[2023] PBRA 13

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Application for Reconsideration by Garmson

Application

1. This is an application by Garmson ("the Applicant") for reconsideration of a decision of the Parole Board dated 6 December 2022 declining to release him. In the Applicant's case an oral hearing had been directed; but in the light of changed circumstances the oral hearing was cancelled and a paper decision taken. The power to take this course is contained in rule 21 of the Parole Board Rules 2019.

2. Rule 28(1) of the Parole Board Rules 2019 (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.

3. I have considered the application on the papers. These are: (1) the dossier, now running to some 1328 pages including the decision letter; and (2) the application for reconsideration dated 21 December 2022.

Background

4. On 20 August 2007 the Applicant was sentenced to imprisonment for public protection with a minimum term (as subsequently increased by the Court of Appeal) of 9 years less time spent on remand. The minimum term expired on 27 March 2015.

5. The index offences of rape, kidnapping and sexual assault related to two incidents. In April 2005 the Applicant approached a man and a woman in a car. He said that he had a gun; forced the man to leave the car; forced the woman to drive on; and then subjected her to a degrading and humiliating attack. In March 2006 the Applicant accosted a group of three who were on their way home after working at a night club. He was holding a knife. He instructed the male victim to drive him to Wolverhampton. In the car he demanded money from all members of the group and sexually assaulted one of the women. He pleaded not guilty at trial. He has gradually come to accept responsibility for the offences.

6. The Applicant was aged 37 when he was convicted of these offences. He already had a significant criminal record, including convictions for assault occasioning bodily harm and (at the age of 29 when he was in the army) oral rape, vaginal rape, assault by penetration and sexual assault. He also has a conviction for harassment of a former partner.

Request for Reconsideration

7. The application for reconsideration is supported by written submissions prepared by the Applicant's legal representative running to some 11 pages. In summary, it is said that the panel chair has acted both unlawfully and irrationally in concluding the case on the papers without hearing live evidence from witnesses and the Applicant at an oral hearing and that it was procedurally unfair to do so.

8. The application contains detailed submissions which interweave background, legal argument and substantive criticisms of the decision and repeat some criticisms in more than one place. I believe that the points made can fairly be summarised as follows:

    a. The decision did not comply with the requirements set out in **Osborn v Parole Board** [2013] UKSC 61 and article 6 of the European Convention on Human Rights. An oral hearing was necessary in the interests of fairness because (a) there was an issue as to the level of risk posed by the Applicant; (b) the were issues as to the contents of the OASys report; (c) there were issues as to the evidence of the Community Offender Manager ("the COM"); and (d) fairness required that the Applicant's representative have an opportunity to put questions orally and make oral submissions, given that the Applicant's risk scores were medium and risk not imminent. If it was procedurally unfair not to hold an oral hearing, it is not necessary to show that an oral hearing would have resulted in a different outcome; it is sufficient to show that it might have done; and in this case it might have done.

    b. The decision was also in breach of rule 24(9) of the Parole Board Rules 2019 because the Applicant did not have an opportunity to address the panel about his risk.

    c. The panel wrongly assessed that until he addressed his needs and fully understood the triggers for his offending, he would present with a very high and imminent risk of further sexual offending in the community. There was no evidence in the dossier that the Applicant's risk was imminent or that he was likely to commit offences similar to the index offence.

    d. The oral hearing ought not to have been cancelled so close to the date for which it was fixed.

    e. There was an implicit duty to prioritise post-tariff prisoners; and this decision was in breach of it.

    f. The decision ought not to have been taken without the psychological assessment which had already been directed.

    g. The decision recorded that it would take 9 months for the Applicant to complete the Healthy Sex Programme ("HSP"), but he has not yet been assessed for this course.

h. The panel erroneously recorded in paragraph 2.15 of the reasons that the Applicant's representative had applied for an adjournment.

i. The panel was not misled by the Applicant's solicitors.

9. I have prepared the summary above for the purposes of analysis, but I make it clear that I have considered the submissions of the Applicant's representative as a whole.

10. The submissions concentrate on the position of the panel chair; and it is indeed the case that under rule 21, set out below, the panel chair may take the decision that the case be concluded on the papers. However, as we will see, relevant decisions are made in the name of the panel as a whole – a point to which I will return later in these reasons.

