

[2020] PBRA 56

Application for Reconsideration by Mr Asawah

Introduction

1. This is an application by Mr Asawah ("the Applicant"), who is serving a 17-year sentence of imprisonment for serious sexual offences. His application is for reconsideration of the decision of a panel of the Parole Board on 16 March 2020 not to direct his early release on licence.
2. The application has been allocated to me as one of the members of the Board who are authorised to deal with reconsideration applications.

Background

3. The Applicant is aged 78. His offences were historic ones, taking place between 1985 and 1990. He was convicted on 11 charges (which included charges of rape and attempted rape) after a contested trial. He has made some limited admissions, but otherwise continues to deny the offences of which he was convicted. The Board is, of course, obliged by law to proceed on the basis of the jury's verdicts.
4. The Applicant was sentenced on 18 June 2009, and his sentence will not expire until 9 June 2026. He became eligible for early release on licence on 9 December 2017 but can only be released early if the Parole Board finds that his risk of serious harm to the public is no longer such as to require his continued confinement in prison. If the Applicant is not released early upon the direction of the Board, he will be automatically released on licence in October 2020.
5. This is the second time his case has been referred to the Board by the Secretary of State to decide whether to direct his early release on licence. On the first referral the case was listed for an oral hearing in September 2018, but at the Applicant's request the hearing was cancelled and the then panel decided on the papers not to direct early release. The Applicant had stated that he did not wish to be considered for early release and that he wished to remain in custody.
6. In August 2019 the Secretary of State referred the case again to the Board. As is the Board's practice, the case was reviewed on paper by a single-member Member Case Assessment ("MCA") panel. That panel had power to do one of four things:
 - (a) To make a direction on the papers directing the Applicant's early release on licence;



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- (b) To decide on the papers not to direct early release on licence (a “negative decision”);
 - (c) To send the case for an oral hearing at which it could be considered by another panel with the benefit of oral evidence; or
 - (d) To adjourn or defer the case for further information to be obtained.
7. On 16 March 2020 the MCA panel decided on the papers not to direct the Applicant’s early release on licence. That was a provisional decision and the Applicant had the right to apply to the Board for an oral hearing notwithstanding the MCA panel’s decision.
8. The Applicant made such an application. That application was considered on 30 March 2020 by a Duty Member, who refused it. The provisional decision of the MCA panel thereupon became final, subject only to the present application under the Board’s reconsideration procedure.
9. The application for reconsideration was made on 6 April 2020 by the Applicant’s legal representative on his behalf.
10. By e-mail dated 14 April 2020 the Public Protection Casework Section of the Ministry of Justice (“PPCS”), on behalf of the Secretary of State, informed the Board that he did not wish to offer any representations in response to the application.

Documents considered

11. I have considered the following documents for the purpose of reaching a decision on this application:
- (a) The dossier provided by the Secretary of State, which contains 281 numbered pages and includes:
 - (i) The decision of the MCA panel (dated 16 March 2020);
 - (ii) Representations submitted by the Applicant’s legal representative on 24 March 2020 inviting an oral hearing; and
 - (iii) The decision of the Duty Member (dated 30 March 2020).
 - (b) The application for reconsideration (dated 6 April 2020) and
 - (c) PPCS’s e-mail of 14 April 2020 on behalf of the Secretary of State.

The Relevant Law

The 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
- (a) as in this case, by a paper panel (Rule 19(1)(a) or (b)); or
 - (b) by an oral hearing panel after an oral hearing (Rule 25(1)); or
 - (c) by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

13. The only two grounds for reconsideration are that the decision was "irrational" or that it was "procedurally unfair".
14. The relevant decision in this case is the decision of the MCA panel not to direct early release. That decision is eligible for reconsideration under Rule 28(1). The decision of the Duty Member, though part of the sequence of events outlined above, is not itself eligible for reconsideration.

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 of its decision):

"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 was the test set out by Lord Diplock in a different context in **CCSU v Minister for the Civil Service [1985] AC 374**. It has been followed by the courts in a great many subsequent judicial review cases.
17. The Divisional Court in **DSD** indicated that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Board in making decisions relating to parole.
18. The fact that Rule 28 contains the same adjective ("irrational") as is used in judicial review cases in the courts shows that the same test is to be applied by the Board when considering an application for reconsideration. The Board therefore adopts the same high standard for establishing "irrationality" as is applied by the courts: see **Preston [2019] PBRA 1** and other cases.

