

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision of the Parole Board dated 2 February 2023 following an oral hearing refusing his application for release and recommending to the Secretary of State that he should be transferred to open conditions.
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)) 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.
3. I have considered the application on the papers. These are the application, the decision letter issued by the Parole Board, and the dossier.

Background

4. On 9 January 2012 the Applicant was sentenced to imprisonment for public protection with a minimum period to serve of 5 years (less time spent on remand) for each of the offences concurrently of causing grievous bodily harm with intent, possession of a firearm with intent to endanger life, and possession of ammunition with intent to endanger life. At the same time a Hospital Direction and a Restriction Order were made under the Mental Health Act 1983. He was aged 21 when he committed the offences in 2010, and aged 23 when sentenced.

Request for Reconsideration

5. The application for reconsideration is dated 20 February 2023. It has been lodged by solicitors acting for the Applicant but drafted by him. Annexed to the application form are written submissions which extend to 19 pages, with an additional 2 pages of submissions which concern recategorization, with annexed supporting documents.
6. The grounds for seeking a reconsideration are extensively set out. They assert that the decision is marred by irrationality and procedural unfairness. Many of the submissions relate to the inclusion of sexual assault allegations made by a relative of the victim of the index offending within the Applicant's dossier.
7. I consider that the grounds can be distilled as follows:



- (1) That the decision contains an error of law because the panel did not apply the correct decision for release, it being said that an assessment of suitability for open conflicts with the release decision.
- (2) That the decision is irrational / procedurally unfair because:
 - (a) The sexual assault allegations made by the relative of the victim were considered by the panel when they should not have been included in the dossier. The panel failed to make findings of fact in relation to the allegations despite being invited to do so.
 - (b) The panel failed to give sufficient weight to:
 - (i) the aggression of the victim at the time of the index offence and the mitigating factors / responsibility taken by the Applicant after the index offence;
 - (ii) the trauma programme conducted in hospital;
 - (iii) the '*duress*' suffered by the Applicant in relation to an incident in custody where he claimed a prisoner made threats to him;
 - (iv) the '*data protection issues*' arising from the inclusion of the sexual assault allegations and management of the Applicant's HCR20 report;
 - (v) the Applicant's accounts of his own prison behaviour which includes the effects of an IPP sentence on the Applicant, the damage to relationships caused by the failure to place the Applicant in Category D conditions and a Lack of prison resources which gives limited access to keyworkers allowing problems build up;
 - (vi) the submissions made by the Applicant about how he appreciated the seriousness of his index offending, the panel concluding that there was no evidence to suggest he appreciated the seriousness of the index offending.
 - (c) There was a general failure to provide adequate reasons for the decision.
- (3) That the decision is procedurally unfair because:
 - (i) The Applicant had to '*apply*' for Category D conditions when this should have been '*on hold*'.
 - (ii) There is a lengthy timetable allocated to tariff expiry parole hearings.
 - (iii) The IPP sentence itself is unfair.



Current parole review

8. On 9 October 2018 a panel of the Parole Board recommended the Applicant's progression to open conditions, a decision endorsed by the Secretary of State. However, due to adverse behaviour the Applicant did not transfer to open conditions.
9. The Secretary of State referred the Applicant's case to the Parole Board on 20 February 2019, with it being assessed at MCA on 9 September 2019 and directed to oral hearing. On 25 February 2020 the Secretary of State made a second referral to the Parole Board for advice. The 2 referrals were combined in February 2020. The hearing was deferred due to covid restrictions. It was concluded on the papers with a negative decision. The Applicant made a successful application for reconsideration.
10. An oral hearing took place on 15 April 2021, with it being adjourned for the production of psychological risk assessments (the Applicant having previously refused to participate in the assessments required). Evidence was heard at oral hearing on 11 October 2021 and adjourned for conclusion on the papers. A decision was made in December 2021. The Applicant made a further successful application for reconsideration.
11. On 1 July 2022 the panel, which included a psychiatrist, a psychologist, and an independent member heard evidence from the Prison Offender Manager, Community Offender Manager, prison appointed psychologist and the Applicant. An additional 78 pages of '*densely packed information*' was submitted to the panel after the hearing. On 5 August 2022 the panel were notified of adverse developments and reconvened an oral hearing so that this information could be fully considered with the Applicant. The reconvened oral hearing took place on 24 January 2023 with the dossier by this stage comprising 929 pages. The Applicant was legally represented at both hearings. Additional papers were provided by the Applicant after the hearing and considered by the panel. A decision letter was issued on 2 February 2023.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 2 February 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions. The legal framework is contained within a proforma section of the decision letter.

