

[2023] PBRA 127

Application for Reconsideration by Wilson

Application

1. This is an application by Wilson (the Applicant) for reconsideration of a decision of the Parole Board dated 13 April 2023 not to direct his release. The decision was taken on paper at the Member Case Assessment (MCA) stage – that is, when a single member panel of the Parole Board first considered the referral of the Applicant's case which the Secretary of State for Justice (the Respondent) had made after he was recalled to prison.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the grounds that the decision contains an error of law, or is irrational, or is procedurally unfair.
3. I have considered the application on the papers. These are (1) the dossier, now running to some 222 pages including the decision and subsequent documents; (2) the application for reconsideration completed by the Applicant's legal representative together with an email dated 17 May 2023 to which that application referred; and (3) a response dated 3 July 2023 by the Respondent's Public Protection Casework Section (PPCS) to a request by me for further information concerning a recent sentence imposed on the Applicant.

Background

4. On 14 May 2009 the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection with a minimum term of just under 6 years. This minimum term expired on 7 May 2015.
5. The sentence was imposed for an offence of attempted murder which took place on 31 July 2008. The Applicant, who was the worse for drink, stabbed the victim on multiple occasions in the course of a fight near a taxi rank. He had, he said, been carrying the knife for his protection. His previous convictions included dangerous driving, assault and breach of the peace.
6. The Applicant was first released on licence on 3 June 2016. He was recalled to prison on 19 September 2017 after he was charged with further offences – being concerned in the supply of diamorphine and cannabis and possessing a firearm. He pleaded guilty to those offences and was sentenced to a determinate sentence of 5 years imprisonment with a Criminal Behaviour Order to regulate his conduct after his

prison sentence ended.

7. On 6 September 2022 the Applicant was released on licence again. He was recalled after just 3 months on 19 December 2022. It was found that he was not residing at the address where he was required to reside. He had moved to his girlfriend's address, in breach of his licence conditions and of the Criminal Behaviour Order. It was also reported that he had been seen in the company of an associate linked to drug offending, and that he had been found with two mobile phones when arrested. It was also reported that he had admitted breach of the Criminal Behaviour Order when interviewed.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Respondent on 16 January 2023 and came before an MCA single member panel for assessment in April 2023.
9. There was very little information before the MCA panel as to the Applicant's stance concerning his recall. Usually by this stage the Community Offender Manager (COM) would have interviewed him and included the results in a report. Unfortunately, the COM had not been able to speak to him, apparently because his case had not been allocated within the prison system. The MCA panel knew that the Applicant was reported to have made admissions in interview and that he had been charged in December with breach of the Criminal Behaviour Order, pleaded not guilty and been sent for trial. But there was no information as to the subsequent state of proceedings or the Applicant's attitude to recall.
10. As noted above, the MCA panel decided on 13 April 2023 not to direct the Applicant's release. It said that the Applicant was on remand "*awaiting Crown Court trial on further serious charges*" and therefore the review should be concluded on the papers at that stage. It said that if the Applicant did not in due course receive a custodial sentence the Respondent should consider a further referral.
11. On 16 May 2023 the Applicant was sentenced on his plea of guilty to 4 months imprisonment for failure to comply with the Criminal Behaviour Order in two respects: he had not lived at the required address, and he had been in possession of a second mobile phone. In response to a request from me, the PPCS has confirmed on behalf of the Respondent that the sentence was effectively served by the time it was imposed; the sentence was therefore no longer an impediment to his case being considered by the Parole Board.
12. Rule 20 of the Parole Board Rules 2019 permits a further request by a prisoner to a duty member for an oral hearing where such a hearing has been denied at the MCA stage. Such a request was made by the Applicant's representative on 26 April 2023. On 17 May 2023 the Applicant's representative informed the case manager by email that the Applicant had been sentenced to 4 months and was eligible for release, either immediately or at latest in 2 months' time. The Applicant's representative confirmed to the case manager that this information was to be treated as an additional submission in support of the application for an oral hearing.
13. On 5 June 2023 the application under rule 20 was refused by a duty member. There

is no reference in the duty member's decision to the email dated 17 May 2023. It had not been added to the dossier which the duty member considered. The duty member said that members should not delay concluding a referral when there was "*no clarity as to when criminal proceedings will conclude*". The duty member also relied on an observation in the dossier that the Applicant's case could take up to a year to come to trial. It is clear that the duty member cannot have appreciated that in the Applicant's case the criminal proceedings had concluded, and his sentence had been served.

