

[2024] PBRA 25

Application for Reconsideration by Jones**Application**

1. This is an application by Jones ("the Applicant") for reconsideration of the decision of a Panel of the Parole Board ("the Board") which on 18 December 2023, after an oral hearing on 8 December 2023, declined to direct his release. The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. I have considered the following documents for the purpose of this application:
 - The dossier provided by the Secretary of State ("the Respondent") which now contains 238 numbered pages;
 - The Panel's decision letter ("DL");
 - The application for reconsideration ("the Application") submitted on behalf of the Applicant by his solicitor dated 10 January 2024.

Background

4. The Applicant is now aged 25. On 17 December 2019 the Applicant received, following his guilty pleas, an extended sentence of imprisonment comprising a custodial element of six years and an extended licence period of three years for robbery together with determinate sentences of imprisonment for further counts of robbery and attempted robbery. These offences were committed whilst the Applicant was subject to a suspended sentence of imprisonment for an offence of inflicting grievous bodily harm (GBH) which was activated in part concurrently ("the index offences").
5. Together with his co-defendant (DD), who was armed with a knife and with their hoods up, the Applicant set upon a group of young people who had been out celebrating an 18th birthday in the early hours of the morning and carried out a number of robberies which involved some violence. The Applicant was heavily intoxicated at the time and he has admitted that he and DD had consumed 2 litres of vodka and 40 bottles of beer between them and a cocktail of cocaine, heroin, crack cocaine and ketamine that day and the day prior to committing the index offences.
6. The offence of GBH involved the Applicant, this time whilst sober, beating a man known to him and fracturing his jaw in two places.



3rd Floor, 10 South Colonnade, London E14 4PU

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7. The Applicant had 3 previous convictions for battery in respect of 4 offences which he committed on 4 separate occasions.
8. The Panel found that the Applicant's risk factors included attitudes supportive of the use of violence and weapons; lifestyle and associates; drug and alcohol misuse; poor emotional control and anger management; impulsivity and lack of consequential thinking.
9. The parole eligibility date is given as 15 October 2023, the Conditional Release Date is in October 2025 and the Sentence Expiry Date is in October 2028.

Current parole review

10. This is the Applicant's first review which was referred to the Board by the Respondent in January 2023 to consider whether or not it would be appropriate to direct his release.
11. The case was allocated to a Panel, which comprised two independent members of the Board.
12. The Applicant was represented by his solicitor who sought a direction for release.
13. At the hearing evidence was given by:
 - a) The Prison Offender Manager (the POM);
 - b) The Community Offender Manager (the COM);
 - c) The Applicant.

Request for Reconsideration

14. The Application for reconsideration is said to be based on the grounds of irrationality and procedural unfairness. The specific grounds relied on are not set out separately but have to be gleaned from the submissions and arguments put forward.
15. I take them to be:
 - a) The Panel's failure to give adequate reasons for its conclusions and, in particular, for disagreeing with the unanimous professional opinion in favour of release;
 - b) That the Panel gave insufficient weight to the professional opinion that risk was not imminent, could be safely managed in the community in accordance with the risk management plan and that no core risk reduction work remained outstanding;
 - c) Undue weight was given to the Applicant having recently used substances although he had completed work to address this issue;
 - d) That the assessment of risk carried out by the Panel was arbitrary and disregarded work and courses completed; and
 - e) That the Panel noted that the Applicant had not completed any work in relation to violence despite the fact that it is said that he is not eligible for such work.

The Relevant Law

The test for re-release on licence

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16. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the Panel in its decision. Indeed, the test is automatically set out in the Board's template for oral hearing decisions.
17. Under Rule 28(1) of the Parole Board Rules 2019 (as amended) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.
18. Rule 28(1) of the Parole Board Rules 2019 (as amended) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
19. In this case the Applicant is serving an extended determinate sentence of imprisonment and a decision was made by the Panel at an oral hearing not to direct his release on licence. It is thus eligible for reconsideration.

Irrationality

20. 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."

21. 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.
22. 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

23. 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.
24. 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.

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

26.It is for me to decide whether I consider the procedure adopted by the Panel in conducting the Parole hearing was unfair to either of the parties.

The reply on behalf of the Respondent

27.By email of 12 January 2024, it was confirmed that the Respondent offers no representations in response to the Application.

Discussion

28.In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration is entitled to substitute his/her 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.

29.The second matter of material importance is that when deciding whether a decision of the Board was irrational, due deference has to be given to the expertise of the Board in making decisions relating to parole.

30.Third, where a Panel arrives at a conclusion, exercising its judgement 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.

