

[2020] PBRA 168

## **Application for Reconsideration by Jones**

### **Application**

1. This is an application by Jones (the Applicant) for reconsideration of a decision by a Parole Board Panel by way of a Decision, dated 5 October 2020, refusing to direct his release and recommending that he be transferred to open conditions.
2. The review had begun by way of oral hearing on 12 June 2020 but was adjourned for additional information and reports, to be concluded on the papers, following receipt of directed reports. The intention to conclude on the papers had been indicated in the Adjournment Notice and Directions dated 18 June 2020 and the submissions from the Legal Representative were based on the assumption that this course would be followed.
3. I have considered this application on the papers. These comprise of the up-dated dossier comprising 641 pages, including the detailed Adjournment Notice and Directions, and the application for reconsideration.
4. The Reconsideration Assessment Panel, on enquiry, was told that the Panel decision was made, on the papers, without any concerns being raised by the Panel as to the adequacy of the Risk Management Plan (RMP) or seeking additional representations as to those concerns or the possibility of the oral hearing being reconvened.

### **Background**

5. On 11 August 2006, the Applicant, having pleaded guilty to one charge of Section 18 Wounding with intent to cause Grievous Bodily Harm, was sentenced to an indeterminate sentence of Imprisonment for Public Protection with a minimum term of 2 years 8 months and 17 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 27 April 2009. On a second charge of Assault Occasioning Actual Bodily Harm, he was given an extended sentence of imprisonment of 18 months with an extended licence period of 3 years.

### **Request for Reconsideration**

6. The application for reconsideration comprises a 5 page document consisting of 22 paragraphs, prepared by the Applicant's Legal Representative.



7. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issues of irrationality or procedural unfairness are dealt with below. The application specifically states that the application is not made on the grounds of irrationality but on the grounds of procedural unfairness.
8. The distinction between irrationality and procedural unfairness is, on occasions, indistinct and, insofar as it might be thought that, in this case, irrationality might be an issue, the Reconsideration Assessment Panel (RAP) has considered both aspects in coming to its decision.
9. Any application relating to recommendations as to open conditions is not within the scope of the Reconsideration Mechanism (see **Panasuik [2019] PBRA 2**). The RAP has not, therefore, considered any potential issues in relation to open conditions save in so far as they are relevant to the statutory limbs of the challenge.
10. The application submits that *"the failure of the Probation Service to provide a robust and full risk management plan should not have automatically led to a negative decision. It was only to the panel to set further directions specifying the perceived gaps and asking them to specifically address or indeed reconvene the oral hearing"*. Elsewhere in the Application, it is submitted *"that the Board should have further adjourned for a full risk management plan."*
11. In outlining submissions as to the relevant law, the application specifically refers to the principles in the case of **Osborn & Anor v The Parole Board [2013] UKSC 61** and suggests that a key proposition in ensuring a fair hearing is that the decision-maker should ensure that all relevant information is obtained and properly tested.

### **Response from the Secretary of State**

12. The Secretary of State (SoS), by e-mail dated 27 October 2020, indicated that no representations were made in response to the application.

### **Current parole review**

13. The Panel considered a dossier of 617 pages and its decision incorporated, in detail, a record of the evidence given at the adjourned oral hearing on 12 June 2020 and provisional views as to the outcome of the review.
14. In particular, at that stage, the Panel indicated that it had no difficulty in concluding that it was not necessary for the Applicant to remain in closed conditions, but that its difficulty was in determining whether to direct release or recommend a return to open conditions. It accepted that there was considerable support for release contingent on the provision of a robust risk management plan. The Panel indicated that, before making a decision, it required a fully detailed risk management plan and expressed a hope that, during the interim period whilst at the prison, he could be contacted by a member of a mental health support team from the area of proposed resettlement in order that preliminary work could begin to arrange assistance in the event of release.

15. Detailed directions were given for reports from the Applicant's Offender Manager (OM), Offender Supervisor (OS) and a Prison Psychologist, all of whom had given evidence on 12 June 2020. In particular, a fully detailed RMP was to include a number of specific requirements, including confirmation of the regime for drug and alcohol testing at the proposed designated accommodation, an assessment of whether either/or he could be fitted with a GPS and/or sobriety tag on release, confirmation that he would be managed in accordance with the personality disorder pathway, contact with his support network and a description of the assistance which he could be offered by the mental health support team, including mother and/or partner if appropriate and a number of other specific requirements, including details of assistance which would be offered by the mental health support team.
16. On 17 September 2020, the Prison Psychologist submitted an addendum report. Due to time constraints, she had not had the opportunity to consider the directed OM report with the detailed RMP but, in accordance with her evidence given orally, advised that, subject to a "*robust release and risk management plan*", the Applicant could be managed in the community and regretted that she had not seen the report despite her attempts to do so. She further advised that she was unconvinced that a progressive move to open conditions would be necessary.
17. On 18 September 2020, the OM submitted a report containing what he described as a comprehensive risk management plan, including proposals as to management in the community both during and after a period in designated accommodation, a detailed outline of risk factors, formal assessments of levels of risk, backed up by standard and additional licence conditions.
18. In submissions dated "September 2020", on the assumption that the review would be concluded on the papers, the Applicant's Legal Representative submitted that the RMP was robust, that the OM supported release, and that open conditions were unsuitable.
19. In its decision, the Panel described the RMP as essentially the same as the one previously provided, which it said was not considered to be sufficiently robust and was the core reason why the hearing was adjourned. It mentions, in particular, that there was no mention within the plan of additional support from a mental health support team which, it suggested, was considered by the psychologists to be an appropriate additional form of support. The Panel found the choice between release and a transfer to open conditions to be very finely balanced and specifically said that if the Panel had been presented with a risk management plan that fully addressed the concerns set out in the adjournment notice, it might well have been satisfied that his risk could be safely managed in the community.
20. Having concluded that risks remained too high to justify release on the proposed RMP, the Panel, in brief terms, found that the Applicant had addressed his core factors sufficiently to warrant a transfer to open conditions and commented that although the Applicant would be disappointed with the outcome, it did not consider that he needed to be tested in open conditions for very long.

