

29. Notwithstanding the absence of evidence to substantiate this complaint, I asked the panel chair, through the Parole Board secretariat, to comment on the assertion that the panel listened to more of the recording than did the Applicant and his representatives.

30. The panel chair confirmed that the panel only ever listened to a short segment of the phone call. This was his response, with his underlining:

> *"The panel only received and listened to part of [the Applicant's] telephone conversation – about 3 minutes long – apparently the same extract that was sent to his solicitors. I attach what was sent to us. We were unable to listen to the entire call recording, said to be 16 minutes long. The 3-minute recording was all that was provided to us by the Security department at HMP Lindholme (sent in an email dated 25/08/2021). It was unclear why we only received part of the recording.*
>
> *However, a transcript of the full telephone conversation was added to [the Applicant's] dossier and the panel considered this, along with the short recording, to be adequate to assess the concerns raised. At no point <u>after</u> the 3-minute recording was provided to all parties did [the Applicant's] solicitors request that a recording of the whole telephone conversation be provided.*
>
> *At the start of the hearing on 20 October 2021, I raised with [the Applicant's] solicitor the issue as to whether the available recording should be played, but this was not requested by him. I would have had it played had it been requested. The solicitor and witnesses, and panel members, had already listened to the 3-minute recording.*
>
> *So, in summary, <u>the panel heard no additional recorded evidence</u> to that made available to [the Applicant] and his solicitor.*
>
> *I wish to add that, although the contents of the telephone call raised concerns (as set out in the decision letter), it was one of a number of concerns, some more serious, that contributed to our decision not to direct [the Applicant's] release."*

31. As the chair says, he sent me what the panel had by way of a recording. It is in fact a video recording lasting just over 3 minutes, during which a part of an audio recording is played back. This corresponds with what the Applicant's representative heard. I have not listened to the recording otherwise than to confirm these facts.

32. The basis of this ground is reiterated in the Additional Reconsideration Representations: *"Our application is based on the suggestion in the decision letter that the Panel may have had the opportunity to listen to the full recording".* The Decision Letter, properly read, contains no such suggestion. The panel did not listen to the full recording. Ground (i) of the application fails.

33. Even if the panel had listened to more of the recording than the Applicant or his lawyers had seen that would not necessarily mean that the hearing was unfair, unless there is some indication that what the panel is alleged to have heard affected its decision. I have read the transcript. It seems that the COM was informed of the telephone call, and was given a somewhat inaccurate summary of it, which included mention of a burner phone. That does not appear in the transcript. The POM says she listened to the entire recording. Her notes of it (which do not contain the word burner), so far as they go, coincide with the contents of the transcript. The SaLT, instructed by the Applicant's solicitors, listened to the entire conversation. Again, the summary in her report of what was said does not indicate that the transcript was incomplete: everything she noted or commented on is in the transcript. The panel based its decision on the transcript. Accordingly, I do not find that there would be any basis for ordering reconsideration on this ground even if it were correct, which it is not.

34. There is a fleeting mention in the Reconsideration Representations that there was a failure of disclosure by not making the full recording available. This is put in the context of the panel having heard the full recording, which, as discussed above, it did not. The panel decided the case, as it should, on the evidence that was placed before it by the parties. If the Applicant's representative wished the full recording to be considered by the panel, they could and should have made an application, by way of a Stakeholder Response Form, to that effect. After he received the recording that was supplied he did not make any further application.

35. Ground (ii) suggests that it was procedurally unfair of the panel to make a finding that the Applicant had sent photographs of the crime scene to a relative without giving notice of its intention to do so and without asking the Applicant questions about it.

36. The panel knew what the evidence about this was, and what the Applicant said about it: he denied that he had sent the photographs to the relative and said that another prisoner had sent the photographs without his knowledge. The panel pointed out in the Decision Letter that there was no dispute about the Applicant's possession of the mobile phone and no reason why another prisoner would do what the Applicant alleged he had done. On the balance of probabilities, therefore, the panel was satisfied that it was the Applicant who had sent the photographs. This was a perfectly justified decision, taking into account all the evidence including the Applicant's explanation. If his representative thought something should be added to this explanation, he could have asked the Applicant to do so in the course of the hearing. The panel was entitled to act on the evidence placed before it. Ground (ii) is not made out.

37. Ground (iii) is a complaint that at the adjourned hearing one member of the panel was unable to attend face-to-face and so took part by video link. The two elements of the complaint are that the Applicant's representative's views were not canvassed

prior to the date of the hearing, and that the consequence of the panel member not being present in the room was that that panel member could not see the independent psychologist when she gave her evidence.

38. What the reconsideration representations fail to deal with is what, if any, adverse effect is alleged to follow from the lack of consultation with the Applicant's representative. Comment is made that the hearing was face-to-face (during the Covid pandemic) because of the Applicant's cognitive difficulties. However, while the complaint is that it was not canvassed with him earlier, it does not appear that the representative was prevented from raising any issues he may have wished to at the start of the adjourned hearing.

39. It seems to be suggested that the panel member was disadvantaged by not being able to see the psychologist's body language. The issue with the psychologist was not whether or not she was a truthful witness, to which an assessment of body language might, in the opinion of some, be relevant. It was the weight to be attached to her expert opinion in the light of all the evidence. That being so, it is difficult to understand what difference her body language would make to the panel's assessment of her evidence. Nor do the Reconsideration Representations assist on this point.

40. Since nothing in this complaint amounts to a suggestion that the panel would have come to a different conclusion if the circumstances had been different, it cannot be said that the panel's decision was fundamentally flawed, or flawed in any way. Ground (iii) fails.

