[2022] PBRA 31

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Application for Reconsideration by Harper

Application

1. This is an application by Harper (the Applicant) for reconsideration of a decision of a Parole Board Member Case Assessment panel dated 10 December 2021 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 Decision Letter dated 10 December 2021
- An Application for Reconsideration of a decision made by a Parole Board Duty Member on 7 January 2022, the Application being dated 24 January 2022 (The First Reconsideration Application)
- An Application for Reconsideration of the MCA paper decision (the Second Reconsideration Application), undated
- The dossier, now paginated to page 238

4. In order to clarify the history of the applications I should explain that on 23 December 2021 the Applicant's solicitor applied (pursuant to Rule 20 of the *Parole Board Rules* 2019 (the Rules)) for a decision that the case should be determined at an oral hearing. A Duty Member of the Parole Board refused to direct an oral hearing, and the First Reconsideration Application was directed to that decision. When the matter came to me, as a member of the Parole Board dealing with reconsideration applications, I pointed out that the application was misconceived: the only power the Board has on reconsideration is in respect of a decision to direct or not direct release. A decision under Rule 20 is not such a decision. However, I indicated that I would consider an application against the decision of 10 December 2021 under the appropriate Rule, Rule 28.

5. I have therefore also considered:

- The Rule 20 Representations dated 23 December 2021
- The Duty Member's Decision dated 7 January 2022

6. Strictly speaking the documents mentioned in Paragraph 5 are not relevant to the application I have to consider, but for completeness, and in fairness to the Applicant, I have read them, and I refer to the Rule 20 Representations below.

7. I have been referred to two reconsideration decisions of the Parole Board, ***Uddin* [2021] PBRA 58** and ***Greene* [2021] PBRA 188**. At Paragraph 10 of the Second Reconsideration Application the Applicant's solicitor states *"It was established in the reconsideration decision of* Uddin *…"*. This reads like a reference to authority. Reconsideration decisions of the Parole Board do not establish legal precedents, though the Board will adopt a consistent approach to legal issues and may look upon earlier decisions as persuasive. Each case is decided on its particular facts, applying the Rules and authoritative decisions of the higher courts. Future reconsideration panels are in no sense bound to follow earlier decisions of other panels, or indeed the same panel.

8. If there is any doubt about what I have said in the preceding paragraph, prisoners' representatives should note that members of the Parole Board who consider these applications are equal in status: no reconsideration panel is superior to another. Reconsideration decisions are almost always taken, like the two cases mentioned, and indeed this one, without oral argument, and often without written representations from the other party. In the circumstances, it is wrong to invite one reconsideration panel to regard a decision by another (or the same) reconsideration panel as establishing anything more than an approach to an individual case which may be departed from in a later case where the facts are different. There can be no harm in referring panels to such decisions, providing it is not suggested that they are anything other than persuasive. I have borne in mind the two decisions to which I have been referred accordingly.

Background

9. The Applicant is now 39 years old. In January 2012, when he was 29, he was sentenced to imprisonment for public protection, with a minimum term that expired in April 2016. The sentence was imposed for a serious sexual offence. Two years earlier he had been sentenced for an offence which had a sexual element, demonstrated by the fact that part of the sentence was a Sexual Offences Prevention Order. He had other previous convictions, of less immediate significance, and had breached court orders.

10. In June 2021 the Secretary of State referred the Applicant's case to the Parole Board for consideration of release or a recommendation for open conditions. This was the fourth review during this sentence.

11. As appears above, on 10 December 2021 an MCA panel refused to direct release (and did not recommend a transfer to open conditions). It is a pre-condition of such a decision that the panel should consider first whether to refer the case for an oral hearing. The MCA panel's decision not to do so is at the heart of the application I am considering.

Request for Reconsideration

12. The application for reconsideration is undated, but is served within the extended time I allowed.

13. The grounds for seeking a reconsideration can be summarised as follows:

- That the MCA panel, when considering whether to direct an oral hearing, simply referenced the leading case of *Osborn, Booth and Reilly* [2013] UKSC 61 without any attempt to engage with the judgement or the principles arising from it.

14. Particulars are given:

(1) An oral hearing would have enabled the panel and the Applicant to scrutinise whether the robust risk management plan and in the absence of any increased risk of harm whether risk is manageable in the community;

(2) It could have considered in a proper sense whether work was indeed core risk reduction work or whether it could be done in the community where access to mental health services is far easier;

(3) An oral hearing would have enabled the Board to hear directly from the Applicant and to question as to future compliance;

(4) Given the pandemic and the issues that this has caused within the prison system, the Board should be ultra aware of the need to fully consider *Osborn*. Prisoners are severely disadvantaged in instructing representatives.

(5) On any fair analysis of *Osborn* this case should have been considered at an oral hearing where the panel could fairly consider the issues identified in the solicitor's earlier representations;

(6) The decision not to grant an oral hearing is inherently linked to the decision not to grant release. In simple terms, the Applicant can only make such an application if/when he is given the opportunity to give live evidence and to cross-examine witnesses, only then would the panel have been in a position to make a properly informed decision;

(7) There is insufficient evidence that the principles laid out in *Osborn* were applied in this case.