Request for Reconsideration

14. The application for reconsideration is succinct. It is argued that it was an "*inappropriate use of process*" to conclude the review on 13 April 2023 when the Applicant was awaiting sentencing without deferring to see what transpired. It is further argued that the decision taken on 5 June 2023 is flawed because it was taken in ignorance of the sentence which had been imposed as notified to the Parole Board in the email dated 17 May 2023.

The Relevant Law

15. The panel correctly set out the test for release in its decision. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
16. The panel's decision as to release is eligible for reconsideration since the Applicant is serving an indeterminate sentence and the decision was taken under rule 19(1)(b) of the Parole Board Rules: see rule 28(1) and 28(2)(a) of the Rules. The panel's decision not to recommend open conditions is not eligible for reconsideration. The decision to refuse an oral hearing taken on 5 June 2023 is not eligible for reconsideration.
17. It is not necessary to set out an exhaustive statement of the circumstances in which a decision will be unlawful. Broadly, a decision will be unlawful if it is taken in contravention of some legal principle or duty applicable to the case; or if it leaves out of account a factor which the law requires to be taken into account; or if it places weight on a factor which is irrelevant in law; or if the reasons fall short of the standard which the law requires for the decision.
18. The concept of irrationality is derived from public law. The test is whether the 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.*" See **CCSU v Minister for the Civil Service** [1985] AC 374, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [2018] EWCH 694 (Admin). This is the standard I have applied when considering this application for reconsideration.
19. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or

a party was not allowed to put their case properly, or where the hearing was unfair, or the panel lacked impartiality.

The reply on behalf of the Respondent

20. The Respondent has informed the Parole Board that he does not offer any representations concerning this application.

Discussion

21. As noted above, it is the decision of the MCA panel dated 13 April 2023 which is eligible for reconsideration. I will therefore focus on that decision.
22. Where a prisoner has been recalled and faces further charges, a negative decision on paper at the MCA stage may be both fair and appropriate. It depends, however on the circumstances. Assistance is given in the Parole Board's Guidance on Member Case Assessment (version 02, October 2022) at paragraph 9.40 where it is suggested that it may be fair to conclude the matter on the papers if (a) it is confirmed that it will be more than 8 weeks before the matter is concluded and (b) the allegations are similar to the index offence, serious, or otherwise relevant to risk. An MCA panel considering whether to take a decision on the papers by reason of further charges will need reliable up to date information on these matters if the decision is to be fair and rational.
23. In my view the MCA panel did not have the necessary information to take a fair and rational decision. It is unfortunate that the papers reached the panel with no up-to-date information from the COM as to the attitude of the Applicant to recall and to the criminal proceedings; nor did the panel have any up-to-date information as to the criminal proceedings.
24. This lack of information led the MCA panel to make a fundamental mistake. It approached its assessment on the basis that the Applicant was awaiting trial for serious criminal offences. In fact he had already admitted a breach of the Criminal Behaviour Order in interview, and was shortly to be sentenced on his plea of guilty to the offence. There was an obvious disparity between the suggestion that the Applicant was awaiting trial and the information that he had apparently admitted the offence. Clarity was required before reaching a decision adverse to the Applicant.
25. In my view fairness required that the MCA panel have some up-to-date information as to the Applicant's attitude to recall and as to the progress of the criminal proceedings. As noted above, in most cases the Applicant's position on these matters will be apparent from the dossier, in particular from the report of the COM. If it is not, fairness will often require some enquiry to be made even if this means adjourning the MCA assessment for a short period. In the minority of cases where the position is not apparent from the dossier it is not at all unusual for MCA assessments to be adjourned for a short period for precisely this reason.
26. The application under rule 20 provided an opportunity for the flawed decision of the MCA panel to be remedied. Unfortunately, that opportunity was not taken, because the email dated 17 May was not added to the dossier, and the duty member held

the same erroneous belief as the MCA panel that the Applicant was awaiting trial sometime in the future. The application under rule 20 is not of itself subject to reconsideration; but since the underlying decision under rule 19(1)(b) must be reconsidered the decision under rule 20 effectively falls away.

Decision

27. For these reasons I am satisfied that the application for reconsideration must be granted.

David Richardson
18 July 2023