Current parole review

11. The current referral was made in October 2018. Four years is by any standards a very long time for a referral to be outstanding. Recurring themes have been the Applicant's distrust of professionals, intermittent refusal to co-operate with the making of assessments and the holding of interviews, and belief that he has been victimised by professionals and made the subject of false allegations.

12. The Applicant's case was repeatedly deferred or adjourned. It would overburden these reasons to set out the course of case management in full; the following brief summary must suffice. Reasons for adjournment or deferral include the following: refusal by the Applicant to engage with directed psychological reports, followed by a transfer of prison and an apparent change in his willingness to engage (20 September 2019, dossier page 571); a request by the Applicant for a progressive transfer so that he could undertake 1:1 work (18 February 2020, dossier page 581); a request by the Applicant for deferral so he could do 1:1 work and demonstrate improved behaviour (3 August 2020, dossier page 744); the instruction by the Applicant of new representatives (20 July 2021, dossier page 806); and the giving of detailed directions including time for the Applicant to obtain an up to date independent psychological assessment (27 September 2021, pages 836 and 957).

13. It is convenient to take up the story in July 2022. An oral hearing was listed for 11 July; but on 5 July the Applicant's solicitor applied for the hearing to be converted to a directions hearing "*because the independent expert cannot attend and that the directions have not been complied with, because the reports are still inaccurate*". With reluctance the panel chair accepted that the hearing should be a directions hearing, only because the independent witness would not be available.

14. At the directions hearing it emerged that no independent expert had in fact been commissioned to produce a report; the Applicant's solicitor applied for time to do so. The Applicant had not co-operated with the making of an up-to-date prison psychological report. The Applicant (who had interrupted the

hearing repeatedly and had to be muted for a time) orally requested that he no longer participate in any oral hearing because he wished to concentrate on recategorisation to category C and a prison move. The panel did not accept that request orally but said to the Applicant's solicitor that if the Applicant repeated those instructions he should request a paper conclusion without delay. The panel appointed a new hearing date of 14 December 2022 and gave directions for psychological and psychiatric assessments, stating expressly that these required the co-operation of the Applicant. It was also later directed that any independent psychological report relied on by the Applicant should be served by 3 October 2022. No such report was served.

15. Then, on 8 September 2022 the Applicant's solicitors applied for an adjournment of the oral hearing listed in December "*to allow [the Applicant] to move [prison] and complete HSP*". That request was refused by the panel chair, applying the Parole Board's guidance on adjournments and deferrals.

16. By November 2022 the Applicant had indeed transferred prisons for this purpose, HSP having been assessed as a core outstanding treatment need in his case. The panel chair invoked rule 21 and by directions dated 7 November 2022 gave the Applicant and his representative and the Secretary of State an opportunity to make representations in accordance with rule 21(3). Representations were received from the Applicant's legal representative dated 21 November 2022; they asked for the hearing to be retained but converted to a face-to-face hearing rather than a video hearing as directed.

17. On 28 November 2022 panel chair directions were issued cancelling the oral hearing on the grounds that it was no longer in the interests of justice to hold an oral hearing and that the case could be more effectively managed by concluding the hearing on the papers. The parties were told that the panel would now consider the referral and issue a decision in due course to conclude the review.

18. On 6 December 2022 a paper decision was issued; it is said to have been taken by a panel consisting of a chair as independent member, and two panel members, one a psychologist, one an independent member. The decision did not direct release or recommend open conditions. In its reasons the panel set out the procedural background in considerable detail before turning to its substantive reasons.

19. The panel summarised the current position as follows.

> *"2.13. Since the disbanding of the Extended SOTP programme, [the Applicant] has been recommended to complete The Healthy Sex Programme (HSP) which is thought to best meet his outstanding treatment needs. Throughout this current period of review, he seems to have fluctuated between agreeing to do the work and refusing outright. He has, so far, refused to engage with a Programme Needs Assessment (PNA).*

2.14. However, following the most recent directions hearing and ahead of the planned oral hearing in December 2022, the panel were informed through his solicitors, that the Application has been allowed to transfer [prisons] for the purpose of completing HSP, which seems to indicate that he is now motivated to comply with further core risk reduction work.

