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[2022] PBRA 12

Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 ("the 2019 Rules") that the Applicant was unsuitable for release ("the Decision"). The letter by which the Decision was communicated is dated 13 December 2021 (the Decision Letter).

Background

2. The Applicant was sentenced to imprisonment for public protection in January 2012 after pleading guilty to wounding with intent to cause grievous bodily harm and possessing a firearm or ammunition without a firearms certificate. The minimum tariff expired on 6 December 2015.

3. The Applicant was aged 23 when he was sentenced and is now aged 33.

Current parole review

4. The Decision was made on the Secretary of State's second referral of the Applicant's case to the Parole Board during the sentence referred to above.

5. The Decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing conducted by remote video links in October 2021. The panel comprised of two Independent Members of the Board and a Psychologist Member.

Application and response

6. The Applicant was represented at the oral hearing of his case by solicitors but initially applied for reconsideration in person without the assistance of a representative, in lengthy handwritten submissions attaching several documents. Applications were subsequently made to extend time for the application to enable the Applicant to give instructions to and obtain the assistance of the legal representative in relation to the application. The extension was granted on the basis that the Applicant had apparently been admitted to hospital in the time between the oral hearing and the deadline for the application for reconsideration of the Decision, which time had also encompassed the Christmas holidays.

7. In directions issued by email on 7 January 2022, I directed as follows:

   '1. Submissions are invited from the Secretary of State and the prisoner, through his representatives, as to whether an extension should be granted and for the grounds to be provided by the prisoner through his representatives. If made by the prisoner's legal representatives, the prisoner's grounds must include all of the grounds relied on by the prisoner, including any grounds raised by him in his earlier direct submissions to the Board, if such grounds are maintained.

   2. The deadline for the above submissions by the parties is not later than Friday 14 January 2022.

   3. The Secretary of State shall then have until not later than 21 January to make any further reply to the prisoner's grounds.'

8. A further extension of time was given by which the current written submissions for the Applicant by his legal representative have been admitted. The submissions are dated 14 January 2022 but were not received by the Board until 18 January 2022. The Respondent has been invited to comment and has not objected to the extensions of time.

9. I have considered the application on the papers comprising:

   a) A dossier of 596 numbered pages, including a copy of the Decision Letter; and
   b) Written submissions for the Applicant the Applicant's Solicitors, dated 14 January 2022 but submitted on 18 January 2022 ("the 18 January 2022 Submissions").

10. The final paragraph of the Applicant's submissions states as follows:

    'In addition to these formal representations, we invite the adjudicator to refer to personal representations made by the Applicant assert that the Decision is marred by procedural unfairness.'

11. I decline that invitation with reference to my 7 January 2022 direction that, if made by the prisoner's legal representatives, the prisoner's grounds must include all of the grounds relied on by the prisoner, including any grounds raised by him in his earlier direct submissions to the Board, if such grounds are maintained.

The Relevant Law

12. Rule 28(1) of the 2019 Rules 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.

Irrationality

13. 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."*

14. 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.

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

Procedural unfairness

16. 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.

Consideration

17. The 18 January 2022 submissions assert that the Decision is marred by irrationality and procedural unfairness.

18. Regarding irrationality, it is submitted that the Decision is irrational in departing from the assessment by the previous, September 2018, panel that the Applicant was suitable for open conditions. The assessment of suitability for open conditions is not within the scope of Rule 28(1) of the 2019 Rules, unless that assessment can be said to have influenced a decision regarding suitability for release. Moreover, the Board's assessment is necessarily focused on the present and a decision by a previous panel of the Board does not bind a successor panel in any way, save that a successor panel ought properly to explain any disagreement with a previous panel's finding of fact.

19. The Board had proper regard to intervening events of significance, including an assault on a prison officer in December 2018, which had been found to be proven on adjudication, disruptive behaviour, mistrust of professionals, and argument against rules and restrictions the Applicant did not agree with, which had frustrated his progression to open conditions. The relevance of those considerations for the Board was that such 'non-compliance' could continue into the community, with adverse consequences for risk management.

20. It is submitted that there is irrationality or an absence of adequate reasoning in the Board's assessment that the factors that are likely to have led to the Applicant committing the index offence are unknown, when the Board had the benefit of a risk assessment by a psychologist. The Decision states as follows:

> "*The problem facing the panel is that, even now, nobody understands why the offences happened, committed by someone with no history of violence. How can it be said that you have the strategy to avoid a recurrence of serious violence when there is no evidence that you have addressed your use of violence?"*

21. The rhetorical question posed in the extract above accords with the psychologist's assessment that there were outstanding treatment needs associated with the Applicant's insight into his use of violence, his emotional management and his ability to be able to manage these in the future. However, the Decision does not reveal why the Board considered that the formulation provided in the psychological risk assessment was unpersuasive, nor does the Decision reveal why the schema-focused work that had been completed by the Applicant was considered to be inadequate.

22. It is also submitted that the Board erred in its approach to the assessment of the Appellant's risk to children, and in particular its approach to allegations that the Applicant had unlawful sexual intercourse with a female under 16 when he was aged 21. The Board did acknowledge that the Applicant had no relevant conviction. However, the Decision refers to a reference in the dossier to a psychology report by Psychologist "*who said that risk to children was an important area of risk that needs to be addressed*", which is a proposition that the Board appears to have adopted without sight of the report or of the reasons for that assessment, and which it has not adequately explained in my consideration. It is moreover apparent that the Board did not disregard the allegation as it should have done having reached the conclusion that it was not in a position to make a finding of fact on the evidence: **Pearce, R (On the Application Of) v Parole Board of England and Wales & Anor [2022] EWCA Civ 4**.

23. I consider that the errors I have identified are serious enough to establish irrationality in the Board's Decision.

Decision

24. Reconsideration is accordingly directed.

Timothy Lawrence
25 January 2022

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