15. It is not clear what is meant by the reference in Paragraph 14(5) above (Paragraph 15 of the Second Reconsideration Application) by *"the issues identified in the solicitor's earlier representations."* Doing the best I can, I take this as possibly meaning:

(8) The Rule 20 Representations: there should have been a Psychological Risk Assessment because there was no clear treatment pathway. The Rule 20 Representations also contain extensive citation from *Osborn*, but without relating to them to the Applicant's case; and/or

(9) The First Reconsideration Application: it was irrational for the Board to conclude the Applicant's review on the basis that the Board is not concerned with issues relating to which treatment/intervention is identified/implemented to address risk. [This seems to be a reference to the decision on the Rule 20 Application rather than the one subject to reconsideration]. It was procedurally unfair for the panel to proceed on the basis that there was a clear treatment pathway, as asserted in a Psychology Case Advice Note, whereas the Applicant's key worker said the Applicant was still in the early stages of treatment and there is still a way to go before we achieve the desirable level of stability.

Current parole review

16. On 10 December 2021 the single-member Member Case Assessment panel decided the case on the papers. The dossier then consisted of 231 pages (later pages now in the dossier consist of the Decision Letter and the decision not to grant an oral hearing). There were no written submissions on behalf of either the Applicant or the Secretary of State.

The Relevant Law

17. The panel correctly sets out in its decision letter 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

18. 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)).

19. 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**.

20. A decision to refuse an application for an oral hearing under **Rule 20**, following an earlier decision not to direct release under Rule 19, is not eligible for reconsideration under Rule 28. However, the original decision not to direct release under rule 19 can properly be the subject of an application for reconsideration, and such an application can properly argue that the lack of an oral hearing amounts to a procedural unfairness.

Irrationality

21. 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."

22. 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.

23. More recently, in *R (Wells) v Parole Board* [2019] EWHC 2710 Saini J. articulated a modern approach to the issue of irrationality: *"A more nuanced approach in modern public law 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 respect 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."*

24. The application of the **DSD** test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

25. 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.

26. 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.

27. In the cases 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.

The reply on behalf of the Secretary of State

28. The Secretary of State has indicated that he does not intend to make any reply to this application.

Discussion

29. It is not easy to discern in what way, if any, the no release decision can be said to be irrational. Neither the Prison Offender Manager nor the Community Offender Manager recommended release or a progressive move at this stage. The panel considered that the Applicant would have to self-regulate to a high degree if he were to be released into the community, and, at this stage, the panel was not assured that the Applicant could achieve this without further evidence of progress being made.

30. I cannot see in any of the submissions on the Applicant's behalf any challenge to that as a reasonable conclusion, leave alone any argument that it is irrational in the way set out above.

31. I must therefore take it that this application for reconsideration turns on the decision not to direct an oral hearing, and that the basis for this is that the lack of an oral hearing amounts to procedural unfairness (see Paragraph 20 above).

32. The thrust of the First Application for Reconsideration, repeated in the Second Application and supported by reference to the cases of ***Uddin*** and ***Greene***, is that the MCA panel paid mere lip-service to the principles set out in ***Osborn*.**

33. However, the panel expressly said it had considered the principles set out in ***Osborn***. As was pointed out in ***Uddin***, it is second nature for a panel to do so. I cannot, on the basis of a mere assertion that the panel failed to engage with the judgement in *Osborn* or the principles therein expressed, find that the panel did not consider those principles. No particular form of words is required in a decision letter, any more than, for example, when a judge passing sentence says "*Applying the criminal standard of proof to an issue of fact …*", it is necessary for the judge to set out what the criminal standard of proof is. If the panel says it considered the principles set out in ***Osborn***, then, to establish procedural unfairness on this basis, there needs to be some evidence that it did not.

34. In ***Uddin*** the MCA panel made no mention of ***Osborn***. In ***Greene*** the reconsideration panel pointed out that G (as I will call him, to avoid confusion) had made an application for release at his first review less than a year before; that he actively engaged in that

process, so that it followed he would likely want to do the same again, particularly as this would be his final review before his conditional release date; and that there were a number of issues raised in the decision letter which would have benefited from G putting forward his evidence or questioning the witnesses. The reconsideration panel therefore found that the decision not to direct an oral hearing was flawed by the apparent failure of the panel to consider ***Osborn*** fully. In other words, ***Greene*** was, as one would expect, a decision on the particular facts of that case.

35. I therefore look, in all the representations on behalf of the Applicant, for evidence to support the assertion that the panel did not consider the principles in *Osborn*. All I can find is that the solicitor disagrees with the panel's decision not to direct an oral hearing.

36. For example, the panel noted the recommendation of a Psychological Risk Assessment in September 2020 that the Applicant engage with a service specifically designed to work with prisoners who have problems like the Applicant's to help them to progress. The Applicant was removed from that programme due to reports of his being offensive towards staff. As mentioned above, the Applicant's key worker thought the Applicant was not yet ready to start any programmes.

37. The Representations suggest that the panel should have directed an oral hearing in order to consider whether the work recommended was core risk reduction work and whether it might not be better completed in the community. There was (and is) no evidence to suggest that the work in question is not core risk reduction work, as the psychologist considered it to be, and the specific programme under discussion is not available in the community.

38. The Representations suggest that an oral hearing should have been directed in order to explore the possibility that a sufficiently robust risk management plan would enable the Applicant to be safely managed in the community. The professionals were all concerned that even with such a plan in place the Applicant's risks could not be managed safely in the community. The panel agreed. All this demonstrates that the panel did indeed consider the matters that are now raised.

39. The references in the Representations to there not being a clear treatment pathway seem to me to be a misunderstanding of the evidence before the panel. The position is that there is a clear treatment pathway, but the Applicant is not yet in a position to embark on it.

40. One of the matters expressly set out in ***Osborn*** is that not every case requires an oral hearing. There is nothing to suggest that there was any procedural unfairness in not directing an oral hearing in the Applicant's case.

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.

Patrick Thomas
22 March 2022