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[2024] PBRA 76

Application for Reconsideration by Marlow

The Application

1. This is an application by Marlow (the Applicant) for reconsideration of a decision made by a two-member panel of the Parole Board (the panel) following an oral hearing held on 5 March 2024 refusing his application for release.

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. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

3. I have considered the application on the papers. These are the decision of the panel, the dossier which runs to over 800 pages and written submissions in support of the application prepared by the Applicant's representatives.

Background

4. The Applicant is very nearly 54 years of age. He has an extensive history of offending, having first been convicted in 1983 aged 13 for offences of dishonesty. He has since been convicted on over 30 occasions for acquisitive offences including theft and burglary. Of greater concern to the panel was his significant history of having committed offences of violence including assault with intent to rob, robbery, grievous bodily harm, actual bodily harm, battery and assault on a police officer and witness intimidation. He has also been convicted of drug and driving offences and has a history of breaching community orders. He has admitted to having volatile intimate relationships, although he denied any direct physical violence.

5. The Applicant was convicted of robbery in 2014. The offence had taken place in February 2014 when the Applicant pushed a female from behind, punched her several times and took her phone. Two witnesses to the robbery pursued the Applicant one of whom he assaulted, for which he received an additional 12 months imprisonment. During a previous oral hearing in February 2022, the Applicant denied punching the victim of the robbery but admitted that he was trying to get her phone because he was focussed only on having sufficient money to fund his drug misuse.

6. When the Applicant was charged with the robbery in 2014, he admitted to the police another offence committed by him in July 2013. The essential facts of this earlier case (the Index Offence) were that he was homeless at the time and during the course of an argument with another homeless person kicked and then stamped on the victim, held him down using a metal pole with which he struck the victim in the eye, causing a detached retina. In a statement made for the purposes of the oral hearing the victim said that he had lost the use of his eye as a result of the attack and had suffered significant psychological harm requiring treatment. The Applicant told the hearing panel in 2022 that at the time of that incident he was withdrawing from drugs and lost his temper. To the panel during the hearing in March of this year he said that his drug misuse had a significant impact on his behaviour. He said that he had used drugs from the age of 15 which helped to block out past trauma. He also spoke of the serious abuse he experienced in childhood, the panel noting references to emotionally unstable and personality disorder and dissocial personality disorder as well as traits of paranoid and avoidant personality disorder.

7. For the offence of robbery in respect of which he was convicted in 2014 the Applicant was given an extended sentence later that same year comprising of a 5-year custodial period and an extended licence period of 3 years. For the offence of Grievous Bodily Harm with intent, committed in 2013 (the Index Offence), the Applicant was sentenced in May 2015 to an extended sentence comprising of 5 years in custody and an extended licence period of 5 years. Unfortunately, there are no sentencing remarks in the dossier in respect of either offence. It should be noted that the extended licence period imposed in May 2015 is the maximum available to the court.

8. As for the Applicant's physical wellbeing. In February 2022 the Applicant told the hearing panel that he could not walk without support and there was reference to the use of a wheelchair in custody. The panel in March 2024 noted a report of an incident in March 2022 when the Applicant was seen to stand up out of his wheel chair and engage in a fight with another prisoner. He told the panel that this was his last use of violence and that he was no longer able to walk any real distance.

9. This was the Applicant's second parole review since his recall to prison. He has been released once previously on the sentence for the Index Offence, on 1 May 2020 but recalled just one month 8 days later, on 9 June 2020, when his accommodation was withdrawn due to suspected drug use. He was also reported to have made threats to stab a prison officer and share address details of officers with other prisoners.

10. Following his return to custody the Applicant's response has been mixed. He had engaged with substance misuse services and other interventions. There had been a proposal that he be moved to another establishment, but he was not accepted because of his physical disability and his marked reluctance to engage with group work. Following the decision of the previous panel in June 2022 not to direct his release, concerns were expressed that the Applicant was engaging in what the panel described as self-destructive behaviours. There were incidents of him threatening violence and being abusive and regularly abusing drugs.

The current parole review

11. The second review of the Applicant's case was heard on 5 March 2024 by a two-member panel. The panel heard evidence from the Prison Offender Manager (POM), the Community Offender Manager (COM) and a prison psychologist. The Applicant was legally represented.

