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[2024] PBRA 37

Application for Reconsideration by Derek Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a parole board panel decision dated 29 January 2024 (the Decision) not to direct his release nor make any recommendation for open conditions. The Decision was that of a two-member panel (the Panel) following an oral hearing (conducted via video link) on 23 January 2024.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) 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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the unsigned written application and representations made by legal representatives on behalf of the Applicant dated 31 January 2024 (the Representations), the dossier relating to the Applicant consisting of 339 pages (including index), the Decision, an email dated 6 February 2024 in which the Public Protection Casework Section (PPCS), on behalf of the Secretary of State (the Respondent), indicated it did not wish to make any submissions in response to the Representations.

Background

4. The background to this application is, so far as relevant, as follows:
    a. The Applicant, then aged 27 (now aged 49), was sentenced on 1 June 2001 to life imprisonment for an offence of wounding with intent (the index offence). Prior to this he had accumulated a history of offending with numerous convictions from the age of 17 involving offences of dishonesty, burglary, robbery, assault causing actual and grievous bodily harm, threats, and failure to comply with court orders, parole, and bail. The Panel found the convictions showed a pattern of aggressive and violent offending potentially linked to substance misuse.
    b. The index offence itself involved a serious assault on the Applicant's supplier of crack cocaine and his (the supplier's) friend in the belief that the substance supplied by the dealer was not the anticipated cocaine. At the time of the offence the Applicant was in breach of a release licence. He pleaded not guilty but was convicted. It does not appear that he appealed either conviction or sentence.

c. The tariff expiry date (TED) was set at 1 December 2005. Thus, the Applicant is well over tariff.
d. Subsequent to the conviction for the index offence the Applicant has been released on licence so far as I can tell four times following what appears to have been five separate parole board determinations (four recommending release). His first release was in March 2009, the second in June 2016, the third in October 2019, and the fourth, and last release, being in January 2022. On each occasion he was recalled following serious breaches of his licence conditions usually involving threats, abuse, assaults on police and others, offences of dishonesty, alcohol and substance misuse, criminal damage, possession of a bladed article, and deterioration of his mental health. He also managed to accrue further convictions reflecting this history. On each occasion the previous panels had found his recall appropriate.
e. The Panel noted that by the time of his latest review (the sixth) his risk factors included use of weapons, aggression, violence, substance misuse, poor emotional wellbeing, poor thinking skills and lack of victim awareness. Also noted by the Panel (based on a previous parole board review) were concerns expressed whilst on release at the Approved Premises (AP) at his alcohol use and aggression to staff. On another occasion whilst on release at an AP he is said to have caused criminal damage and to have assaulted another resident (though the Panel accepted that he had not been prosecuted as a result). However, these incidents, concern over aggression to other residents, return to substance misuse and deterioration in his mental health, led to the Applicant's recall in March 2022 which he apparently accepted.
f. At the outset of the latest hearing, the Applicant's Prison Offender Manager (POM) was not available, but another (the POM's Senior Prison Officer (SPO)) who was reasonably familiar with the case, could be substituted to which the Applicant's legal representative appearing at the Panel hearing had no objection.
g. The Panel decided after consideration to proceed on this basis and heard evidence from the SPO, the Community Offender Manager (COM) and the Applicant. The Panel had, of course, the dossier, then consisting of 316 pages.
h. At the conclusion of the evidence the Applicant's legal representative then asked for an adjournment and to conclude the review on the papers having considered further evidence (the Further Information) in the form of:
    i. An updated report from Care Grow Live (CGL) to detail the current situation as regards residential rehabilitation its timescale, funding and location and,
    ii. as a possible alternative, but alongside the AP referral, the outcome of a referral to the Community Accommodation Service, tier 3 (CAS3) as to whether or not the Applicant had been accepted at [Approved premises] (*sic*; presumably the same as that referred to above) on the basis that if not, this could alter the nature of his risk management plan;
    iii. confirmation of the Applicant's suitability for the Thinking Skills Programme (TSP) since he was denying any assessment had taken place;
    iv. the identity of any new COM if the Applicant was released, since the present one would not (as she dealt only with offenders in custody) be able to continue to be his COM.

i. On this aspect the Panel then noted:

> "[The Applicant's legal representative] *confirmed that she was content for the panel to consider the adjournment application alongside their decision, and made no further closing submissions, despite the opportunity being offered*."

j. The Panel decided there was no need to adjourn for further information as this would not impact on their decision, which, after adjourning to consider the matter, as it turned out, was to refuse release and make no recommendation for open conditions.

k. In fact, the Applicant's legal representative did lodge further written closing submissions with the Panel dated 25 January 2024 (having been further so invited). In these submissions reference was made to the adjournment application and its refusal but was not, or at least not expressly, renewed whilst submitting the Panel should direct the Applicant's release.

