

[2020] PBRA 109

Application for Reconsideration by Urwin

Application

1. This is an application by Urwin (the Applicant) for reconsideration of a decision of an MCA panel dated the 27 May 2020 to refuse release on the papers.
2. Rule 28(1) of the Parole Board Rules 2019 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.
3. I have considered the application on the papers. These are a dossier of 150 pages which now includes the MCA decision dated 27 May 2020 and the decision of the duty member dated 29 June 2020 to refuse the Applicant an oral hearing, the application for reconsideration dated 20 July 2020 and an amended application from the Applicant's solicitors dated 23 July 2020.

Background

4. The Applicant was sentenced to an Indeterminate Sentence for Public Protection with a minimum term of five years on 18 September 2011 for two offences of rape against two different female victims who had both been in relationships with him.
5. The Applicant was released from this sentence for the second time on 5 March 2019 but was recalled on 18 March 2020.
6. According to the Applicant's Offender Manager, the decision to recall the Applicant was made after the Applicant's ex-partner made an allegation to probation that the Applicant had attempted to strangle her and threatened to kill her.

Request for Reconsideration

7. The application for reconsideration is dated 20 July 2020.
8. The grounds for seeking a reconsideration are as follows:

(a) Irrationality

- (i) The Panel's decision was based upon allegations concerning the Applicant's recall without requesting further information.



- (ii) A full risk assessment could not have been achieved based on the absence of information in relation to the recall.

(b) Procedurally unfair

- (i) The matter should have been progressed to an oral hearing to allow the Applicant to put forward his own account.
- (ii) There was insufficient consideration given to the fairness of the proceedings (**Osborn v Parole Board [2013] UKSC 61**).

Current parole review

- 9. The Applicant was returned to prison on 19 March 2020. He is now 39 years old. This is his first review since recall.
- 10. The decision not to release the Applicant was made by two MCA panel members on 27 May 2020. No legal representations were submitted at that stage of the review. On 23 June 2020 the Applicant's legal representatives asked the Duty Member to send the case to an oral hearing. This request was refused by the Duty Member on 29 June 2020. The only new information not before the original MCA panel was the 23 June 2020 legal representations.

The Relevant Law

- 11. The panel correctly sets out in its decision letter dated 27 May 2020 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.

Parole Board Rules 2019

- 12. 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)).
- 13. 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 decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

- 14. 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."



15. 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.
16. 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

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.

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

Other

19. In the case of **Osborn v Parole Board [2013] UKSC 61**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications for an oral hearing. Their conclusions are set out at paragraph 2 of the judgment. The Supreme Court did not decide that there should always be an oral hearing but said there should be if fairness to the prisoner requires one. The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; they should be ordered where there is a dispute on the facts; where the panel needs to see and hear from the prisoner in order to properly assess risk and where it is necessary in order to allow the prisoner to properly put his case. When deciding whether to direct an oral hearing the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him. It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.
20. **R (on the application of Morris) v Parole Board [2020] EWHC 711** found the Parole Board is not only entitled to consider unproven allegations made against the prisoner, but is expected to do so.



The reply on behalf of the Secretary of State

21. The Secretary of State has indicated that he does not wish to submit any response to this application.

Discussion

Procedural Unfairness

22. Central to this application is the manner in which the panel addressed the question of allegations made against the Applicant whilst on licence. There were two relevant allegations:

(a) The Applicant had been arrested and charged with a drink drive matter, this matter had not been yet concluded but the evidence of the officer at the scene was that the Applicant's reading of alcohol in his breath was "*well over the drink drive limit*".

(b) The Applicant's ex-partner had made an allegation to the Applicant's probation officer, and had since made a statement to the police, that the Applicant had recently assaulted her and made serious threats towards her. The alleged victim of this assault had made a statement to the police but it did not appear from the dossier that the Applicant had been arrested or charged with any offence.

23. The dossier before the MCA panel did not contain any information from the Applicant explaining his account in respect of either allegation. The Offender Manager had not had an opportunity to speak to the Applicant since recall due to the COVID-19 restrictions in place at the time and so could not provide the Applicant's account of events. The Offender Manager did, however, state that the Applicant had told his mother that he had no idea why he had been recalled.

24. No legal representations were submitted for the initial MCA review on 27 May 2020. The panel were not obliged to invite representations or adjourn for the Applicant's account to be provided and there is no reason to conclude that the Applicant was not properly invited to engage at this stage of the process. We do not know why he chose not to do so. Nevertheless, the allegation that the Applicant had assaulted and made serious threats of violence to his then partner was unsubstantiated and fairness required the panel to proceed with caution (particularly given that he, through no fault of his own, had not been afforded an opportunity to give his own account to his Offender Manager).

25. The panel also chose not to adjourn consideration of the case for any further information about either allegation or to direct the matter to an oral hearing where such evidence could have been given. They did not, for example, ask to see the complainant's account of events or seek any information from the police about the progress of their investigation or timetable for the outcome. Again, they were not obliged to do so if they considered that there was sufficient evidence in the dossier to treat the allegation fairly and to adequately assess risk. The absence of any further information about the allegation should, however, have meant that the panel



proceeded with caution in making a finding of fact or placing weight on it in their risk assessment.

