

[2019] PBRA 60

## Application for reconsideration by Modeste

### Application

1. This is an application by Modeste (the Applicant) dated 31 October 2019 for reconsideration of a decision by a Parole Board panel not to direct his release on the basis that the decision was irrational and procedurally unfair.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both bases. Eligible cases are confined to those set out in Rules 19(1)(a) or (b), 21(7) or 25(1). There are further restrictions upon eligibility set out in Rule 25(2) as to the type of sentence being served by the prisoner. The Applicant is eligible to apply for reconsideration.
3. All four of the decisions which are amenable to reconsideration concern decisions whether a person is 'suitable or unsuitable' for release **and not a decision whether or not to direct an oral hearing**. The principal thrust of the grounds submitted in an email from the Applicant's representative is aimed at the decision not to grant an oral hearing. Such submissions should be made – as is clear from the 2<sup>nd</sup>-4<sup>th</sup> paragraphs of the decision letter – by way of a request for an oral hearing. However some of the grounds may be interpreted as an attack on the merits of the decision not to direct release as being 'irrational'. I have therefore considered them on that basis.

### Background

4. In September 2005 the Applicant was sentenced to an Indeterminate Sentence for Public Protection (IPP) with a tariff set at 2 years 4 months less time on remand. The Applicant's case has now been considered 3 times by the Parole Board. In 2011 his release was directed at an oral hearing. The same happened in February 2019 following an oral hearing after his recall the previous year following his conviction for theft. The same happened again (a decision on the papers) in April 2019 following his recall for alleged breaches of his licence. He was recalled again in June 2019 for alleged breaches of his licence. On 17<sup>th</sup> September 2019 a single member panel made no direction for release. This decision was made on the papers. The 28-day period for the Applicant to submit an application that the case be referred for an oral hearing expired on 17<sup>th</sup> October 2019. This application was submitted by the Applicant's legal representatives on his behalf on 31<sup>st</sup> October 2019.
5. The index offence was the robbery of a person in the street. The offence was committed when the Applicant was on licence following his release from a sentence imposed for a similar offence.



## Request for Reconsideration

6. In summary the unnumbered grounds submitted by the Applicant's legal representatives now instructed on his behalf are as follows:
  - a. The decision not to direct an oral hearing was arguably both procedurally unfair and irrational. There was a delay in the Applicant's being supplied with the paperwork and in his ability to instruct lawyers to represent him within the 28-day period set down for a request to the Board to change its decision to deal with the case on the papers. The *dicta*, in particular of Lord Reed in the case of **Osborn and Others v The Parole Board [2013] UKSC 61**, highlight the potential for procedural irregularity of not granting an oral hearing in this type of case.
  - b. The decision not to direct release was irrational in that it was based not upon a significant risk that the Applicant would commit offences similar to the index offence which would result in serious harm if released but on the premise that he would be unlikely to comply with the terms of his licence. Reliance is placed on a passage in the speech of Lord Carnwath in **R (Sturnham) v Parole Board [2013] 2 AC 254** to this effect.

## The Relevant Law

7. 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*'. This test had first been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**.
8. 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.

## Discussion

9. There is no valid ground of appeal concerning procedural irregularity. The Applicant, as stated above, may apply for an oral hearing following a negative decision on the papers. He failed to do so. See Paragraph 2 above.
10. As to the complaint concerning the grounds on which the decision not to release was based:
  - a. The recall was initiated as the result of the failure of a drug test, a failure to attend designated accommodation for an afternoon sign in and a failure to return to those premises for curfew.

- b. The Offender Manager and Offender Supervisor were of the opinion that the underlying high risk of reverting to drug use and to violent crime in order to finance it, a tendency to be violent when confronted by police officers, together with his persistent unwillingness or inability (or both) to comply with his licence conditions, meant that he needed to remain in prison for some further time before he could be safely released. He had offended (theft by shoplifting) during his first period on licence.
  - c. The Decision Letter deals briefly with the previous breaches but does not mention the fact that none of his previous violent offending has involved the use of a weapon or the infliction of serious physical injury, or that his last offence of violence was the index offence some 15 years ago. The reasoning of the letter follows three steps:
    - i. His failure to comply with licence conditions which
    - ii. May lead to his resuming the use of dangerous drugs, which
    - iii. May result in his committing violent crime as he had in the early years of the century.
11. Arguably those steps are insufficient to establish the existence of a significant risk of serious harm. In particular no reason was given as to why, given the existence of strict licence conditions, warning signs would have enabled, as they had now on three occasions, appropriate steps to be taken before the risk became a reality.

## **Decision**

12. In those circumstances it is arguable that the decision lacked the necessary degree of rationality and should be reconsidered. Therefore this application is granted.
13. The case should be referred to a fresh MCA panel to consider on the papers and decide whether an oral hearing should be directed or whether a paper decision be produced.
14. The decision successfully challenged should be removed from the dossier of documents so that the new panel do not have sight of it although they can be informed that the matter has been reconsidered.

**Sir David Calvert-Smith**  
**21 November 2019**