The Request for Reconsideration

12. I have distilled a number of submissions made on behalf of the Applicant in support of this application into what appear to me to be five key grounds, while of course taking into account all of the other submissions made to the panel. If I have understood their overall effect correctly it is submitted that the decision not to release was irrational and in one respect potentially procedurally unfair in that:

    i. The panel failed to take sufficiently into account that there was among all the professional witnesses support for release.

    ii. The panel failed to take into account the fact that the Applicant had not been violent in prison for a period of time (since 2022) and that his more recent misconduct in 2023 and 2024 had not involved allegations of acts of violence.

    iii. The panel failed to take sufficiently into account in the Applicant's favour that his prison misconduct was in part at least attributable to factors requiring psychological treatment not available in custody.

    iv. The panel failed to balance the risk to the public against the benefits of release to the Applicant before the end of his sentence supported by what is submitted to be a sufficiently robust risk management plan.

    v. The panel decision fails to make clear that the panel took into account the closing submissions made on the Applicant's behalf.

The Relevant Law

Parole Board Rules 2019 (as amended)

13. 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)).

14. 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)).

Irrationality

15. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined a long time ago in **Associated Provincial Houses Ltd v Wednesbury Corporation (1948) 1KB 233 (CA)** by Lord Greene in these words:

…'if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere'.

16. The same test applies to a reconsideration panel when determining an application for reconsideration of a decision on the ground of irrationality.

17. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court applied this test to Parole Board hearings when an irrationality challenge to a panel decision is made in these words 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."

18. **DSD** is therefore an important case in setting out the limits of a rationality challenge in parole cases. Since it was decided another division of the High Court in **R (on the application of Secretary of State for Justice v Parole Board [2022] EWHC 1282 Admin) (the Johnson case)** adopted a *'more modern'* test set out in the case of **Wells [2019] EWHC 2710 (Admin)**.

19. In **Wells** the judge set out what he described as *'a more nuanced approach'* at paragraph 32 of his judgment when he said:

"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 regard 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".

20. It must be emphasised that this is not a different test to the **Wednesbury** reasonableness test. The interpretation of and the application of the **Wednesbury** test in parole hearings as explained in **DSD** was binding on the judge in the case of **Wells**.

21. What is clearly established by all these authorities which are binding on the Parole Board is that it is not for the reconsideration member deciding an irrationality challenge on a reconsideration, or a Judge dealing with a Judicial Review in the High Court, to substitute his or her view for that of the oral hearing panel who had the opportunity to see the witnesses and evaluate all of the evidence. It is only if a reconsideration member considering the application decides that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that he or she should allow the application.

22. Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. In **DSD** the court made it clear 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. A panel's duty is clear, and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence they accept and what evidence they reject. While the views of the professional witnesses must of course be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

23. The giving of reasons by a decision maker is *"One of the fundamentals of good administration"* **(Breen v Amalgamated Engineering Union [1971] 2 QB 175)**. When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in deciding this application, an absence of reasons does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law. The way in which a panel fulfils its duty to give reasons will vary, depending on the facts and circumstances in any particular case. For example, if a panel is intending to reject the unanimous evidence of professional witnesses, then detailed reasons will be required. In **Wells** at paragraph 40 the court said:

    "The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".

24. When considering whether the decision in this case is irrational, I will keep in mind that it is the decision of the panel who are expert at assessing risk. Importantly, it was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept. It is extremely important that I do not substitute my judgment for theirs. My function is to decide whether the panel in this case erred in law or reached a decision that was unreasonable and/or procedurally unfair in some respect.

Procedural unfairness

25. In conducting its proceedings, the Board must comply with the requirements of procedural fairness which is the modern term for the rules of natural justice. 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.

26. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

28. The Respondent has indicated that he does not wish to make any submissions in response to this application.

The Panel's Decision

29. In light of the way in which this application is expressed it is necessary to consider the panel's decision in some detail.

Risk Factors/Future Risk

30. The panel identified a number of risk factors as being relevant to the Applicant's case. They included accommodation; employment and training; relationships; lifestyle and associates; drug misuse; thinking, behaviour and attitudes. The panel specifically noted the Applicant's own evidence that not being believed and people talking down to him were issues for him. The panel found that poor emotional management and poor compliance were also areas of risk.