Parole Board Rules 2019 (as amended)

13. 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)).

14. 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



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



www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk



@Parole_Board



0203 880 0885

decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

15. 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."

16. 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.

Procedural unfairness

17. 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.

18. 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.

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

20. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision.

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



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

21. On 14 March 2023 the Respondent informed the Parole Board that he did not wish to make any representations in response to the application for reconsideration.

Discussion

22. In dealing with grounds for reconsideration, for matters of basic importance should be stressed. Firstly, the reconsideration mechanism is not a process by which the judgement of the panel can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute their own views of the facts in place of those found by the panel, unless, of course, it is manifestly obvious that there was an error of fact of an egregious nature which can be shown to have directly contributed the conclusion arrived at by the panel.

23. Secondly when deciding whether the decision of the parole board was irrational, due deference must be given to the expertise of the board in making decisions relating to parole.

24. Thirdly, where a panel arrives at the conclusion, exercising its judgement based on the evidence before it having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of panel.

25. Fourthly, in many cases, there can be more than one acceptable decision that the panel can be entitled to arrive at depending on its view of the facts.

26. In considering ground 2, I have kept in mind the decision of the Court of Appeal in **Pearce R (On the Application Of) v Parole Board of England and Wales & Anor [2022] EWCA Civ 4** which is relevant to the question whether and to what extent it was necessary for the panel to make findings of fact on the balance of probabilities relating to the allegations of sexual assault. This case has been the subject of an appeal to the Supreme Court, and the Judgment is awaited.

Ground 1

27. The reconsideration application acknowledges that the panel correctly set out in the decision letter the test for release and for open conditions. However, it is said that the panel mixed the tests for open and release. The application puts it in the following way:

"The 2023 decision made by the panel who has denied [the Applicant] release was flawed. The correct test is whether it is necessary for the protecting the public that the prisoner ought to be confined to custody whether considered to benefit or not the prisoner in transferring to an open prison this was irrational and procedurally unfair to apply this in considering the prisoner for risk to the public harm with matters of imminence for public protection being the issue, it was not properly followed in the guidelines for panel members deciding not



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

to grant prisoner for release post tariff (on the grounds of interpersonal relationship difficulties) the decision letter has not set out the reason as why it is necessary for the public protection vs prison management issues listed in their decision giving none of the risks identified were risk to public harm but rather an issue for prison management involving interpersonal difficulties' Rotls Resettlement plans Trust & Complaints or being the criteria for open conditions, which does not amount to risk of harm for the protection of the public which stated as the test for release."

28. The decision letter sets out the legal framework to be applied in the applicant's review. It identifies the test for release which is to be considered by a panel first, before considering if a recommendation for transfer to open conditions can be made. This is correct in law and in accordance with the Secretary of State's referral.
29. The decision letter carefully identified that "*The first test for the panel is whether [the Applicant] meets the statutory test for release, namely whether he no longer needs to remain in custody for the protection of public.*" It then concluded that he did not meet the test, setting out its detailed reasons for this conclusion.
30. Having reached the conclusion that it would not direct release the decision letter then moved on to consider whether a period in open conditions was essential to inform future decisions about release and to prepare for possible release on licence into the community. It concluded that a period in open conditions was essential, again setting out its detailed reasons for this conclusion, along with its conclusion that the Applicant posed a low risk of absconding from open conditions.
31. There is no mixing of the tests within the decision letter, quite the opposite. The panel considered the evidence in relation to both tests as it must do and there is no error of law, or procedural irregularity in the way it has done so.