Request for Reconsideration

5. The application for reconsideration is dated 31 January 2024.

6. The grounds for seeking a reconsideration are in summary and in substance, as follows:

   a. The refusal to adjourn the hearing to elicit the further information mentioned above (the Further Information) was, in the circumstances, procedurally unfair and ultimately rendered the decision not to release unfair and irrational.
   b. The Panel, by refusing to adjourn to seek the Further Information, was Wednesbury unreasonable.
   c. By failing to inform itself of all proper, material, and relevant information (i.e. the Further Information) the Panel failed in its duty to take all reasonable steps as regards scrutiny of the Applicant's level of risk, a duty which was particularly enhanced given the level of time the Applicant had spent in custody (or on licence) post the TED.

Current parole review

7. I have set out above how the Panel came to be constituted following the usual referral by the Secretary of State consequent on the Applicant's recall to custody in March 2022. I have also noted above the evidence and witnesses before the Panel and the application for adjournment.

8. It is clear, not just from the refusal to adjourn the hearing for the Further Information, that, having heard and seen the evidence then before them, the Panel concluded that the requested adjournment and the sought for Further Information would not be likely to alter their ultimate decision.

9. Not only is this clear from the reasons stated for refusing the adjournment (outlined above) but also from the Decision itself as to which see further below.

The Relevant Law

10. Whilst the Applicant's legal representative seems to object to the Panel's considering the Applicant's risk of re-offending and whilst the Decision did not, in express terms, set out the need to consider the question whether it was no longer necessary for the protection of the public that the Applicant be kept in custody, it is, in my judgment, clear from an overall fair reading of the Decision that that is exactly what the Panel had in mind.

11. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham had 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.*"

12. In making the above-mentioned objection the submissions in support of the application for reconsideration quoted para. 4.5 of the Decision as follows:

> *"The panel carefully considered the potential of [the Applicant] being released into the community and not re-offending, deciding that unless he addresses his substance abuse and thinking skills, further work in the community was unlikely to succeed and the risk of offending would remain."*

13. She did not, however, include the next following sentences, namely:

> "*The risk of offending and harm [the Applicant] presents would currently be unmanageable within any of the potential options given his level of risk. Therefore, the panel does not direct release*." [my emphasis]

14. Direct quotes from a panel decision which it is sought to impugn can be of great assistance, but they can be over selective and do not detract from the need to read the decision as a whole, fully and fairly. Such decisions are not to be viewed as a lease or other legal document requiring proper and lawful construction on a line-by-line basis.

15. It is apparent from the further quoted passage above, as well as from a fair reading of the Decision as a whole, that the Panel not only met the desirability expressed by Lord Bingham above but equally had well in mind the public protection test and also the potential options, i.e. those offered by the further lines of enquiry (the Further Information) sought by the Applicant's legal representative.

Parole Board Rules 2019 (as amended)

16. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

17. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

18. 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**. To be fair, this is not sought in this case.

Irrationality

19. 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."*

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 contains the same adjective as is used in judicial review shows that the same test is to be applied.

21. 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

22. 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.

23. 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.

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

Other

25. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

26. That said, I entirely accept that the Panel had a power to adjourn the hearing to obtain further information (see rule 6(11)). I also entirely accept that, generally speaking, there is a duty to take reasonable steps on a panel to ascertain and acquaint itself with all relevant information, but it is for the panel to decide upon the manner and intensity of inquiry to be undertaken to ascertain the material needed to reach an informed and rational conclusion (see, for example **Tameside** [1977] AC 1014 and **Plantagenet** [2014] EWHC 1662 (Admin)). As will be seen, I see nothing irrational or Wednesbury unreasonable in the Panel's decision not to adjourn.

The reply on behalf of the Respondent

27. I have mentioned above the decision by the PPCS not to make any representations on behalf of the Respondent.

Discussion

28. I have also previously indicated that in my judgment the Panel had the public protection test well in mind. It is also clear that the Panel considered that seeking and obtaining the Further Information sought (the potential options referred to above) would be of no assistance. It must be remembered that when the adjournment application was sought and refused the Panel had heard and seen the evidence placed before them. They had copious relevant material before them to reach and justify the decision they did. Information whether there had been a PNA or not and the outcome of an update on accommodation was at best speculative and not likely to have a material effect on the substantive outcome. I have no doubt that if the Panel had thought either might have a bearing on the risk management plan, they would have directed an adjournment. But, as I said, having seen and heard the evidence by that stage, and in light of the Applicant's custodial and release behaviour attitudes and conduct and the risk assessment, there was, in my judgment, nothing unreasonable or irrational in refusing the adjournment nor was the Panel in any breach of duty in refusing to do so.