41. The next three complaints are all of irrationality. Ground (iv) asserts that *"We consider the decision of the Panel to disregard the evidence of [the independent psychologist] to be irrational."* The panel did not disregard the evidence of the independent psychologist. The panel considered her evidence carefully and disagreed with her conclusion that, if he abstained from alcohol as he intended, the Applicant could be safely managed in the community by the risk management plan proposed.

42. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses, whatever their specialism and level of expertise. 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.

43. The reconsideration representations then go on, under Ground (iv), to complain that *"Whilst there have been instances of concern that professionals have raised in relation to [the Applicant's] behaviour, i.e., telephone recording from 15th May 2021, comments made to [the prison psychologist] and the alleged sending of images from a mobile phone, there is a distinct lack of real evidence to suggest that firstly, [the Applicant] has made actual or genuine threats of violence, or that any individual has been caused serious*

psychological harm as a result of any comments made. We fail to therefore see where or how the Panel have come to the conclusion that psychological harm is imminent upon [the Applicant's] potential release."

44. There was undisputed evidence before the panel that, for example, during discussions with the prison psychologist

"When discussing 'revenge seeking', [the Applicant] stated that she was putting ideas into [his] head and [was] likely to 'adopt it' (revenge). He recounted to [the psychologist] the contents of [a letter he had written before the index offence] and the line he wrote that 'every [****] day I spend in prison I'll put a cut on her body'. [He] made a comment that [he] had not committed a murder in prison yet. Towards the end of the meeting, [he] started re-enacting scenes from the 'Silence of the Lambs'. [He] referred to a character in the film called 'Catherine', and asked [the psychologist] if [he] could have a closer look at her neck to make sure [he] saw the details for when ruminating about strangling her later."

45. Central to the panel's decision was what should be made of behaviour such as this when assessing risk. The prison psychologist considered that the Applicant was saying these things with the intention of unsettling her, which reinforced her concerns that he was still displaying revenge-seeking behaviour. She added that if he used the same approach in the community the situation could escalate rapidly, potentially into a violent confrontation. The Applicant, in his evidence, told the panel that his comments were *"just banter"* and an attempt to keep his mood up on his birthday.

46. The independent psychologist attributed ways of speaking such as this to the Applicant's ASD. The panel had to, and did, bear in mind the Applicant's offending history, including the index offence, which contained incidents of violence not explained by ASD. The telephone call was an indication that the Applicant's tendency to make inappropriate and frightening potential remarks was not just a matter of impulsive response to stress, but could be accompanied by rumination on grievances and thoughts of and plans for revenge.

47. All of these were proper matters affecting the panel's decision, which was carefully considered and justified by the evidence. Ground (iv) is not made out.

48. Ground (v) is a complaint that the panel should not have found there to be further core risk reduction work to be done in custody. Again, this decision followed a careful consideration of the competing views of the witnesses and cannot be described as irrational. Ground (v) is not made out.

49. Ground (vi) is expressed as follows:

"This ground relates to the Panel's incorrect application, in our view, of the assessed risk of psychological harm. The primary basis of the negative decision appears to be based on risk of psychological harm should [the Applicant] be released. There is a distinct lack of evidence that [the Applicant] has caused any psychological harm whilst in custody or indeed during the significant amount of day releases and overnight ROTLs that were previously achieved in open conditions. There is no evidence at all of serious harm being inflicted since the index offence was committed nearly 20 years ago".

50. This Ground seems to demonstrate a misunderstanding of the difference between evidence of harm caused in the past and the risk of harm being caused in the future. Panels of the Parole Board have to bear in mind the difference between the reaction to words and conduct of professionals working in a custodial situation and members of the community who may feel themselves more vulnerable than prison staff. Furthermore, as discussed above, there are grounds identified by the panel for thinking that in some ways the Applicant does mean what he says. Ground (vi) is not made out.

51. The final ground, unnumbered in the reconsideration representations but which I have called Ground (vii), sets out a number of so-called '*factual inaccuracies'*. They include giving the wrong name for the prison where the unauthorised mobile phone was found, describing the 13 offences of violence on the Applicant's record as 'many', and not properly acknowledging the number of releases on temporary licence the Applicant had completed. Neither individually nor together were these inaccuracies, insofar as they are inaccuracies at all, material to the panel's decision.

52. A further complaint is made about the panel describing as *"an aggressive outburst"* the Applicant's behaviour when he was told that the first hearing would be adjourned. The panel described in the Decision Letter what it saw and went on to discuss what the Applicant later told the prison psychologist: that, had he not retained control and walked out, he may have thrown the table and used the table leg *"to smash [the panel's] [****] skulls in"*, demonstrating the action with his hands.

53. The panel members made it perfectly plain that at the time of the incident, given the layout of the hearing room and the number of people present, they did not feel directly threatened, but considered that the Applicant's emotional state was such that it could easily have escalated into more aggression.

54. The suggestion that the panel should have recused itself from the case after this incident is unsustainable. Panels cannot be obliged to abandon a case by the bad behaviour of the prisoner.

55. The suggestion that a future panel should contain a psychologist with special knowledge and experience of ASD, if meant as a criticism of the constitution of the panel that considered the Applicant's case, is also ill-founded. The expertise and responsibility of a panel of the Parole Board is the assessment of risk. Its members are not primarily there to supply specialist expertise in any field, but to assess risk on the basis of the evidence put forward.

Decision

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

Patrick Thomas
13 January 2022