Ground 2

Inclusion of the sexual assault allegations in the dossier

32. The Applicant has throughout his review process been exercised by the inclusion in his parole dossier of the sexual assault allegations made by the relative of the victim. He essentially considers that because no further action was taken in relation to these allegations by the police that they should be expunged from his dossier. In his submissions he states that he requested the panel to make a finding of fact in relation to these allegations and that their failure to do so was irrational. He submits that their consideration as part of the index offending is procedurally unfair.
33. The Applicant was convicted on an accepted basis of plea. The Judge's sentencing remarks set out the background to the index offence which involved the victim, the brother of a girl aged 13 or 14, being unhappy about the relationship the Applicant was having with her. It was accepted that the victim



made contact with the Applicant in order to bring the relationship to an end. The girl was said to be present in the vehicle at the time of the index offence when the Applicant discharged a handgun through the windscreen of the vehicle, causing his victim to be shot in the stomach.

34. The Applicant has accepted that he had a relationship with the girl. He states that she represented to him that she was 17 when they met. There is a dispute in evidence within the dossier about whether this relationship was sexual/continued to be sexual after he became aware of her true age. The relationship with this girl has led to the Applicant being assessed as a medium risk of serious harm to children, and a high risk of serious harm to known adults (one of those adults being the girl who is now an adult). Psychological evidence was received by the panel that stemming from this relationship there was considered to be a history of problems with relationships which formed part of the formulation of the risk factors for the Applicant.
35. The panel correctly recorded in the decision letter that the Applicant has never been convicted of a sexual offence and that the police took no further action in relation to the allegation he had caused a female child to engage in a sexual act. They observed that the Applicant had devoted considerable time and energy to his concerns that the allegations remain in his dossier and that they are taken into account by professionals when assessing his risk.
36. The Applicant had a full opportunity to put his case in relation to the allegations and the relationship with the girl to the parole panel. The professionals involved in the Applicant's case consider that this relationship should be taken into account when assessing risk.
37. It is the panel's role to assess risk and to balance relevant considerations, taking into account all of the evidence. No findings of fact were made in relation to the allegations and it is not stated within the decision expressly or implicitly that the decision not to direct release was based upon these allegations. Indeed the panel observed that it was the Applicant who was "preoccupied" with the inclusion of the allegation of sexual offending and that they considered whilst "these concerns may be legitimate, they have unfortunately distracted [the Applicant] from focusing on the nature of the index offence and the triggers for violent offending. [The Applicant] holds the view that these concerns have contributed to a lack of progress in the custodial environment. In the panel's view, [the Applicant] has struggled to progress to the custodial system due to difficulties in managing interpersonal relationships with a range of professionals and periods unsettled and at times aggressive behaviour."
38. I am satisfied both that the panel was entitled to assess all of the evidence before it and that it was not necessary to make a finding of fact in relation to the sexual assault allegations in order for the panel to reach its conclusion. It was the relationship itself, which was admitted by the Applicant, rather than the truth or not of the allegations which had a bearing on risk management. I therefore dismiss this ground.

Failing to give sufficient weight



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



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



@Parole_Board



0203 880 0885



39. The Applicant has identified a number of issues that he considers the panel failed to give sufficient weight to in reaching their decision. He also makes a more general complaint that adequate reasons were not provided in the decision letter.
40. It is for the panel hearing the Applicant's case to assess the weight that they wish to place on each piece of the evidence before them. They are uniquely qualified to do so, having heard evidence from the Applicant and the other witnesses.
41. The panel's decision letter was clear and reasoned, focusing on the elements that the panel considered were most relevant to its risk assessment. Each of the issues raised by the Applicant were considered. The panel as the designated fact finders are entitled to decide the weight to be attached to the evidence. They did this in a reasoned decision letter. I find nothing in these aspects of the ground.

Ground 3

42. The applicant submits that the IPP sentence to which is subject is itself unfair and complains that he has been subject to a lengthy timetable which is allocated to tariff expired parole hearings. It is not the function of the reconsideration mechanism to address the sentence imposed by a criminal court nor the consequences of an underfunded criminal justice system. Neither is the reconsideration mechanism the right route to address issues of re-categorisation. Panels of the parole board can only make recommendations for transfer to open conditions.
43. In the premises there is nothing in this ground.

Decision

44. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Angharad Davies
16 March 2023