31. As for the risk of serious harm, it is noted that statistical analyses indicated that the Applicant presented a high risk of serious harm towards known adults, staff and prisoners. The panel recorded that when dynamic risk factors are included the Applicant was assessed as presenting a medium risk of further general and violent offending. Importantly, the panel found that the risk of re-offending to have been underestimated, observing that the Applicant did not manage to avoid drugs on licence and had continued to use drugs in prison. The panel considered that his risk of further general and violent offending to be high.

The evidence of the professionals

32. The psychological assessment before the panel is dated 8 December 2023. The psychologist concluded that the Applicant had outstanding treatment needs principally as a result of childhood trauma. He expressed the opinion that addressing the trauma would initially be overwhelming for the Applicant. He identified succinctly the key question as being whether the Applicant would cope with life outside and the trauma inside without resorting to unhelpful coping mechanisms. In the psychologist's opinion he identified the following three months (i.e., December 2023 to March 2024) as presenting a useful indicator of whether the Applicant could maintain his improved responses to engagement with therapy. In his evidence the psychologist told the panel that he was recommending release because it was unlikely that the Applicant would be able to engage in therapy prior to the end of his sentence. The psychologist told the panel that in his view the risk management plan was supportive and robust. He is recorded as adding that any immediate issues arising would be evidenced by verbal threats which would allow for action to be taken prior to the risk escalating.
33. The POM while mindful of the concerns regarding the Applicant's recent custodial behaviour supported release on the basis that it offered support to the Applicant before the end of his sentence. The COM told the panel that in her opinion release should be supported and that the Applicant's risk would be minimal. She is noted

to have added that an intended intervention would be helpful although she had not discussed what support could be provided and when. Any release would require the Applicant to reside in professionally monitored accommodation. GPS tagging was proposed which the Applicant said he would try it, while questioning whether his health would permit it. The panel expressed itself as being surprised by the COM's concession at the hearing that if the Applicant could not comply with tagging, then it would not be in her opinion necessary. Indeed, the panel went further than being surprised and found that they disagreed with the COM and considered the tag to be a critical licence condition.

The Risk Management Plan

34. The panel expressed serious doubts about the proposed risk management plan. It is well understood that a risk management plan is designed to provide external controls to reduce a prisoner's risk of serious harm to the public. External controls cannot on their own reduce the prisoner's risk: there needs to be a combination of internal and external controls if risk is to be effectively managed. The panel noted that the risk management plan's focus was on the ability to provide therapeutic support to the Applicant, yet in their view the details of that support were yet to be confirmed. The panel expressed its concerns about the limited time that would be available for the Applicant to remain in the proposed monitored and supervised accommodation. Commenting upon the COM's evidence that abstinence from drug misuse would in her opinion be evidence of change, the panel's view was that there would be a need for support to have progressed to a point where the Applicant would be at a reduced risk of returning to the misuse of drugs when in the community. In short, the panel were not satisfied that enough work could be completed in the limited time available. At best, the panel found the release plan to be optimistic and heavily reliant upon the Applicant's ability to cope with change and difficulties, something the panel found he had not been able to do in custody, but rather had evidenced aggressive behaviour.

The Panel's Findings and Conclusions

35. The panel began its findings by making it clear that *"it had considered all available evidence and the closing submissions"* made on behalf of the Applicant by his legal representative.

36. The panel referred to the cases of **Johnson [2022] EWHC 1282 (Admin)** and **Dich [2023] EWHC 945 (Admin)** which importantly make it clear that the statutory test to be applied by the Parole Board when considering a prisoner's release does not involve a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The panel reminded itself that the only question for the Board when considering an application for release is whether the release of the prisoner would cause more than a minimal risk of serious harm to the public. The panel observed that these two High Court cases also established that the test for release does not include a temporal element. Therefore, any consideration of risk *may* go beyond conditional release dates (CRD) and sentence expiry dates (SED).

37. The panel reached the following six key conclusions:

(i) That the Applicant had caused serious harm and that his offending is linked to poor emotional management and his abuse of drugs. It stressed that on a previous release on licence he had returned to using drugs and continued to misuse drugs when back in prison.

(ii) That although a pathway to address the Applicant's risk factors had been identified, this had not yet been facilitated and he has yet to make progress in addressing key risk areas.

(iii) While commending the Applicant for realising that he needs to change and that he wishes to do so, the panel nonetheless, concluded that there remained a high likelihood of further serious offending in circumstances where critical areas of risk had yet to be addressed.