29. It is apparent from the legal representative's submissions in support of the application that after the adjournment application had been made, the panel chair

had (understandably) asked why the application had not been made prior to the oral hearing. The answer commendably and candidly conceded was that the legal representative had expected the answers to the Further Information sought would be provided in oral evidence at the hearing, but this had not occurred. That, if I may say so, seems to me to be an understandable but high-risk strategy. If the Further Information was as important as now appears to be the argument it could and should have been sought before the hearing in the form of Panel Chair Directions. We can all, however, be wise after the event.

30. It is convenient to deal first with the confirmation or otherwise of the Applicant's suitability for the TSP and the identity of any new COM.

31. The Decision, the submissions on behalf of the Applicant and indeed this decision were and are much littered with initials and acronyms. They can be useful. But they can also be very unhelpful and confusing if, however obvious they may seem to the writer, they are not defined. Much criticism in the legal representative's application and submissions in support of reconsideration addressed the absence of any "PNA" (which is unhelpfully nowhere defined in these submissions and so far as I can ascertain, does not appear in the dossier as it was before the Panel, but which, from the context, I understand and assume to mean either Programme Needs Analysis or Psychological Narrative Assessment it probably does not matter which). The issue was that it appeared that the Applicant had been accepted for the TSP (another term not defined in either the Decision or submissions but again I assume to mean as defined above: Thinking Skills Programme) yet denied that any assessment had taken place. Whether this be true or not is not for me to determine, the Panel however accepted the evidence of the SPO that the Applicant had been assessed and considered suitable. Evaluating and accepting the evidence was a matter for the Panel. The Applicant's evidence that he could not remember being assessed and refuted that any assessment had taken place was put before the Panel (see above) and they decided to accept, and were entitled to accept, the evidence of the SPO that the Applicant had been assessed as suitable for TSP. Ascertaining further confirmation, in my judgment, would not have affected the ultimate decision.

32. Likewise, the identity of the COM turned out to be of no significance since the Applicant told the Panel (as noted in the Decision) that he was not concerned about the change of COM and that whilst he had trust issues, this did not impact on his ability to engage with professionals.

33. I therefore turn to the accommodation issues.

34. It is equally plain that based on that evidence even if the Further Information had been potentially favourable to the Applicant as regards the availability of accommodation on release it would not have changed the view obtained by the Panel following the evidence. How such information might be favourable and influence the ultimate decision was not stated beyond, in substance, the suggestion that it might affect the risk management plan.

35. The Applicant had a long history of non-co-operation (to put it mildly) in residence at Approved Premises (see, for example, above).The Panel dealt thoroughly with the Applicant's level of, and features of, risk: the Panel accepted the Applicant

presented a high level of risk of serious harm to the public with a medium risk to known adults and staff because of his preparedness to use aggression and violence to resolve situations or to further his own aims. Whilst they gave him credit for the work that he had completed, it was noted that he did not accept responsibility for his own actions, could not engage in group work (thereby rendering himself unable to complete TSP), was resistant to an AP placement, both of which were necessary for risk management. Hence the Panel concluded and determined as set out in paras. 12-13 above. He needed to complete core risk reduction work which should take place in closed conditions. He had little support in the community and the Panel could not readily identify any protective factors. Thus, any consideration of CAS3 referral or update on any AP placement would also not assist.

36. I have no doubt that the Panel dealt with the Applicant's case fairly, carefully, and justly and was well alive to the requirement for anxious scrutiny particularly bearing in mind the length of time the Applicant had been in custody (the relevant dates being noted, as customary, at the outset of the Decision). In so far as his history was any guide to his future behaviour and conduct in the community against the background of his identified risk factors the auguries were not promising.

37. In my judgment the Panel gave careful consideration to the request for the adjournment for the Further Information and concluded for sound reasons that such information was not going to assist. It was a decision for them. There was plenty of evidence to justify the conclusion they came to and I detect nothing unfair, unreasonable, or irrational within rule 28 or in the principles as outlined above in the refusal to adjourn or in the decision not to release.

Decision

38. For the reasons I have given, I consider that neither the refusal to adjourn nor the decision was irrational/procedurally unfair and accordingly the application for reconsideration is refused.

HH Roger Kaye KC
14 February 2024