2.15. His solicitors sought a further adjournment for completion of the
programme. This would have taken perhaps 9-10 months for the completion of the course, consolidation work and a follow-up psychological risk assessment and was refused by the panel chair as being contrary to Parole Board policy as explained above in the other relevant information section.

2.16. [The Applicant] is now at HMP Ashfield waiting for the final assessment and allocation to the programme, providing he remains motivated to do the work.

2.17. Should he not be suitable or decline to do the programme then professionals recommend that he should be encouraged to participate in a therapeutic regime through the Offending Personality Disorder Pathway ahead of his next parole review. Professionals have been trying to arrange for a mental health assessment but they are concerned that [the Applicant] will refuse to cooperate with this as he has with other assessments."

20. As to the manageability of his risk if released, the panel said

"3.1. [The Applicant] expects to be released directly from closed conditions and does not see any benefit in a progression to open prison, it is reported.
However, with his refusal to co-operate with professionals his release and risk management plans are underdeveloped and not currently robust.

3.2. He is likely to need ongoing support, treatment and additional monitoring within any risk management plan and without his participation and involvement, development of a robust plan will be very difficult to achieve and is still some way off.

3.3. Furthermore, professionals agree that he still has core outstanding
treatment needs in respect of his sexual violence offending behaviours and
although the final pathway to addressing these needs is yet to be agreed, and will require his co-operation, without this having been done, he is unlikely to be safely manageable in the community."

21. In its conclusions the panel said

"4.1.[The Applicant] has an established and escalating pattern of serious violent sexual offences to women. Although he has begun to address these risks through accredited work in prison, he still has significant outstanding core treatment needs. The panel concluded that until such time as he has addressed these needs and fully understands the triggers for his offending, he would present with a very high and imminent risk of further sexual offending in the community.

4.2. Assessment by professionals and progression of [the Applicant] has proved difficult as he has disengaged and refused further prison assessments since completing SOTP in 2016.

4.3. He has recently agreed to transfer establishments to complete recommended work and it is hoped that he is now motivated to address and
reduce his risks further ahead of any future review. An application to adjourn the hearing for the purpose of completing accredited interventions was refused for reasons expanded upon above.

4.4 Having carefully considered all that it read about [the Applicant], along with his own and legal representations, the panel have concluded that he still needs to remain in prison for the protection of the public and therefore no direction for release has been made."

The relevant law

22. In its decision letter the panel correctly set out the test for release: the Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

23. The Applicant was serving an IPP sentence. The decision to decline his release was taken under rule 21(7) of the Parole Board Rules 2019. The decision is therefore eligible for the reconsideration procedure: see rule 28 (1) and (2)(a). For the avoidance of doubt, the panel's decision as to a recommendation for open conditions is not eligible for the reconsideration process.

24. The Parole Board has a duty to take decisions which are lawful. A panel must therefore (1) take decisions which are within its legal powers, (2) apply the law correctly when taking its decisions, (3) fulfil legal duties which are placed upon it in taking its decisions, (4) exercise its discretionary powers for proper purposes, (5) take into account considerations which the law requires it to take into account, and (6) leave out of account considerations which are irrelevant in law.

25. 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.

26. 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. However, not every procedural irregularity will result in procedural unfairness; many irregularities cause no unfairness or are dealt with satisfactorily by the overall process. Errors of procedure, including failures to comply with a rule, do not of themselves invalidate any step taken in the proceedings: see rule 29.

27. In **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 informed the Parole Board that no submissions are to be made on his behalf.

Discussion

29. From time to time it happens that after an oral hearing has been directed a prisoner is ear-marked with his agreement for a course which is regarded as core risk reduction work. This may well also require a transfer within the prison system. Although there is a concept known as "*parole hold*" (whereby a prisoner is not considered for a transfer or such work while there is an outstanding reference) this is by no means always applied; and in a case such as this, where the Applicant was an IPP prisoner over tariff, it is not surprising that he was transferred with a view to such a course and that he agreed to it.