31.I move now to consider the grounds put forward by the Applicant.

32.It is recorded in the DL:

"[the Applicant] has undertaken a significant amount of work to address his substance misuse problems and there has been a prolonged period in custody during which he has not behaved violently. These may act as protective factors against future risk.

During this sentence [the Applicant] has engaged with the Forward Trust and completed a number of in-cell workbooks including Relapse Prevention, 12 Steps, Alcohol Awareness, Cocaine Awareness, Ecstasy Awareness and NPS (New Psychoactive Substance) Awareness and he has also undertaken the Sycamore Tree

victim awareness course in November 2021. [The Applicant] has also completed in-cell packs on Finance, Benefit and Debt, and Who Am I?...until recently [the Applicant] has shown a prolonged period of stability in custody, it is the case that this has coincided with him being housed in a VPU [Vulnerable Prisoner Unit] in closed prison conditions."

33.The Panel, however, was clearly exercised by the Applicant's history of fighting and possession of a weapon in custody given that it was common ground that he poses a high risk of serious harm to the public.

34.It was of considerable concern to the Panel that the Applicant continued to misuse illicit drugs, despite completing significant work to address this, particularly during the weeks prior to the Parole hearing which included an occasion upon which he had collapsed on the floor and an ambulance had to be called. In addition, the Applicant frankly admitted to the medical team that he had been using Spice on a regular basis since 16 November 2023. I find that the Panel was understandably not prepared to treat these as "lapses" (as is submitted on the Applicant's behalf) since this was an issue which also gave the COM cause for concern.

35.The Panel concluded that the formal risk assessments and those of the professionals tended to underestimate the risk that the Applicant posed to the public and to known adults as, so it found, he had yet to fully address the underlying reasons for his use of violence in the past and concluded that his risk had the capacity to escalate quickly, as the Applicant himself conceded would be the case should he drink alcohol.

36.The Panel's conclusions were:

"that the proposed risk management plans are insufficient to protect the public. This is because he lacks the internal controls necessary to avoid using illicit substances whilst on a VPU in closed prison conditions and the panel considers it unlikely that he will be able to do so in the community, especially as he intends to spend time with past associates who he knows to be regular drug and alcohol users. [The COM] told the panel that he was not absolutely confident in [the Applicant's] ability to remain abstinent, which was an assessment with which the panel agreed."

"His [the Applicant's] ability and motivation to remain abstinent in future is therefore in question and despite the fact of the clear link between his substance misuse problems and his violent offending behaviour. It also appeared to the panel that [the Applicant] has not yet completed any work directly to address his attitudes that support the use of violence and those matters to which he referred in his childhood which contributed to it."

37.Finally, the Panel found that the two professional witnesses (the COM and the POM) tended to underestimate the Applicant's risk of future violence linked particularly, but not exclusively, to substance relapse and association with negative peers.

Decision


38.I find that the grounds relied on by the Applicant relate to the exercise of a judgement based on all the evidence which is peculiarly a matter for the Panel.

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39. The Panel was well aware of, and fully acknowledged, the work, courses and interventions which the Applicant had undertaken and set these out in some detail in the DL.
40. The Panel noted the professional opinion in relation to release, imminency of risk and the adequacy of the risk management plan and gave clear and cogent reasons for diverging from it in the DL.
41. In my view the Panel was rightly concerned about the Applicant's ongoing substance misuse and it concluded that the Applicant did not, as yet, appear to have completed any work directly to address his attitudes supportive of the use of violence. This represents a finding of fact which, on the evidence, the Panel was entitled to make. Decisions about his suitability and the availability of such courses in custody were not a matter for the Panel.
42. In addition, I find there is no substance in the bold submission that the assessment of risk by the Panel was arbitrary.
43. Finally, I note that none of the reasons put forward in the application suggest that the Applicant was not given a fair hearing or that his case was not dealt with justly. It is therefore difficult to understand why reference is made in the application to procedural unfairness when, as I find, there was none.
44. In addition, the submissions in the concluding paragraph of the Application that *"this is clearly a case where the stakes are so high. This is a question of liberty. Justice must not only be done but seen to be done"* are trite propositions which do not assist me with the tests I have to apply.
45. Overall, I am satisfied that the Panel set out its concerns and conclusions with considerable clarity and took proper account of the evidence and views of the professionals, which it analysed with care, and that it was justified, on the basis of the evidence before it, in reaching the conclusion that the Applicant did not meet the public protection test for release.
46. Accordingly, I find that the Application is without merit and, for the reasons I have given, I do not consider that the decision is irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

Peter H. F. Jones
24 January 2024