(iv) The panel found that it could not accept that the Applicant's current level of risk would allow for the necessary work to be done and completed safely with him living in the community.

(v) The panel concluded that the Applicant presents a far greater than a minimal risk to others and did not therefore meet the test for release.

(vi) For all these reasons the panel found itself not being able to agree with the recommendations made by the professional witnesses.

Analysis and Findings

38. **Ground (i).** Asserts in effect that the panel should have reached the conclusion to release bearing in mind that all the professional witness were in agreement with and supportive of release. The relevant law is set out in paragraphs 13 to 24 above and does not require repetition. This submission on behalf of the Applicant in my judgment misunderstands the law and the manner in which the panel are required to carry out its role in the evaluation of risk. In **DSD** the court considered this role as follows:

"117.The evaluation of risk, central to the Parole Board's judicial function is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced…The individual members of a panel, through their training and experience, possess or have acquired skills and expertise in the complex realm of risk assessment.

118.The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain.

133.A risk assessment in a complex case is multi-factorial, multi – dimensional and at the end of the day quintessentially a matter of the judgment of the panel itself,"

39. This ground fails.

40. **Grounds (ii) and (iii)**. These grounds can be conveniently taken together. I do not accept the submission that the panel did not fully consider the Applicant's prison conduct in the light of his history, the psychological evidence and the Applicant's conduct itself, which showed nine adjudications found proved against him between November 2023 and February 2024 which included using threatening words and behaviour, disobeying orders, possession of unauthorised substances and damaging property. In my judgment, it is clear that the panel considered this important part of the Applicant's case carefully and fairly. This ground fails.

41. **Ground (iv).** As I understand this ground, it is in effect that the panel should have carried out what amounts to a balancing exercise where the risk to the public should have been weighed against the benefits of release to the prisoner. This submission runs contrary to the judgments of the High Court which are binding on the Parole Board in the cases of **Johnson** and **Dich** referred to in some detail by the panel in paragraph 4.2 of the decision. This ground fails.

42. **Ground (v).** It is in my judgment inconceivable that a panel of the Board should fail to take account of written and oral submissions made on behalf of a prisoner. Such a submission is all the more surprising and I am bound to say ill-advised when paragraph 4.1 of the panel's decision makes it absolutely clear that the panel did just that. I find that there was nothing procedurally unfair in the conduct of the hearing. This ground fails. This application stands or falls on whether the decision was irrational.

Conclusions

43. This was not a straightforward case. The panel appropriately at the beginning of the decision made it clear that in applying the test for release it had considered the case of **Sim [2003] EWHC 152 (Admin)** and reminded itself that as the Applicant was by then in the extended term of his sentence a panel should be minded to release, unless it considered it likely that he will commit a further serious offence. At the centre of this review was a prisoner with outstanding treatment needs, facing a second review, following a recall, in circumstances where his progression was limited due to what were said to be a number of obstacles to progression within the custodial setting and all this against a background where his sentence was due to expire in the relatively near future. As the psychologist succinctly put it, the dilemma was that there was support available in the community, but the Applicant's risks were very likely to be amplified due to the nature of the work the Applicant would be required to undertake.

44. As I have already said, a panel are not obliged to follow the recommendations of professional witnesses, even if they are unanimous. It is the panels' responsibility to make their own assessment of the prisoner's risk of serious harm and its manageability on licence in the community. If the panel decide to depart from the recommendations of the professionals, as they did in this case, they must explain their reasons for doing so. On my reading of their decision, I find without hesitation that the panel did just that. Therefore, I find that the panel satisfied its public law duty to provide clearly expressed evidence-based reasons that sufficiently explained and justified the conclusion it had reached to refuse release.

45. In my judgment, this very experienced panel with commendable thoroughness provided a balanced and fair-minded analysis of all of the evidence, information, and material before them. Clearly, they were left with real concerns about critically important matters including the Applicant's risk level and his manageability were he to be re-released into the community.

46. In my judgment it cannot be sensibly argued that this was a decision that no reasonable panel could have come to and accordingly I find the decision is not irrational.

Decision

47. For the reasons I have given, I do not consider the decision of the panel irrational or procedurally unfair. Accordingly, the application for reconsideration is refused.

HH Michael Topolski KC
12 April 2024