the Parole Board
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[2024] PBRA 217

Application for Reconsideration by Smith

The Application

1. This is an application by Smith ('the Applicant') for reconsideration of a decision of the Parole Board ('the Board') to decide on the papers not to direct the Applicant's release on licence. The decision was made on 23 September 2023 by the Chair of the panel to which the case had been allocated for an oral hearing.

2. The Applicant is serving

   (a) an extended determinate sentence (comprising a custodial term of 6 years and licence extension period of 3 years) which was imposed on 4 November 2014 for a number of serious offences; and

   (b) a consecutive determinate sentence (30 months) which was imposed on 4 July 2016 for an offence committed in a psychiatric hospital in December 2014. The combined sentence will expire in March 2025. The history of the case will be discussed below.

3. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that applications for reconsideration of panel decisions may be made, either by the prisoner or by the Secretary of State for Justice, in eligible cases. The Secretary of State is the Respondent to any reconsideration application made by a prisoner, and will be referred to as such in this decision.

4. Rule 28(2) specifies the types of cases in which reconsideration applications may be made. They include cases, like the Applicant's, where the prisoner is serving an extended determinate sentence.

5. A reconsideration application may be made on the ground (a) that the panel's decision contains an error of law and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

6. In this case an application for reconsideration has been made by the Applicant's solicitors on his behalf. The application has been made within the prescribed time limit. It is therefore an eligible case.

7. I am one of the members of the Board who are authorised (as 'Reconsideration Panels') to make decisions on reconsideration applications, and this case has been allocated to me. I have not found it necessary to receive any oral evidence and I have considered the application on the papers.

8. The documents which have been provided to me and which I have considered for the purposes of this application are:

   (a) The dossier of papers provided by the Respondent in the Applicant's case (the dossier now runs to 1339 numbered pages and includes the Panel Chair's decision);

   (b) The representations made by the Applicant's solicitors in support of the application for reconsideration; and

   (c) An e-mail from the Public Protection Casework Section of the Ministry of Justice ('PPCS') stating on behalf of the Respondent that she does not wish to submit any representations in response to this application.

Background and history of the case

9. The Applicant is now aged 45. He has a substantial criminal record (both in the USA and in this country). He has mental health difficulties and has spent significant periods in prisons and in psychiatric hospitals.

10. The offences for which he is serving the extended determinate sentence were robbery (x2), attempted theft, theft from a dwelling and having a blade or sharply pointed article in a public place. When prosecuted for those offences he was found 'unfit to plead', and in a 'trial of the facts' he was found to have done the alleged acts and was sentenced accordingly.

11. After receiving the extended determinate sentence, he was initially detained in a psychiatric hospital but was transferred to the prison system after assaulting another patient (this was the offence for which he received the consecutive 30 month sentence).

12. On 12 September 2018 the Applicant was released on licence (automatically as he had reached his conditional release date) to reside at a probation hostel ('AP'). His time on licence was not a success. His behaviour was poor and the AP decided to withdraw his bed space. Probation then decided to ask the Respondent to revoke his licence as, without the bed space, his risks could not be managed safely in the community. His licence was duly revoked by the Respondent on 3 October 2018. Since then he has remained in custody, either in prison or in a psychiatric hospital.

13. His case has now been referred by the Respondent to the Board three times to decide whether he should be re-released on licence. On the first two occasions it was decided by the Board that he did not meet the test for re-release.

14. The present review commenced in April 2023. In July 2023 a MCA panel considered the case but adjourned it for more information to be obtained. In November 2023

the MCA panel directed that the case should proceed to an oral hearing. It appeared that there had been some improvement in the Applicant's behaviour, and there was a possibility that he would be considered suitable for a place in a psychiatric hospital or a transfer to a special unit in a prison.

15. Unfortunately, once further information was provided, it showed that there were ongoing reports of instability and concerning behaviour on the Applicant's part, and the Applicant was not considered suitable for either of the above moves.

16. The oral hearing was scheduled to take place on 23 April 2024 and the panel convened on that day. Unfortunately the Applicant was not produced to take part in the hearing. That was because it appeared that he was 'under the influence' and unfit to attend the hearing. A nurse from Healthcare had visited him on the wing and confirmed that he was under the influence: protocol required that he would remain on the wing.

