

[2020] PBRA 90

## Application for Reconsideration by Taylor

### Application

1. This is an application by Taylor (the Applicant) for reconsideration of a decision of a single member panel dated the 20 of April 2020 not to direct release.
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 the dossier, the decision letter and representations made on behalf of the Applicant.

### Background

4. The Applicant was sentenced on the 5 of October 2015 in respect of one count of sexual assault to an extended sentence of imprisonment, with a custodial period of 5 years 4 months and 3 days and an extension period of 3 years. He was released automatically on the 19 of December 2019; his licence was revoked on the 3 of March 202 and he was returned to prison on the following day.

### Request for Reconsideration

5. The application for reconsideration is dated 2 July 2020. A successful application for an extension of time to make this application was made on the 2 of June 2020 and time was extended to 3 July 2020.
6. The grounds for seeking a reconsideration are as follows:
  - (a) Procedural unfairness on the basis that the Applicant should have been granted an oral hearing; and
  - (b) Irrationality on the basis that the reports of the Community Offender Manager (COM) contained in the dossier were insufficient, in particular because the COM had not formally interviewed the Applicant as part of the preparation of those reports. I have set the complaint out in this way to reflect the way in which it is framed in the reconsideration application. It seems to me, however, in reality not to be a complaint of irrationality but rather one particular aspect of the submission that the failure to direct an oral hearing was procedurally unfair.

## Current parole review

7. The Applicant's case was referred to the Parole Board in accordance with **section 255C(4) of the Criminal Justice Act 2003** to consider whether to direct the prisoner's immediate release, or direct the prisoner's release on a fixed date; or make no direction as to release.
8. His case was referred to a single member panel and was considered on the papers on the 20 of April 2020. The panel considered a dossier consisting of 95 pages. No representation had been made by or on behalf of the Applicant.

## The Relevant Law

9. The panel correctly set out in its decision letter the test for release.

### *Parole Board Rules 2019*

10. 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)).]

### *Irrationality*

11. 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."*

12. 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.
13. 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*

14. 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.
15. 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 reply on behalf of the Secretary of State**

16. No representations have been made by the Secretary of State in respect of this application.

### **Discussion**

17. The panel was required to decide between three options, namely that the Applicant was suitable for release or that he was not or that the case should be directed to an oral hearing (Parole Board Rules 2019 r19(1)).
18. Although the referral to the Parole Board made reference to the possibility of directing release on a fixed future date, there was no possible basis disclosed on the face of the dossier on which the panel could have directed future release on the papers. The complaint made on behalf of the Applicant is in reality that the panel should have directed the Applicant's case to an oral hearing so that all possibilities could be considered, including not only immediate release but also future release.
19. As is correctly submitted in the Applicant's representations, in determining the question of whether or not it should direct an oral hearing, the panel was obliged to follow the principles and guidance set out in **Osborn** (above).
20. Lord Reed, delivering a judgment with which all other members of the court agreed, set out the principle thus:

"In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release ..... whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged."

21. The judgment goes on to set out a non-exhaustive list of circumstances in which an oral hearing might be appropriate and then lists some of the important matters to which the panel should have regard in making its decision.
22. In summary, the court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one; it 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. The court also noted that a decision not to direct an oral hearing is provisional and not final. At the relevant time, the process by which a prisoner could apply for an oral hearing after a decision on the papers was described as an "appeal. The court disapproved this description; it is not to be found in the 2019 Rules (see r20).
23. Specific complaints made on behalf of the Applicant include the following:
- (a) The COM had not formally interviewed the Applicant. This seems to me to be without any real substance. The factual basis for it is a passage in a report written by the COM reciting the fact that the COM had tried to arrange a telephone conversation with the Applicant but had been unsuccessful. It is to be noted that the purpose of the conversation would have been to discover the Applicant's current attitude to his recall and no more. It is simply unrealistic to assert that this omission is capable of rendering the process unfair. There were other opportunities available to the Applicant to express his view, none of them taken up by him. In any event, in the context of all of the circumstances of the recall, the attitude of the Applicant was a matter of minimal significance.
- (b) The panel should have directed an oral hearing on the grounds that the recall was not the result of the Applicant committing a further offence. I regret that I am unable to follow the logic of that assertion. This is not one of the examples given in **Osborn** nor does it find any resonance in the statements of principle enunciated in that case. In the absence of any or any cogent argument to support this proposition, I reject it as a proper complaint of irrationality or of procedural unfairness.
- (c) The panel should have directed an oral hearing on the grounds that an oral hearing would be necessary in order to determine whether future release was appropriate. Leaving to one side whether this was in any real sense a live issue for the panel, the decision letter in any event recorded the recommendation of the COM for a review in 6 to 9 months.
24. In the present case, the dossier disclosed an unhappy post-release history. The Applicant, who has an extensive offending history, had been drinking alcohol to excess with a negative impact on his mental health, including a failure to take his prescribed medication. Excessive drinking was an identified risk factor and had

been a feature of the index offence. He had declined to engage with support agencies to assist him in reducing his alcohol intake. His behaviour in the premises in which he was required to live had deteriorated to the point that he was required to leave them but only after considerable efforts had been made to help him to avoid this by changing his attitudes and behaviour, but without success. On the day of his recall, he behaved in a threatening and abusive way towards staff in a local pharmacy. He was assessed by the manager of the premises in which he was required to live as presenting an escalating risk towards staff there and as targeting specific staff members, one of whom was described as "fearful to come to work".

