

[2024] PBRA 103

Application for Reconsideration by Jackson

Application

1. This is an application by Jackson ("the Applicant") for reconsideration of the decision of a Panel of the Parole Board ("the Panel") which on 21 February 2024, upon consideration of the papers, 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 Parole Board who are authorised to make decisions on applications for reconsideration.
3. I have considered the following documents for the purpose of this application:
 - a) The dossier provided by the Secretary of State ("the Respondent") which now contains 453 numbered pages;
 - b) The Panel's decision letter ("DL");
 - c) The Application for Reconsideration ("the Application") submitted on behalf of the Applicant by his solicitor dated 3 May 2024

Background

4. The Applicant is now aged 36. On 23 April 2019 he received an extended determinate sentence of imprisonment comprising a custodial element of seven years and four months and an extended licence period of two years and eight months for one count of causing grievous bodily harm with intent to do grievous bodily harm which was committed against his partner ("the index offence").
5. When police arrived the victim was unresponsive and unconscious, part of her ear had been bitten off and she later described the Applicant as throwing her to the floor and repeatedly stamping on her head. Her injuries included a partially severed ear, a fractured nasal bone, a bleed on the brain and lacerations to her face together with bruises and swelling to her face, ribs and arms. A doctor described her injuries as potentially fatal and most likely life-changing.
6. The Applicant had a number of previous convictions including battery and affray in relation to a previous partner and a racially aggravated ABH when he attacked a pharmacist in a pharmacy. In 2017 he was sentenced to 8 weeks imprisonment for



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battery and affray against the victim of the index offence. Additionally, there have been 16 reported police call-outs between 2008-2019 which included abusive behaviour to family members, females and intimate partners.

7. The Applicant's custodial conduct has been problematic and it is considered his mental health is somewhat unstable. He has received a large number of adjudications. He was moved to a specialist unit where he was initially making progress but on 30 December 2023 he started a fire in his cell, smashed his toilet and sink and was relocated to the segregation unit.
8. The Applicant believes that healthcare and prison staff are deliberately killing prisoners by ignoring their health concerns and he believes that, when they leave prison, they have, in fact, been killed by healthcare and the prison.
9. Upon review by a psychiatrist, he was found to present with paranoid thoughts, poor coping mechanisms and impulsivity in line with features of personality difficulties. He is appropriately medicated.
10. The Applicant's sentence plan includes completing Kaizen (IPV strand) and professionals consider that he has outstanding core risk reduction work to complete in custody. Release was not supported.
11. The parole eligibility date was 27 November 2023, the conditional release date is May 2026 and the sentence expiry date is January 2029.

Current parole review


12. This was the Applicant's first review, the case having been referred on 28 February 2023 to the Parole Board to consider whether or not it would be appropriate to direct his release.
13. The review was adjourned on 2 occasions (October 2023 and again in December 2023) for further information.
14. In representations dated 20 June 2023 the Applicant's solicitor submitted that fairness required that an oral hearing should be convened noting that the Applicant had current mental health concerns and was expressing views "*which, though may perhaps not be correct, were genuinely held*".
15. In subsequent representations dated 8 February 2024 the Applicant's solicitor again sought an oral hearing stating that, although the Applicant did not at that time seek release, an oral hearing should be convened given his client's "*mental health, lack of faith in the system and diagnoses of anxiety and depression*".
16. In making its decision as to whether or not the review should proceed to an oral hearing, the Panel confirmed that it had considered the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 ("Osborn"), did not find reasons to convene an oral hearing and found that there was sufficient information in the dossier to make a full risk assessment.
17. The decision to conclude the review without an oral hearing was challenged by the Applicant's solicitor in a letter dated 18 March 2024 and on 9 April 2024 a duty member of the Parole Board ("DM") declined to direct an oral hearing.

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Request for Reconsideration

18. The Application for reconsideration is made on the Applicant's behalf by his solicitor and is dated 3 May 2024 and is based on the ground of procedural unfairness in relation to 1) concluding that the Applicant should not be released and 2) conducting the review by way of an oral hearing.
19. In support of the application the solicitor seeks to rely on the arguments put forward to the DM in the letter of 18 March 2024 together with references to overall fairness and justice being seen to be done.
20. I will return to deal with the arguments in detail in the **Discussion** section below.

The Relevant Law

The test for re-release on licence

21. The test for 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, nowadays, the test is automatically set out in the Board's template for oral hearing decisions.
22. 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.
23. 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)) 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.
24. In this case the Applicant is serving an extended sentence of imprisonment and a decision was made by the Panel not to direct his release on licence. It is thus eligible for reconsideration.

Irrationality

25. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd -v- Wednesbury Corporation* 1948 1 KB 223 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*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
26. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings 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."

27. In *R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)* set out what he described as a more nuanced approach in modern public law which was "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". This test was adopted by a Divisional Court in the case of *R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin)*.
28. As was made clear by Saini J this is not a different test to the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in Parole hearings as explained in DSD was binding on Saini J.
29. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
30. Further while the views of the professional witnesses must 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.

