

[2024] PBRA 53**Application for Reconsideration by Johnstone****Application**

1. This is an application by Johnstone (the Applicant) for reconsideration of the decision of a Parole Board panel dated 26th January 2024, following an oral hearing on 25th September 2023, not to direct his 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:
 - i. The dossier of 544 pages including the Decision Letter (DL) the subject of this application.
 - ii. The application for reconsideration submitted on his behalf by his legal representative.
 - iii. An email sent on behalf of the Secretary of State of Justice (the Respondent) indicating that he did not wish to submit representations for the purpose of the appeal.

Background

4. The Applicant's index offence and the subsequent sentence and parole history are accurately set out in the DL. In summary, on 20 March 2006, aged 30, he was sentenced, having pleaded guilty, to imprisonment for public protection for wounding with intent to cause grievous bodily harm. His minimum term was set at 2 years, 9 months and 29 days. He was last released on licence on 6th January 2022 and recalled to prison on 30th July 2022. This was the 1st review of his case by the Parole Board since his latest recall.

Request for Reconsideration

5. The application for reconsideration is dated 20th February 2024.
6. It is not entirely clear from the application for reconsideration supplied on the Applicant's behalf which parts of it are said to constitute grounds for seeking reconsideration of the decision and which parts are simply descriptions of events or passages within the Decision Letter (DL) under consideration.
7. Under procedural irregularity I list the following:



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

www.gov.uk/government/organisations/parole-boardinfo@paroleboard.gov.uk

@Parole_Board



0203 880 0885

- a. At paragraph 18-20 it is said that the DL, the issue of which had already been delayed for further information to be received, was not issued on the last date (1st December 2023) on which it was due following that adjournment. On 5th December 2023 the Board informed the Applicant's legal representatives that the DL would now be issued on or before 18th January 2024. No reason was given for the failure to issue the DL on or before that date. In due course it was issued on 29th January 2024. No reason was given for the late service of the DL.
 - b. At paragraphs 22-23 the Grounds point out that the date of the hearing and the location of the Applicant are wrongly set out in the DL.
8. Under irrationality I list the following:
- a. At paragraph 24 it is said that the panel stated that the Applicant's current residence in a Category C prison makes it difficult for the panel to decide whether the Applicant's desistance from violent behaviour following the consumption of illegal drugs is attributable to restraint on the part of the Applicant or to the fact that he is under a prison regime with strong external controls. In fact there was evidence relating to this period which demonstrated the former, albeit that a man with his personality traits is unlikely ever to have a "completely clean" record. There was also evidence from the Prison Offender Manager (POM) which confirmed evidence of improvement in this area.
 - b. At paragraph 25 it is submitted that the panel's consideration of an incident in August 2023 and its possible relevance to its decision whether to direct release was irrational.
 - i. The officers involved in the incident had given different accounts of the incident.
 - ii. The only person who recorded that the Applicant had been the aggressor in this incident was the officer who submitted the report. There is no evidence that that officer witnessed the incident.
 - iii. Video evidence had suggested that the Applicant had been confronted by another prisoner and followed into his cell by that prisoner.
 - iv. The DL contains the statement that the fellow prisoner had suffered a broken nose. There was no evidential basis for this finding.
 - c. In summary, the panel's conclusion that the Applicant would not be ready for release until he had completed further work was irrational.
 - d. The possibility exists that the decision, which had been marked by sometimes unexplained delays, may have relied on matters which are not within the text of the decision and are unknown to the Applicant and his legal representatives.

Current parole review

9. The case was referred to the Parole Board by the Secretary of State for Justice (SoSJ) on 1st September 2022.

The Relevant Law

10. The panel correctly set out in the DL the tests for release.

Parole Board Rules 2019

11. 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)).

Irrationality

12. 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."

13. 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.
14. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.
15. 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."*

Procedural unfairness

16. Procedural unfairness means some procedural impropriety or unfairness which resulted in the proceedings being fundamentally flawed and therefore producing a manifestly unfair, flawed or unjust result.
17. 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) s/he was not given a fair hearing;
 - (c) s/he was not properly informed of the case against them;
 - (d) s/he was prevented from putting their case properly; and/or
 - (e) the panel was not impartial.