17. The events of that day and the period which followed were accurately described by the Panel Chair in her decision. They will have to be described in more detail below (see paragraph 39), but it is sufficient at this point to record that the panel ultimately decided that the Panel Chair should conclude this review on the papers with a decision not to direct the Applicant's release on licence. This is a procedure authorised by the Parole Board Rules.

18. The Panel Chair's decision was duly issued on 23 September 2024, and the Applicant's solicitors submitted this application for reconsideration of her decision on 7 October 2024.

The Relevant Law

The test for re-release on licence

19. The test for re-release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The rules relating to reconsideration of decisions

20. Under Rule 28(1) of the Parole Board Rules 2019 (as amended in 2022) 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. The grounds on which an application may be made are as set out above (error of law, irrationality or procedural unfairness). A decision not to recommend a move to an open prison is not eligible for reconsideration.

21. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
(i) A paper panel (Rule 19(1)(a) or (b)) or
(ii) An oral hearing panel after an oral hearing, as in this case (Rule 25(1)) or
(iii) An oral hearing panel which makes the decision on the papers (Rule 21(7)) as in this case.

Error of law

22. Examples of administrative decisions made by a panel of the Board which may be ruled to be unlawful under the broad heading of illegality are where the panel:
    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;
    d) exercises discretionary power for an extraneous purpose;
    e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    f) improperly delegates decision-making power.

23. These are not the only possible reasons for a finding of error of law but they are the ones most commonly alleged. The task of the High Court or a Reconsideration Panel in evaluating whether a panel's decision is unlawful 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 principle.

Irrationality

24. The power of the courts to interfere with a decision of a competent public authority on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene as follows: *"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 Parole Board is a public authority for that purpose, and the Wednesbury test therefore applies to applications to the High Court for judicial review of a panel's decision. It also applies to applications to Reconsideration Panels of the Board for reconsideration of a panel's decision on the ground of irrationality.

25. In **R (DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** ('the Worboys case') a Divisional Court applied this test to Parole Board decisions in these words: "*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*." The same test of course applies to '*no release'* decisions.

26. In **R (on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)** Mr Justice Saini set out what he described as a more nuanced approach in modern public law. This approach 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*". This formulation of the 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)**.

27. As was made clear by Mr Justice Saini, this is not a different test from the Wednesbury test. The interpretation of (and application of) the Wednesbury test in parole hearings (as explained in the Wednesbury and DSD cases) was of course binding on Mr Justice Saini. It is similarly binding on Reconsideration Panels.

28. It follows from these principles that in considering an application for reconsideration a Reconsideration Panel cannot substitute its own view of the evidence for that of the panel who heard the witnesses. It will only direct reconsideration on the ground of irrationality if the Wednesbury test is satisfied.

Procedural unfairness

29. 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.

30. Examples of procedural unfairness which may be a ground for quashing a panel's decision on this ground are where:

(a) express procedures laid down by law were not followed in the making of the relevant decision; or
(b) the party was not given a fair hearing;
(c) the party was not properly informed of the case against them;
(d) the party was 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.

31. These are not the only possible grounds for a finding of procedural unfairness but they are the ones most commonly alleged. The overriding objective is to ensure that the Applicant's case was dealt with justly.

The request for reconsideration in this case

32. As noted above this application was submitted on 7 October 2024 by the Applicant's solicitors on his behalf. The grounds advanced by the solicitors will be discussed below.

The position of the Respondent

33. As noted above, as a party to any parole proceedings the Respondent is entitled to submit representations to the Board in response to an application by a prisoner for reconsideration of a panel's decision. PPCS have indicated that the Respondent does not wish to submit any representations in this case.

Discussion

34. It will be sensible for me first to examine the arguments advanced by the Applicant's solicitors and then to examine the Panel Chair's reasons for deciding to conclude this review of the Applicant's case with a negative decision on the papers.