26. The panel had a choice to disregard both allegations, make a finding of fact in respect of one or both allegations or make an assessment of the allegations to decide whether and how to take it into account as part of the parole review. As the 2019 Parole 'Guidance on Allegations' makes clear, the panel should then have recorded in the decision letter their analysis and conclusions regarding the allegations including any impact the allegations had on the parole decision. Where there is sufficient evidence to do so panels will ordinarily be expected to make a finding of fact on the balance of probabilities.
27. In respect of the drink drive allegation, the panel concluded from the alcohol reading that he had been drinking to a problematic level. They note elsewhere that alcohol use is directly linked to the Applicant's risk of serious harm and that as the Applicant was found to be over the legal limit for alcohol use whilst riding his moped "*this demonstrated that your alcohol use remains extremely problematic*".
28. In respect of the assault allegation, the panel does not explicitly state whether or not it is proceeding on the basis that this allegation is true. At various points in the decision, however, the panel agrees with the Offender Manager that the Applicant should conduct further work to address his domestic violence.
29. I have found that the panel did not follow the 2019 Guidance on Allegations and did not therefore make clear that it had treated these allegations fairly. There are a number of explanations which might be given as to how the panel approached the allegations. It may well be that in the circumstances they did not have sufficient information on which to make a finding of fact. In that case, the panel should have stated this and gone on to explain whether, and if so on what basis, they could nevertheless adequately assess risk on the papers. It may alternatively be that the panel chose to take these allegations into account and give some weight to them without being able to make a finding of fact in relation to them. Again though, it is not clear on the face of the decision that the panel took this approach. It is also possible that the panel may have chosen to disregard one or both of the allegations on the basis that they did not have sufficient information to decide one way or the other.
30. Nevertheless, the most likely explanation seems to me, based on the content of the decision alone, is that it appears that the panel did make findings of fact that the allegation was true based on a) the reading of breath in the drink drive allegation and b) the Offender Manager's account of the complainant's allegation alone. This can be illustrated through the words the panel chose when forming their assessment as to whether the recall was justified. The panel properly considered whether the Applicant's release was justified and concluded that it was. In doing so, the Panel does appear to have assumed both allegations were true.
31. It is difficult to see from the face of the decision how the panel reached the decision it did and whether they considered at all the possibility that the complainant was not telling the truth or that the Applicant may have a different account of the events in question.

32. The Applicant appears to have obtained legal representation after the 27 May 2020 decision and had the benefit of solicitors when he asked the Duty Member to send his case to an oral hearing.
33. Although new legal representations were not in themselves good reason to grant an oral hearing, these particular legal representations were significant in that they provided the Applicant's perspective for the first time. The representations made clear that the Applicant's position was that the allegation of assault made against him was malicious and entirely fictitious. At that point it was clear that there was a significant factual dispute between the understanding the Applicant's Offender Manager had to what had happened on licence and the Applicant's account. This did in my view make a material difference and should have been given more weight by the Duty Member.
34. The case of **Osborn** is clear that fairness will not require an oral hearing on every occasion and it is also clear that a mere assertion on behalf of a prisoner that he should have an oral hearing will not entitle a prisoner to an oral hearing providing fairness can be achieved on the papers.
35. **Osborn**, does, however, also provide helpful guidance as well as illustrative examples of situations where fairness to the prisoner does require an oral hearing. One of them is:

"Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation."

36. At least by the time that this decision was considered by the Duty Member it was clear that a significant (in this case central) allegation was in dispute and fairness to the prisoner did require the matter to be sent to an oral hearing. I have therefore also concluded that the Duty Member did not proceed fairly by denying the Applicant an oral hearing once it had become clear that a central allegation which led directly to the Applicant's recall was in dispute and that the MCA panel had not had an opportunity to consider the Applicant's account.

Irrationality

37. This finding of procedural unfairness is a conclusion only about the way in which the decision was reached and not the substance of the decision itself. In my view, the ground of irrationality in the application before me does not add anything of substance to the assertion that the way the Applicant's review has been dealt with is procedurally unfair. Given my finding on unfairness, it is not necessary to consider this ground in detail but I should make clear that I did not find the decision itself to meet the very high test for irrationality in law.
38. The Applicant was a man with two rape convictions where the victims of the offences were former partners. He has been recalled once before when his then partner also made a serious allegation of assault although this was not proceeded with. This is his second recall following another serious allegation that the Applicant had



assaulted and made threats to another partner. Had a panel properly considered all the available evidence in respect of this allegations (including the Applicant's account of events) it is unlikely to have been irrational for a panel experienced in assessing risk to conclude that it remains necessary for the protection of the public for the Applicant to remain confined. It does of course remain fully open to a fresh panel to reach this conclusion.

39. Nevertheless, fairness requires an opportunity for the Applicant to set out his account of his time in the community on licence and for the panel to consider this as well as the risk assessments of those professionals with knowledge of him and any other evidence which is available to the panel in respect of the allegations made against him.

Decision

40. Accordingly, whilst I do not find the decision in this case to have been irrational, I do consider, applying the test as defined in case law, that the decisions to refuse release on the papers and not to grant an oral hearing to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh MCA panel.

Kay Taylor
16 August 2020