Procedural unfairness

19. 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 decision itself.
20. In summary an Applicant seeking to complain of procedural unfairness under Rule 28 will normally need to show one or more of the following things:
 - (a) That express procedures laid down by law were not followed in the making of the relevant decision;
 - (b) That they were not given a fair hearing;
 - (c) That they were not properly informed of the case against them;
 - (d) That they were prevented from putting their case properly; or
 - (e) That the panel was not impartial.

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

Deciding whether to direct an oral hearing

21. In the case of **Osborn and others 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. 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.
22. The Supreme Court gave examples of situations in which fairness would require there to be an oral hearing: where there is a dispute on the facts, where the panel needs to see and hear from the prisoner in order properly to assess risk, and where it is necessary in order to allow the prisoner properly to put his case. This is not, of course, an exhaustive list.
23. If there is a realistic prospect of progression, an oral hearing should obviously be directed. If there is no such prospect, fairness to the prisoner may nevertheless require one; and, when deciding whether to direct one, the Board should take into account the prisoner's legitimate interest in being able to participate in a decision with important implications for him.

The Request for Reconsideration in this case

24. In his written representations the Applicant's legal representative makes it clear that he is not suggesting (and indeed he could not sensibly have done) that the MCA panel should have directed early release on the papers: nor is he suggesting that the case should have been deferred or adjourned for further information to be obtained. His suggestion is that the case should have been sent for an oral hearing instead of being concluded on the papers with a negative decision.
25. In support of the application the legal representative submits that:
 - (a) The decision not to direct this case to an oral hearing was irrational and procedurally unfair;
 - (b) The MCA panel failed to apply the principles set out in **Osborn**;
 - (c) In the particular and complex circumstances of this case, fairness demanded an oral hearing;
 - (d) An oral hearing was required to enable the Board to undertake a fair assessment of risk;
 - (e) An oral hearing was required in the interests of procedural fairness;
 - (f) An oral hearing was required to explore the links between risk and lifestyle at the time of the Applicant's offending; and
 - (g) An oral hearing was required to enable the medical condition and age of the Applicant to be explored and linked to risk and sexual functioning.

Discussion

26. This application is made on the basis that the MCA panel's decision was both irrational and procedurally unfair. The only complaint of procedural unfairness which is made that the MCA panel made a negative decision on the papers when it should have sent the case for an oral hearing. That complaint therefore adds nothing to the complaint that to make a negative decision on the papers was irrational. If that was irrational, it could no doubt be said that there was procedural unfairness. However, if it was not irrational, the complaint of procedural unfairness falls away. The outcome of this application therefore depends on whether I uphold the complaint of irrationality.
27. Before turning to the legal representative's grounds for arguing that to make a negative decision on the papers was irrational, it is necessary to say something about the facts of the case.

The facts of the case

28. The offences for which the Applicant is serving his present sentence were committed over a long period, starting when he was in his mid-40s and continuing for about 14 years. They were very serious offences committed against vulnerable victims in respect of whom he was in a position of trust. One victim was aged between 12 and 17 when he committed the offences against her, and his other two victims were aged between 4 and 7 when he committed the offences against them.
29. In addition to the sexual offences the Applicant subjected the victims to physical abuse. He also forced one of his victims to work as a prostitute. Underlying all these offences were some deeply disturbing beliefs and attitudes concerning females. Although he had not previously been convicted of sexual offences, there is a certain amount of evidence of domestic abuse against intimate partners. He had been convicted of a significant number of offences of serious non-sexual violence earlier in his life.
30. His behaviour in prison during his sentence has been exemplary, as is often the case with sex offenders.
31. During his sentence he has completed a programme designed to address sexual offending as well as a programme designed to address deficits in thinking skills. However, it is the unanimous opinion of professionals that his work on those programmes was insufficient to reduce his risk to the public to a level which would be manageable on licence in the community, or indeed in an open prison. These professionals include a prison psychologist who assessed the Applicant in 2013 after his completion of the sex offender programme and an independent psychologist instructed by the Applicant's solicitors, who carried out a detailed risk assessment at about the same time.
32. The Applicant's outstanding treatment needs largely relate to his disturbing attitudes and beliefs concerning females. The evidence strongly suggests that those beliefs and attitudes remain present to a significant extent. The independent psychologist suggested that an appropriate means of addressing the Applicant's outstanding treatment needs would be a series of 1:1 sessions with a

psychologist. However, the Applicant has repeatedly made it clear that he is not willing to engage in that or any other further risk-reduction work in prison.