The legal representative's submissions

35. The solicitors' representations are helpful and detailed. They focus, as one would expect, on the question whether fairness required that there should be an oral hearing in this case. What is fair and what is unfair are of course broad concepts on which views can and often do reasonably differ.

36. The solicitors point to the leading case on this topic and to a number of subsequent cases in which it was held by the courts to have been unfair for Parole Board panels to make decisions on the papers instead of directing oral hearings.

37. The leading case is ***Osborn, Booth and Reilly v The Parole Board [2013] UKSC 61*** where it was emphasised by the Supreme Court that a decision whether to direct an oral hearing does not depend on whether there is a realistic prospect of such a hearing resulting in a direction for release but on whether it would be fair or unfair to decide the case on the papers.

38. As the solicitors rightly point out, it is impossible to give a list of all the possible reasons why fairness may require an oral hearing. The solicitors draw attention to a number of situations in which such hearings have been held by the courts to be required (see below). Everything depends, of course, on the facts of the particular case.

The Panel Chair's reasons

39. The Panel Chair's reasons are, like the solicitors' submissions, very detailed and helpful. To decide whether they are (a) in accordance with the law (b) rational and (c) procedurally fair, I can do no better than to set them out in full. They were as follows:

'[The Applicant] is serving an extended determinate sentence and therefore the [Respondent's] referral in this matter included only the issue of [his] re-release. The statutory test for release is that 'the Parole Board must not give a direction [for release] unless the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined…'

*'The presumption in favour of release as set out in the case of **R v Sim [2004]** applies to this review. [The Applicant] is serving the 'extension period' part of his extended sentence. Parole Board guidance notes that 'panels are required to reverse the test, applying a presumption in favour of release. In such cases, the panel should direct release unless positively satisfied that continued detention is necessary for the protection of the public'.*

'A panel should consider whether release would cause a more than minimal risk of serious harm to the public ***(R v King [2017], R v Johnson [2022], R v Dich and Murphy [2023]*** *and others).*

'[The Applicant's] hearing was adjourned on the day of oral hearing because he did not attend, having been kept on his wing due to suspected drug use. The panel chair issued directions for the results of the drug test that was anticipated, for (a) a statement from the nurse who assessed [the Applicant] on the day, for (b) entries on the NOMIS system, (c) for an updated security report and (d) for representations to be submitted. Having received new evidence, including the result of the drug test completed on the day of the hearing and representations, the chair indicated that consideration would be given to the possibility of concluding the review on the papers under rule 21 Parole Board Rules 2019 (as amended 2023).

'The rules provide that: Rule 21.—(1) Subject to the provisions of this rule, where … a panel have directed that a case should be determined at an oral hearing under rule 19(1)(c) or 20(5), a panel chair or duty member may direct that the case should be decided on the papers if an oral hearing is no longer necessary— (a) in the interests of justice; (b) to effectively manage the case; or (c) for such other reason as the panel chair or duty member considers appropriate, including where further evidence is received by the Board. The Board must notify the parties where it is considering making a direction to conclude on the papers and allow a period for representations.

'That notification was given by the Panel Chair in directions issued on 20 June 2024 and provided an opportunity for either party to provide further representations on the issue of a conclusion of the review without a further hearing. Further representations on behalf of [the Applicant] were received; no representations were received from [the Respondent]. The panel considered the dossier of 1303 pages including representations on behalf of [the Applicant].

'There were four sets of written representations in all in the dossier. The first, in June 2023, at the start of this review, sought an oral hearing if [the Applicant] were not to be released on the papers. The single member considering the case at that stage adjourned consideration of the decision for further information, as the dossier had concluded with information that [the Applicant] was being assessed for a secure psychiatric unit or for transfer for treatment at [a special unit in a prison].

'A second set of submissions was filed, in August 2023, indicating that [the Applicant] continued to seek release and requesting an oral hearing if [he] were not released on the papers.

'The case was listed for hearing in April 2024 and was adjourned on the day, as noted above, due to the prison assessment that [the Applicant] was under the influence. Further submissions were filed following the adjournment of the hearing in response to directions and the latest representations were submitted in response to the June directions regarding possible conclusion on the papers. These submissions sought relisting of a hearing and objected to conclusion on the papers.