Procedural unfairness

31. 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.
32. 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;
 - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
 - (f) the panel was not impartial.
33. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Error of law

34. An administrative decision is unlawful under the broad heading of illegality if the panel:
- misinterprets a legal instrument relevant to the function being performed;
 - has no legal authority to make the decision;
 - fails to fulfil a legal duty;
 - exercises discretionary power for an extraneous purpose;
 - takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - improperly delegates decision-making power.
35. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

The reply on behalf of the Respondent

36. To date no representations have been received from the Respondent in response to the Application.

Discussion

37. The decision not to direct release in this case was made by a single Parole Board member. That member is referred to as an “MCA member”. Members of the Parole Board initially consider references from the Respondent in a process called *Member Case Assessment*. At this stage of the parole process the MCA member will assess whether there is sufficient material upon which to progress the review. The MCA member will also consider whether the case is one which can be fairly concluded on the basis of a decision on paper without an oral hearing, or whether the case should be scheduled for an oral hearing, at a future date.
38. In this case after an initial assessment, the case was adjourned on two occasions for further information and legal representations on behalf of the Applicant. Thereafter, having considered the totality of the evidence, the Panel/MCA member found that the matter was one which should be concluded with a paper decision, rather than sent for an oral hearing.
39. It is that paper decision which is the basis of this application for reconsideration **NOT** the later decision of the DM to refuse an application to direct an oral hearing.
40. I move now to consider the grounds put forward by the Applicant.
41. Sadly, this is a case in which the Applicant, as his solicitor acknowledges, has considerable mental health vulnerabilities and holds paranoid beliefs.
42. I find that the Application conflates the challenge to the decision not to hold an oral hearing with the submission that, in some way, the decision not to direct release itself was flawed, despite the fact that it is not submitted that the decision not to release can be impugned on the ground of irrationality.

43. It is worth repeating that the reconsideration mechanism relates to the substantive decision of February 2024 and not to the refusal of the DM to direct an oral hearing and, accordingly, I find that the submission at paragraph 16 of the Application that the decision of the DM was procedurally unfair is not a matter for me.
44. In addition, Grounds 1(2) and (2) (adopting the numbering used by the Applicant's solicitor) relate to the conclusions reached in the DL to support a decision not to release and are therefore, as I find, matters for the Panel's judgement upon consideration of all the evidence and involve no procedural unfairness.
45. As to Ground 1(1) the Panel makes clear that it has applied Osborn and I take the phrase "*a dangerousness sentence and has yet to complete any risk reduction work*" as referring to some of the reasons for the Panel finding that it had sufficient information to make a full risk assessment.
46. The gravamen of the Application is in fact the submission that it was procedurally unfair not to direct an oral hearing in this case.
47. As did the Panel, I have carefully considered the principles and guidance contained in Osborn together with the Applicant's overarching rights to a fair hearing and procedural fairness.
48. In Osborn the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the Judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one.
49. Thus, whilst Osborn contains a strong indication that decision-makers must exercise care when deciding whether or not to order an oral hearing, fairness will not require an oral hearing in every case as it may be possible to fairly determine the matter on the papers without an oral hearing taking place on the basis of all the evidence contained within the dossier including the legal representations made on behalf of a prisoner.
50. It is to be remembered that the sole issue which the Parole Board was asked by the Respondent to consider was whether or not it would be appropriate to direct the Applicant's release.
51. In this case the Applicant's conditional release date was over two years away and he had not been the subject of recall. Whilst the likelihood of release is not a relevant consideration when assessing whether or not to hold an oral hearing, it is noteworthy that the Applicant was not seeking release and there is no indication of what case was to be presented on his behalf or that any professional views were to be tested or any evidence was to be challenged.
52. The Applicant has a legitimate interest in participating in an oral hearing but there is no suggestion here that there was a dispute as to facts, that the Panel needed to see and hear from the Applicant in order to properly assess risk or, indeed, as to whether it was, in fact, the Applicant's wish that an oral hearing take place.
53. Indeed, it is difficult to discern the presence of any of the relevant factors which might point towards the need for an oral hearing and the position taken on behalf of the



Applicant seems throughout to have been based upon his mental health diagnoses, his anxiety and depression and his lack of faith in the criminal justice system.

54.I find that, by applying the appropriate principles to all the circumstances of this case, I am satisfied that fairness did not require the holding of an oral hearing and that the decision of the Panel to conclude the review without one was in no way procedurally unfair.

55.Finally, for the sake of completeness as it appears to be suggested that the Panel should not have concluded that the Applicant should not be released, I confirm that I am satisfied that the Panel set out its concerns and conclusions with considerable clarity and that it took proper account of the evidence and the views of the professionals 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.

Decision

56.I find that the Application is without merit and, for the reasons I have given, do not consider that the decision was procedurally unfair or (although this has not been pleaded) irrational and, accordingly, the application for reconsideration is refused.

PETER H. F. JONES
31 May 2024