33. The Applicant does not display any remorse or empathy for the victims of his offences.

The grounds relied upon in support of the application

34. The legal representative submits that in deciding not to send this case to an oral hearing, the MCA panel failed to apply the principles set out in **Osborn**. In deciding whether that submission is correct, it is necessary to examine each of the specific grounds advanced by the legal representative to support his submission. Do any of them, taken separately or together, establish (a) that there was a realistic prospect of an oral hearing resulting in a direction for early release on licence or (b) if not, that there was some other good reason for directing an oral hearing?

Was an oral hearing required to enable the Board to undertake a fair assessment of risk?

35. I am satisfied (having carefully studied the dossier and the MCA panel's decision) that there was ample evidence (a) to enable the MCA panel to make a fair assessment of the Applicant's risk and (b) to support the panel's assessment that that risk was too high to be safely manageable on licence in the community. Indeed, the evidence was overwhelming, and any other conclusion would have been open to challenge by the Secretary of State as being irrational. An oral hearing could not possibly have led to any different conclusion.

Was an oral hearing required in the interests of procedural fairness?

36. The decision in **Osborn** makes it clear that an oral hearing is not required in every case: it is only required if there is a reasonable prospect of it resulting in a progressive move or if there is some other good reason for it. The Board's resources are limited and it receives a large number of referrals from the Secretary of State. An oral hearing without good reason would be of no benefit to the prisoner in question and would cause unnecessary and undesirable delay to the progress of other cases.
37. Unless, therefore, any of the legal representative's other grounds establish a good reason for an oral hearing in this case, the complaint of procedural unfairness cannot succeed.
38. The legal representative has not identified any relevant disputes of fact which need to be resolved at an oral hearing for future purposes.
39. The Applicant will be automatically released on licence in six months' time, and it is inconceivable that an oral hearing at this stage could be of any benefit to him during those six months. It could not affect his progress in custody, nor will his case be referred again to the Board, during that time.

Was an oral hearing required to explore the links between risk and lifestyle at the time of the Applicant's offending?

40. I cannot see that it was. There is a good deal of evidence about the Applicant's lifestyle at that time, and further exploration of that lifestyle could not make any significant difference to the assessment of his current risk. There is ample evidence of his disturbing attitudes and beliefs about women at that time, and of the fact that they remain present to a significant extent.

Was an oral hearing required to enable the Applicant's medical condition and age to be explored and linked to risk and sexual functioning?

41. Again, I cannot see that it was. The MCA panel gave very careful consideration to the relevance of the Applicant's age and medical condition. It stated the factual position, which was as follows, in its decision. All reports in the dossier indicated that the Applicant was fit and healthy. Although the Applicant's legal representative's representations to the MCA panel suggested that his risks would have decreased with age, the panel noted that it was stated in the assessment of risk of reoffending and outstanding treatment needs that, given the Applicant's criminal history and his age when he committed the sexual offences, any effects of ageing were likely to be less typical in his case.

42. It is not suggested that this was an inaccurate summary of the evidence. Age is not a bar to the commission of sexual offences. More significant than the Applicant's age is the fact that he still retains, to a significant extent, the disturbing beliefs and attitudes concerning women which were clearly linked to his offending. It is not realistic to suppose that further exploration of his age and medical condition at an oral hearing could affect the assessment of the Applicant's risk.

Conclusions

43. For the reasons explained above I have been unable to find that any of the matters advanced by the legal representative establish grounds for reconsideration of the MCA panel's decision. The MCA panel reminded itself of the test for release on licence, and it is clear that it faithfully applied that test. It also reminded itself of the principles set out in **Osborn** with regard to oral hearings, and its decision not to direct an oral hearing was fully justified and in no way irrational within the meaning explained above: indeed it could be said to have been inevitable.

44. Since the decision to issue a negative decision on the papers cannot be faulted, there was no procedural irregularity in this case.

45. The MCA panel's decision was fully and carefully explained to the Applicant. An oral hearing would not have been of any benefit to him.

Decision

46. In the circumstances I must dismiss this request for reconsideration.

Jeremy Roberts
22 April 2020

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