'The panel concluded, by way of a decision dated 21 August 2024, that it was appropriate to conclude the case without an oral hearing and on the papers alone. Having done so, this letter now concludes the review with a no release decision.

'In coming to a decision to conclude the case on the papers without further oral hearing and not to release [the Applicant] the panel considered:

- *the new evidence received after the date of the listed hearing, as well as the totality of the evidence previously compiled in the dossier;*
- *the representations received on behalf of [the Applicant] (noting that the Secretary of State for Justice had not submitted representations);*
- *the Parole Board Rules and Parole Board guidance;*
- *the guidance of the courts, in particular the guidance on holding oral hearings provided by the Supreme Court in the 2013 case of* ***Osborn, Booth and Reilly [2013] UKSC 61.***

'The panel chair also considered in some detail the case of ***R (Garmson) vs Parole Board [2024] EWHC 1106 (Admin),*** *upon which [the Applicant] relied heavily in his representations. The panel chair took into account the range of court authorities relevant to the issues in the case and not listed here.*

'Representations were made on behalf of [the Applicant] that it would be unfair and, indeed, unlawful to conclude the case on the papers, without an oral hearing. The judgment in ***Osborn*** *was relied on to highlight the wide range of circumstances in which fairness requires a hearing, including where there is factual dispute or the need for oral mitigation, where a hearing is needed to assess the prisoner's risk, particularly where an assessment is based on a prisoner's characteristics and to test the views of those who oppose release.*

'That judgment also highlighted the principles that: holding oral hearings can avoid a sense of injustice arising from a prisoner not being able to participate in the decision-making process and the general 'public good' principle that decision-makers should hear from those whose lives they affect. Representations also highlight the principle, confirmed in other more recent cases, that Parole Board decisions as to whether an oral hearing should be held should not be overly focused on the likely outcome or result, i.e. whether the application is likely to succeed at hearing or not, but should focus on fairness and take into account the range of purposes that a hearing may fulfil.

'It was argued on behalf of [the Applicant] that he cannot reduce his risk further, that he wanted to apply for release and that he meets the test. It was said that he wanted to challenge the witnesses' evidence and to present his own evidence. It was said that he disputes the risk assessments.

'The case of ***R v Garmson*** *is cited as authority for the proposition that it would be unlawful to conclude an oral hearing on the papers without hearing live evidence. The argument that a legitimate expectation of a hearing had been created by the MCA decision to direct an oral hearing was also advanced.*

'The argument that a decision at MCA to hold an oral hearing creates a legitimate expectation and should deter the Board from later making a decision to conclude on

*the papers, was dismissed in the case of **R v Garmson**. This panel did not put any substantial weight on that argument. It cannot be right that, having decided to direct a case to oral hearing, it is never permissible to later decide not to hold a hearing but instead to conclude the case on the papers. That specific scenario is one that r 21 Parole Board Rules provides for and it must, therefore, be permissible in a range of circumstances.*

*'The decision at MCA to direct the case to an oral hearing takes into account a wide range of matters, including those articulated by Lord Reed in **Osborn**, and fairness is at the core of the decision-making process.*

*'One aspect of fairness may be the prisoner's legitimate right to be concerned in the decision-making process that affects his sentence and his life. All prisoners have the right to be concerned in their case, but that does not equate to a rule that all prisoners are entitled to an oral hearing. That is not envisaged by the judgment in **Osborn** nor in the Parole Board rules or guidance.*

'There is clear provision for a review being concluded on the papers without an oral hearing being directed, as well as a decision being made to conclude on the papers after an initial decision to hold an oral hearing. Prisoners may engage in the process in a range of ways. They may express their views, make representations and make requests and their legitimate interest in their case does not always require giving live evidence at an oral hearing.

'The specific case of indeterminate prisoners, particularly post-tariff life and IPP sentenced prisoners, has concerned the courts in a number of cases. Some of the relevant cases are quoted in the representations, and the judicial comment that there is 'tantamount to a presumption' in favour of an oral hearing for such prisoners, is quoted.