## **The Relevant Law**

21. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

22. In **R (on the application of 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".*

23. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

24. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

25. Under the principles expressed in **Osborn**, the key test is whether the fairness to a prisoner requires an oral hearing, bearing in mind the facts of the case and the importance of the issue at stake. Factors to be considered include:

- Whether the evidence can be considered without the need for it to be tested orally or in person;
- Despite the duty of the Parole Board to provide a swift review, the test is not the likelihood (or otherwise) of release or the need to save time, expense or trouble;
- All evidence must be given the appropriate scrutiny with particular care in relation to issues of fact which may be disputed or open to explanation or mitigation;
- Whether the prisoner wishes to have an oral hearing and the legitimate interest in being able to participate in a decision which has important implications for him;
- The evidential effect of the conclusion of pending criminal proceedings;
- Whether there are psychological issues which need to be tested;
- The decision is not confined to a determination of whether or not to direct release (or recommend a transfer to open conditions) but includes other aspects, such as comments or advice in relation to the prisoner's treatment or offending behaviour work which may be required, which will, in practice, have a significant effect on his management in prison or on future reviews.

## Discussion

26. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel, having clearly considered with care the documents in the dossier gave a clear and reasoned decision, on that basis, and adopted a correct test for its decision.

27. In light of my decision in relation to procedural fairness, it is not necessary to scrutinise further the details of the decision.

### **Procedural Unfairness.**

28. I am, however, concerned about the decision of the Panel to conclude this case on papers and without either giving further directions for specific additional information or reconvening the hearing so as to give opportunity for the professional witnesses, particularly the OM, to meet its concerns about the RMP and to outline in more detail their views as to any need for progress to open conditions. It would have also given the Prison Psychologist an opportunity to consider the OM report and comment on its suitability.

29. I find, too, that the Legal Representative should also have had the opportunity, when aware of the Panel's concerns, to make further submissions. Her written representations were made against a background of an adjournment notice clearly indicating that its preferred decision would be to release and when she had no indication that the revised RMP, described by the OM as comprehensive, might be considered insufficient.

30. I have come to my decision bearing in mind the principles enunciated in **Osborn** and specifically the need for evidence to be given careful scrutiny where open to explanation, whether that should be done orally or in person and the legitimate interest of a prisoner in being able to participate in that decision. It seems to me that following receipt of the OM report containing what was described as a comprehensive risk management plan, the Applicant had a reasonable expectation, one clearly shared by his solicitors, that the Panel's adjournment requirements had been met so as to justify release. I find that, if the Panel continued to feel that their specific requirements had not been met, it was only by having a further oral hearing that the quality of the RMP could be properly assessed and the true level of risk established.

### **Decision**

31. For the reasons I have given, I find that there was procedural unfairness, requiring reconsideration of the Panel's decision. Accordingly, I have decided that this application be granted.

32. In coming to this decision I am mindful of the duty on the Panel under **Article 5 (4) of European Convention of Human Rights (ECHR)** as interpreted by the European Court of Human Rights to ensure a speedy determination of cases. This is a decision made in the very narrow factual context of this case and should not be thought to impinge on the normal responsibility of the Panel to decide a case on the basis of the evidence placed before it. It is no part of the duty of a Panel to identify specific weaknesses in the case of either prisoner or Secretary of State and to provide opportunities for rectification. In this case, however, the Panel had

specifically required additional information and I take the view that, through no fault of the prisoner, the Offender Manager had produced a plan which he, professionally, clearly felt met the Panel's needs, and that, if the Panel remained unsatisfied, the opportunity should have been for the Offender Manger to clarify details of and, if appropriate, to make adjustments to it. The overarching principle of **Osborn** is fairness to the prisoner and, in this specific case, I do not consider that it has been met.

## **Directions**

33. I have no doubt that it is appropriate for the original Panel to continue to deal with the case. It has heard all the relevant factual evidence and it remains only for the narrow issue of the adequacy of the RMP to be re-examined.

34. The following further directions are made:

(a) Time estimate – 2 hours. There should be an oral hearing which I consider suitable for telephone or video link but this is a matter to be reviewed by the Panel Chair.

(b) The re-hearing should be expedited.

(c) Up-dated reports should be prepared by the OM, OS and Prison Psychologist dealing with the issues raised in the Panel decision and with any significant developments since the oral hearing. These reports should be submitted by 1 December 2020 and the hearing listed as soon as possible thereafter. 14 days leave to any party to make representations as to directions or timetable.

(d) The need for any additional directions should be considered by the Panel Chair.

**Edward Slinger**  
**11 November 2020**