30. When this occurs the first application made by the prisoner, or his representative is often for an adjournment or deferral of the oral hearing. This

may seem best for preserving the prisoner's position, but it is in fact problematic – especially because it is often difficult to predict timings and may result in unnecessary listings which serve no useful benefit to the prisoner while wasting time and resources. There is therefore specific Parole Board guidance that a case should not be deferred or adjourned in the run up to an oral hearing, or at an oral hearing, where the prisoner is about to begin an intervention, but post course review, documentation and submission of follow-up reports is likely to exceed 4 months; see the Parole Board Adjournments and Deferrals Guidance (2020) at paragraphs 5.6 and 6.7. The expectation is that in such a case the Secretary of State will make a further referral in the light of developments. It is therefore not surprising that the Applicant applied for an adjournment here; or that it was refused in accordance with the Guidance. There can be no doubt that the process in the Applicant's case would take more than 4 months.

31. Where such an application is refused, experienced prisoner representatives will often apply for the case to be decided on the papers (rule 21) or will give notification that the prisoner does not want the panel at an oral hearing to consider the case (rule 23). They will expect the Secretary of State to make a further referral once the intervention is advanced; and this is what generally occurs. However, if no such application is made the case will proceed to oral hearing unless rule 21 is operated.

32. Rule 21 (which was amended in July 2022) requires three stages. Firstly, it requires the panel chair to form a provisional view that an oral hearing may no longer be necessary for specified reasons – here, in the interests of justice or to effectively manage the case. If so, the Board will notify the parties with reasons that it is considering the making of a direction that the case should be decided on the papers, and it will give the parties 14 days to make representations on those reasons, the contents of any further evidence, and whether they agree to the case being decided by a panel on the papers. See rule 21(1)-(3). Secondly it requires the panel chair to consider the case after the time for representations has elapsed and direct whether it should be decided on the papers or continue to an oral hearing: see rule 21(4). Thirdly, if a direction is made that the case is to be decided on the papers, either the panel chair or a new panel must determine whether or not the prisoner is suitable for release: see rule 21(5) and (7).

33. Subject to two procedural points which I will address below, this is the procedure which was followed in the Applicant's case.

34. The central argument in the application for reconsideration is the argument which I have summarised in paragraph 8(a) above. Did fairness require that the Applicant's reference be the subject of an oral hearing? Upon an application for reconsideration this matter must be considered objectively in accordance with the guidance in **Osborn**: it is not sufficient simply to review the decision of the panel and ask whether it was rational – see **Osborn** at paragraph 65. In reaching a view on this question I have paid careful attention to the summary provided by Lord Reed in paragraph 2 and the detailed discussion at paragraphs 64–96. In the end, however, what fairness requires depends on circumstances which vary from case to case: see paragraph 80.

35. I have reached the clear conclusion that fairness did not require an oral hearing in the circumstances of the Applicant's case in November and December 2022. It is important to keep in mind that the Applicant had recently been transferred with his agreement with a view to undertaking HSP – a programme based on one-to-one work with him and of central relevance to his core risks. It is inevitable that any panel or professional assessing his case would wish to know the outcome of the transfer and will be reluctant to make any final assessment or commit to a detailed risk management plan at the moment. Moreover if the Applicant's engagement in HSP is positive and the outcome indicates that the Applicant's risk has been reduced, this may be a very important point for a panel to evaluate in his favour. It is therefore in the interests of justice and in his interests that a full review should follow this work; and inevitable that any hearing which takes place when such an important piece of work is in prospect in the immediate future will be overshadowed by it (because witnesses, including the Applicant, will know that much better evidence as to the Applicant's progress may soon be available and will inevitably have this in mind when answering questions). As noted above, the Applicant himself applied for an adjournment, as others do in these circumstances.

36. I accept that there are issues which the Applicant wishes to raise concerning his level of risk, the contents of the OASys report and the like; and in particular that he wishes to put questions orally to the COM about his concerns. I do not, however, consider that these issues required to be heard and determined in November 2022 or December 2022. As noted above, the Applicant has himself made applications in the past for adjournments; the concerns were not so pressing to him that they needed to be addressed immediately. It is much better, and to my mind both fair and in the interests of justice, that there should be a full assessment (which in practice is virtually certain to include an oral hearing) after the best up to date evidence is available.