'[The Applicant's] case can be distinguished from these cases; he is not an over-tariff indeterminate sentenced prisoner. He is serving an extended determinate sentence, on which he has been recalled from the community, and he has a sentence end date in March 2025. He has also had two reviews since the recall. This panel is fully aware of the requirement for the 'ever anxious scrutiny' to be paid to the cases of over-tariff indeterminate sentenced prisoners; those injunctions do not apply to [the Applicant], though of course the principle of fairness does equally apply to his case.

'Parole Board guidance on when a hearing should be directed focuses in part on whether a decision can be made on the papers, i.e. whether there is sufficient evidence available to make the appropriate risk assessment, or whether a hearing is required to be able to explore risk, the proposed plans and to inform a decision. Some factors highlighted in that guidance are: the period of liberty at stake; whether the prisoner has had an oral hearing previously or recently; whether there have been any significant changes and whether there are disputed facts which are relevant to risk and can only be explored properly with oral evidence, again highlighting the central part that fairness plays in the decision.

'An oral hearing in [the Applicant's] case was justified at the time of the direction to hearing; there was uncertainty over the pathway for progression, with assessments of outstanding intervention, but [the Applicant] was relatively engaged with the regime and those supervising him and - despite some instability of behaviour - he was exhibiting some motivation to engage and an exploration of evidence at a hearing was deemed to be valuable.

'The [present] panel considered that there were a number of reasons why fairness did not require that a fresh hearing be convened and that conclusion on the papers is fair. [The Applicant] was afforded the opportunity to engage with the Parole Board and the review process, to attend a hearing and give live evidence. He chose to use substances on the morning of the hearing and found himself not permitted by the prison to attend – an outcome which would not have unfairly surprised [the Applicant]. It would, of course, have been inappropriate for him to attend the hearing under the influence, even had he been permitted by staff to leave the wing. He could not have properly provided evidence or engaged in the process.

'This incidence of substance misuse has been proven by drug testing but is one in a very long list of occasions (both prior to and after the hearing) when [the Applicant] has been found under the influence and, indeed, on occasion unresponsive. Not only his substance misuse, but his aggressive behaviour, have resulted in him not being offered the opportunity to transfer to the [special unit] to undertake work that could address his risk and personality difficulties.

'The ongoing substance misuse has seen him reduced to the basic IEP level for extended periods of time. Substance misuse is a clear risk factor for [the Applicant], linked directly to his risk of reoffending, the use of violence and to problems with his management. He is also reported to have exhibited non-engagement, aggressive and dismissive behaviour and exhibited disregard for the regime in not complying with orders.

'None of the professionals currently assess that [the Applicant] meets the test for release and all express concern about his behaviour and lack of engagement as it directly impacts his manageability in the community. There is no support for the view that he 'cannot reduce his risk further' and that he meets the release test, as [the Applicant] advances through his representatives. The panel is enjoined to consider risk reduction as a wider task than simply engaging in offence focused work. The panel agrees that risk reduction can be demonstrated in a range of ways and that it is not determined simply by completion of programmes or interventions.

'In [the Applicant's] case, work on understanding his personality has been proposed as one way in which he could reduce his risks. The panel has fully considered all aspects of the evidence that could indicate risk reduction, including the views of those who work with [the Applicant], his reported comments, the representations made on his behalf and his behaviour as reported over a substantial period. It is clear to this panel that [the Applicant] has core risk reduction work to undertake.

'It was submitted on behalf of [the Applicant] that he wished to challenge the views of others, to challenge the risk assessment and give his own evidence. It is argued

that an oral hearing is the only way that this can be achieved and that it would be unfair to deny him that opportunity.

'The panel noted that [the Applicant] has not provided any evidence or submissions about his substance misuse, the reasons for it, or anything other than bald denials of his behaviour in the past. His representatives have submitted four sets of representations, yet [the Applicant] makes no comment in that regard. In the two sets of submissions since the adjourned hearing he does not refer to the positive drug test or acknowledge the seriousness of the situation of choosing to use drugs on the day of the hearing, nor the ongoing substance misuse despite the work he has previously undertaken to address that risk.