25. The Applicant made no representations to the panel. There was, therefore, nothing to contradict the narrative and the assessments provided in the dossier by the COM. It is to be noted that in his representations in support of the application for reconsideration before me, there is a substantial degree of acceptance of the COM's reports, in particular in relation to problems with alcohol (although to a somewhat lesser degree than the COM reports) and to the distressing incident in the pharmacy. It is not asserted on his behalf that the withdrawal of his accommodation was in any way unjustified or unreasonable.
26. As to risk, the panel was assisted by assessments within the dossier as to reoffending (including, notably, a very high risk of sexual offending) and as to the risk of serious harm in the event of reoffending (high to the public and to a known adult). No representation was made to the panel to contradict these assessments. Here again, the representations before me raise no issue as to these assessments other than to express some optimistic assertions that his risk might be manageable.
27. In addition, as I have already noted, no application was made for an oral hearing.
28. The decision letter acknowledged the panel's duty to consider whether to direct an oral hearing and to do so in the light of the principles set out in **Osborn**. It made express reference to four particular matters, all of them deriving from the judgment in that case. They were that (1) the facts of recall were clear; (2) no dispute had been raised by the Applicant; (3) there was no request from the Applicant for an oral hearing; and (4) the issues relating to risk assessment were clear.
29. It was in those circumstances and for those reasons that the panel did not direct an oral hearing.
30. It is submitted that the decision was procedurally unfair because the panel was unable to take account of the Applicant's version of events; if they had been able to do so, it is submitted, fairness would have required an oral hearing. This is, in my judgment, misconceived. The reason that the panel was unable to take account of his version of events was the result not of procedural unfairness, but of the failure of the Applicant to take his opportunity to provide the panel with his representations (see r18). There was nothing on the face of the dossier to suggest that an oral hearing was appropriate or necessary in order to achieve fairness for the Applicant.

31. In addition to the matters to which I have already made specific reference, further arguments are deployed and factual matters asserted in support of the contention that the decision not to direct an oral hearing was procedurally unfair.
32. I have considered them all with care but am unpersuaded that they go to the question of procedural fairness. They are in their nature, arguments that might have been deployed in support of an application under rule 20, if one had ever been made, rather than in support of the application before me.
33. As has been noted already, the decision of the panel that the Applicant was unsuitable for release was provisional for 28 days from provision of the decision letter, in which period it was open to the Applicant to apply for an oral hearing (see r19(6) and r20). The decision letter in ordinary language advised him to seek legal advice and set out his right to apply for an oral hearing. He did not do so.
34. His failure to make such an application is unlikely to be capable of remedying any procedural unfairness to him arising from the panel not directing an oral hearing (if there was any such unfairness). It is to be noted, however, that the Applicant had two opportunities to make representations as to why there should be an oral hearing but took neither of them. This has obvious relevance to his complaint of unfairness to the extent that it is based on the proposition that he was unfairly denied a chance to present argument as to why his case should be directed to an oral hearing.
35. Soon after the 28 day period had expired and, no doubt on the basis that it appeared to them that the 21 day period for reconsideration had also expired, the Applicant's legal representatives applied under rule 9 for an extension of time. Their application was for an extension not of the 28 days provided for in rule 20 but of the 21 days provided for in rule 28. This was the extension which was granted, hence the application before me.
36. A good deal of the material in the representations before me raises matters which were not before the panel and which, if they have relevance, go to the merits of an application under rule 20. I express no view as to whether such an application, if it had ever been made, should have succeeded.
37. It is, however, important to stress that the panel's decision cannot be properly be set aside on the basis of procedural unfairness where the thrust of the complaint is that it failed to take account of what are asserted, rightly or wrongly, to be relevant matters in circumstances where it could only have known of these matters if the Applicant had chosen to bring them to its attention.
38. The panel correctly identified the statutory release test, its duty to decide whether to direct an oral hearing and the principles which it was required to apply to that decision. It took account of matters in the dossier relevant to its decisions both as to directing an oral hearing and as to release and did not take account of any matters which were not relevant. It acknowledged expressly in the decision letter that it had not received any representations from the Applicant and pointed out the consequence that it had to take evidence at face value. There was no material before it suggesting that fairness to the Applicant required an oral hearing.

39. It is in those circumstances impossible to find that the decision of the panel was procedurally unfair.

40. All other complaints, to the extent that they are asserted on behalf of the Applicant to amount to irrationality, go to the question either of procedural fairness or of the merits, if any, of a hypothetical application under rule 20.

## **Decision**

41. For the reasons I have given, I do not consider that the decision was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

**Alistair McCreath**  
**9th July 2020**