37. I can deal quite briefly with the remaining arguments which I have identified in paragraph 8 above.

38. As to (b), rule 24(9) applies where an oral hearing takes place; it has no application to the prior decision under rule 21, which is taken on paper not at an oral hearing. There was no breach of rule 24(9).

39. As to (c), I see no error of law or irrationality in the panel's assessment of risk. The panel states his risk of serious harm in the community is "*very high*" whereas the OASys assessment is "high"; but I note also that the OSP (contact sexual re-offending) risk was "*very high*". The panel's view was open to it, given the Applicant's repeated sexual and violent offending.

40. As to (d), after the transfer to Ashfield the rule 21 process had to be operated; the decision to cancel the hearing was then taken on 28 November. I see no procedural unfairness in the timing of the cancellation.

41. As to (e), the oral hearing was not cancelled over any issue of prioritisation; the true reasons were, as stated, to do with the interests of justice and case management.

42. As to (f), it is true that a psychological risk assessment had been directed. However the Applicant had not co-operated in it and a report dated 31 May 2022 had been prepared without an interview with him. An update was then directed, giving him another chance to co-operate; that was not done before his transfer to HMP Ashfield, and, as noted above, the Applicant had not served any report of his own. Any psychologist would now wish to know the outcome of the Applicant's transfer and the HSP course. I do not think that it was irrational or unfair to take a decision under rule 21 given these facts.

43. As to (g), the reasons (paragraph 2.1.15) estimated about 9-10 months for completion of the course, follow-up consolidation work and a psychological risk assessment. This was only a rough estimate; it was included in order to demonstrate the potential impact of an adjournment and was adequate and appropriate for that purpose.

44. As to (h), the Applicant's representative did apply for an adjournment: see dossier, page 1162. This point is without substance.

45. As to (i), the reasons indeed state that the panel was misled, although this was in the introductory section dealing with procedure; I think this must be a reference to the legal representative's application dated 5 July which I have described in paragraph 13 above. In my view that application did tend to mislead; a busy chair would think that an expert had been instructed to report and attend the hearing, whereas the only report in existence was a historical report. In any event, the panel gave directions for an adjourned oral hearing after that date and it was the subsequent transfer of the Applicant, not any concern over being misled, which resulted in the rule 21 determination.

46. This brings me finally to two procedural matters which are not the subject of any complaint in the legal submissions, but which I think I should mention.

47. As noted above, the hearing which took place on 11 July 2022 was converted to a directions hearing at the request of the Applicant's representative. The whole panel participated in that hearing and was retained for the hearing listed in December. Rule 7(5) of the Parole Board Rules 2019 prior to amendment on 22 July 2022 specifically permitted this course; and in any event whenever a case adjourns on the day of the oral hearing members will be present and will participate in discussions about the need for an adjournment and the directions to be given. It is not surprising that the panel chair, his members having already read the papers and been involved, then involved them in considering rule 21; but rule 21 is a self-contained rule with its own procedure.

48. Rule 21(4) calls for the duty member or panel chair to consider representations and give the direction that the case should be decided on the papers

or proceed to oral hearing. In this case the decision was taken by the panel chair with members: see the panel chair directions dated 28 November 2022. That seems to me to be an irregularity, although entirely understandable given the involvement of the panel as a whole in July and the retention of the same panel for December. However I do not think the irregularity has resulted in any unfairness, and it does not of itself invalidate subsequent steps in the proceedings – see rule 29.

49. Rule 21(5) provides that the paper decision may be taken by a panel constituted of the panel chair who made the direction or by a new panel appointed under rule 5(3). I do not entirely understand why the rule refers to a new panel: I do not think it means that members of the existing panel may not be re-appointed, for I can see no purpose to that. In this case the decision records that it was taken by the chair and the existing panel members; that may be irregular, if the panel members had not been appointed to a new panel; but again I do not think that this has resulted in any unfairness, and it does not of itself invalidate subsequent steps in the proceedings.

Decision

50. For the reasons I have given the application for reconsideration is refused.

David Richardson
23 January 2023