'He merely continues to argue that he wants the platform of a hearing. He had previously expressed a willingness to engage in [the special unit] to address his risk, but his behaviour precluded that option. His behaviour has not improved since that option was closed to him. His [sic] states that he is manageable in the community and yet is currently disengaged and there is no information to suggest that he recognises the importance of his self-management in custody and the importance of engagement and motivation to continue to address risk.

'[The Applicant] states via his representatives that he wishes to challenge the evidence and risk assessment. He does not articulate in any way what that challenge would be and what aspect of the risk assessment he does not agree with.

'Representations highlight the OASys assessments of [the Applicant's] likelihood of reconviction in favour of him meeting the release test. According to the actuarial scores, [the Applicant] falls into the band of prisoners with a 'medium' likelihood of proven reoffending in terms of general and violent offending using the OGRS-3, OGP, OVP and RSR tools. He is currently assessed as posing a high risk of harm to the public and a medium risk to children, known adults and staff in the community and a medium risk to prisoners and staff in custody.

'The high risk assessment is described as 'there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious' and the medium risk of serious harm indicates that 'there is the potential to cause serious harm the offender is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse'.

'Those assessments clearly suggest that [the Applicant's] substance misuse and other behaviour would be key to whether he was manageable in the community and it is not clear what he wishes to challenge there. The most recent psychological risk assessment provides an assessment that takes into account recent custodial behaviour and puts his current dynamic risk as higher than the existing OASys assessments; indeed the psychologist who assessed him concluded that risk would be imminent on release.

'Undoubtedly, [the Applicant] would take issue with that as such an assessment would make release unlikely, however, specifics are not indicated. [The Applicant] may wish to argue that a move to [the special unit] is no longer necessary and that

he wished to show he was working on his relapse prevention plan, his release plan and his wider risks to argue that he meets the test for release. However, his behaviour has deteriorated and continues to be poor; he has not engaged in a meaningful way with the substance misuse team in recent times and continues to use drugs and to show a lack of motivation to demonstrate that he is manageable.

'On his behalf it is said that his 'engagement with his sentence plan has been completed the best he can and his position in terms of risk reduction is therefore highly unusual and he has done everything he can to reduce his risk'. It is assumed that this may refer to the point about the lack of availability of accredited programmes and that there is more to risk assessment than programme completion; there are many aspects to exhibiting risk reduction that [the Applicant] could seek to show, but he has not done so.

'It is asserted that [the Applicant's] behaviour is good, that he can do nothing more to reduce his risk and that he wishes to challenge assessments and other witnesses' evidence. The panel is not assisted in understanding the scope or nature of such challenges other than the assertions he has already made that he wishes to do so and does not agree.

'Clearly, in the case of ***Garmson****, the court found that it was appropriate to hold an oral hearing where the prisoner challenged his risk assessment and the need for treatment and wanted to challenge witnesses' views of his risk. The court decided that 'an oral hearing should be allowed where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representative to put his case effectively, or to test the views of those who have dealt with him' and that in that case there was unfairness in not allowing him to challenge evidence and to detail how he had reduced risk.*

'This panel draws distinctions between that case and the current matter. [The Applicant] has had multiple opportunities to draw the panel's attention to specific aspects that he wishes to challenge and has not done so. Nor has he sought to provide any mitigation or explanation for the behaviours identified in this decision that are directly related to risk, though he asserts that he should be permitted the opportunity to do that in oral evidence.

'[The Applicant] has had the opportunity to participate in this process in multiple ways including by representations, by engaging with professionals and by an oral hearing being set up which would afford him the opportunity. He decided that on the day of the hearing he would use drugs and caused the hearing to be abandoned. As set out in this decision, the actions of [the Applicant] on that day are taken into account. They are, however, but part of the factors taken into account in making this decision.

'The panel has outlined [the Applicant's] current behaviour and live risks, not to illustrate that a hearing would be 'pointless' or could result in a no release decision; the courts have made it plain that it is error to decide that an oral hearing is no longer necessary for 'outcome-focused' reasons. It is overall fairness that determines the decision and the current evidence indicates to this panel that an oral

hearing is no longer necessary to assess risk, over and above the very detailed and up to date written evidence that is available. This is so from a case-management perspective and when assessing whether it is in the interests of justice to hold a hearing.