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

The reply on behalf of the Respondent

19. The Respondent has offered no representations.

Discussion

20. Procedural irregularity.

- a. Clearly when a court or other judicial body sets dates for hearings or other steps in a case and fails to keep to them it may cause distress and – possibly - result in the offender being in a different position, whether more or less favourable, when the hearing finally occurs. It is not suggested that the delays themselves – including the unexplained delay before the issue of the DL – could have altered the actual decision. Although of course a failure by a court or other tribunal to produce its decision is always regrettable it cannot be said that in this case the delay was such as to constitute the sort of irregularity envisaged by the authorities. (Paragraph 7 a above).
- b. I do not understand that it is suggested that the mistaken dates set out at paragraph 7 b on their own amount to an error which should provoke an order for reconsideration. If it is I have no hesitation in rejecting it. Unless such an error can be shown to have led to a serious error in the conduct of the hearing or to have resulted in unfairness to the Applicant it cannot found a successful appeal based on procedural irregularity.
- c. As to paragraph 8 d. This ground is – as it concedes – based on the unfortunate delays which beset the case, some of which were explained and others not. While it would have been preferable for the Applicant, who had already waited a very long time for his hearing and the eventual decision to have been informed in general terms of the reasons for the delays I have seen nothing which would suggest that the undoubted 'procedural' flaws which beset the case were of such a nature as to make the ultimate hearing and the subsequent DL "procedurally irregular" in the sense referred to at paragraph

21. Irrationality.

- a. When considering irrationality the 'appellate tribunal' must always have regard to the fact that it was not present at the hearing and it therefore should not simply "second guess" the conclusions of the panel.
- b. As to paragraph 8 a above. It is unarguable that the panel's comment concerning the fact that the Applicant was now held in a Category C prison has some relevance to its ability to reach a conclusion in favour of release.
- c. As to paragraph 8 b above. I have found no reference to a 'broken nose' within the dossier. I considered whether it might be necessary for me to listen to the recording of the hearing to ascertain whether there had been such a reference. However, on reflection, even if the panel mistakenly believed that they had seen or heard such a reference the mistake would fall far short of the tests set out above by the authorities set out above. There is no indication within the DL that the 'broken nose' suggestion had tipped the balance in favour of the decision not to direct release. There are references to the 'August incident' at 2.4, 2.16, 2.19 and 2.28 of the DL. The weight to be attached to particular incidents is a matter for the panel to decide. It is clear that the incident – while significant - was only one of a number of factors which caused the panel to

reject the recommendations of the POM and COM – see paragraphs 3.2, and 4.2 and 4.3, of the DL.

- d. As to paragraph 8 c above. The conclusion reached that the Applicant needed to complete further work before he would be suitable for release was not irrational. It explained the reasons why it reached the conclusion that it did at paragraph 3.4 of the DL. The panel was entitled to conclude that the risk demonstrated by the Applicant's long previous record, the index offence, his subsequent time in prison, his two recalls to prison and aspects of his current behaviour entitled it to reach its decision. The fact that another panel faced with the same history and the same evidence at a hearing may have reached a different "rational" conclusion does not lead to the conclusion that this decision was "irrational" within the definition set out above at paragraph 12 above.

22. I have considered carefully whether the unfortunate delays which accompanied the hearing of the case from its inception may on their own or put together have amounted to the sort of procedural irregularity described above at paragraphs 16 & 17. It is clear that by the time of the hearing the Applicant was well aware of the contents of the dossier and was well represented. The situations envisaged in the paragraphs above are far removed from those envisaged in the cases which have in the past led to judicial decisions of any kind being quashed and remitted for a fresh hearing.

23. The possibility is raised in the Grounds – at paragraph 27 – that some factor outside the material considered within the dossier and at the hearing may have tipped the scales against a direction for release. I have seen nothing to justify such a suspicion. The DL focuses on the evidence given within the dossier and at the hearing and explains clearly why in the opinion of the panel it reached its conclusions.

Decision

24. Accordingly, this application is refused.

Sir David Calvert-Smith
07 March 2024