'The panel took into account all the evidence, the rules and the guidance and the circumstances when an oral hearing should be pursued. The panel concluded that the interests of justice did not require that a further oral hearing be listed and that it was fair to conclude this review on the papers.

'It follows from the analysis set out that the panel considered itself properly able to assess [the Applicant's] risks from the evidence and representations available on the paper case.

*'The panel gave due regard to the presumption in favour of release during the extension period of an extended determinate sentence (**R v Sim**). This panel concluded that it was positively satisfied that continued detention is necessary for the protection of the public in [the Applicant's] case, such that the presumption was rebutted.*

'The panel considered the statutory test for release and concluded that it was not satisfied that it is no longer necessary for the protection of the public that he remain confined. The evidence in this case is that [the Applicant] continues to present a substantially more than minimal risk of serious harm to the public. He has a substantial history of violent offending, both use of instrumental violence for financial gain and reactive violence and has convictions for carrying a weapon. His criminal history involves multiple serious offences in this country and he has a criminal record in USA, about which there is limited information.

'It is clear that his historical risk factors are substantial. As a previous panel of the Parole Board put it, 'his pattern of behaviour is indicative of an early and entrenched criminal lifestyle'.

'In relation to dynamic risk - the risk that he poses now - there is a significant amount of evidence that a range of [the Applicant's] risk factors remain live. There is a clear history of mental health difficulties and personality issues in [the Applicant's] case and he has been transferred into and out of hospital for treatment. Latterly, it has been considered by professionals that he has not met the test for further transfer and more recent diagnoses focus on personality-driven difficulties.

'Unfortunately, [the Applicant's] behaviour and lack of motivation to address his difficulties have not only seen him returned from hospital previously but have led to him being rejected from a personality-based placement at the [special unit] where he would have been able to address his risk-related personality traits.

'In relation to substance misuse, this has been linked to deteriorations in [the Applicant's] mental health and wellbeing, but also directly to his offending and his risk of harm. The evidence is that he is currently using substances regularly, with little acknowledgement that this is a problem and with little apparent motivation to address the issue.

'There was clear evidence in recent custodial behaviour that other core risk factors remain live and unaddressed, such as poor emotional control, poor consequential thinking and problem solving skills, impulsivity, recklessness and risk-taking. There is no evidence that other previously identified core risk areas such as lack of finances, permissive attitudes towards the use of violence and relationships have been addressed or could be managed by the proposed risk management plan. Any release would be relying heavily on external controls. Given [the Applicant's] risk factors, that is assessed as insufficient and his internal controls would need to be active and strong. Such internal controls are not assessed as sufficiently strong for him to comply with restrictions or to manage his behaviour in accordance with the needs of public protection.

'The panel concludes that [the Applicant] does not meet the statutory test for release and does not direct [his] release.'

My decision

40. I have set out the Panel Chair's reasons in full as it is abundantly clear that she gave very detailed consideration to the arguments advanced by the solicitors. I cannot fault her reasoning in any way.

41. I would only add one comment about the risk assessments made by probation and the psychologist. The solicitors rely heavily on the statistical assessments used by probation to assess a prisoner's risks of various types of further offending. These can be useful in assessing risk but it often happens that the clinical assessments made by probation and psychologists of the prisoner's risks of causing serious harm to the public if he reoffends are more important. That is clearly the position in this case.

42. I cannot see that there was any error of law in the Panel Chair's decision. She set out and followed the relevant principles of law laid down in the authorities.

43. I have reminded myself of the Wednesbury test of irrationality and I cannot see that this is a case where the Panel Chair's reasoning (though other panels might have reached a different conclusion) comes anywhere near meeting that test.

44. Equally I cannot see that there was any procedural unfairness in the Panel Chair's decision. On the contrary she followed the necessary procedures admirably.

45. It follows that I cannot accept that any of the grounds advanced by the solicitors for reconsideration of the Panel Chair's decision can succeed. I must therefore dismiss this application.

Jeremy Roberts
11 November 2024