[2021] PBRA 24

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**Application for Reconsideration by Ali**

## Application

1. This is an application by Ali (the Applicant) for reconsideration of a decision of a single member panel of the Parole Board dated the 15 January 2021 not to direct his release on licence. The panel had considered his case on the papers.

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, including the decision letter, amounting to 162 pages, the written representations requesting an oral hearing dated 26 January 2021 and the written representations in support of the application for reconsideration.

## Background

4. On 3 December 2010 the Applicant, then aged 18, was sentenced to Imprisonment for Public Protection following conviction for three offences of Wounding with intent. The offences involved him stabbing three adult males. He was also given a determinate sentence of 4 months for an offence of handling stolen goods.

5. The minimum term of 5 years (less time served on remand) expired on 4 September 2015.

6. On 26 February 2016 the Applicant was released on the direction of the Parole Board. He was recalled on 2 July 2019 following conviction for further offences. For possession of a bladed article, threatening behaviour, two offences of assaulting a police officer and resisting a police officer he was sentenced to a custodial sentence of 12 weeks.

7. His case was reviewed by a panel of the Parole board on 17 January 2020. The case had been listed for an oral hearing but, on the day of the hearing, the Applicant asked via his legal representative for his case to be concluded on the papers. The panel therefore did not take any oral evidence and concluded his case based on the information within his dossier. The panel did not direct his release and did not recommend transfer to open conditions.

## Request for Reconsideration

8. The application for reconsideration is dated 17 February 2021. It is an 8 page document submitted on the Applicant's behalf by his solicitor. Much of the document is taken up by detailing the history of the case including the review in January 2020 and repeating matters set out in the earlier application for an oral hearing. There are then submissions set out which indicate that the application is based on both procedural unfairness and irrationality.

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

   **Ground 1.** That it was both procedurally unfair and irrational to consider the case on the papers without giving the Applicant the opportunity to put his views across to the Parole Board.

   **Ground 2.** That the decision was irrational as the Applicant is being told he must complete a course to address his offending behaviour which is not currently available, there is no clear pathway for progression for him and the recommendations from professional witnesses have not set out why further time in closed conditions would reduce his risk and why he cannot be managed under a stringent risk management plan.

**Current parole review**

10. The Secretary of State referred the case to the Parole board in August 2020 for it to consider whether it was appropriate to direct the Applicant's release or, if not, to consider whether a recommendation should be made for his transfer to open conditions.

11. The matter came before an experienced member of the Board for Member Case Assessment (MCA) on 15 January 2021 when the Applicant was 28 years of age. The dossier was paginated to 140. Neither the Community Offender Manager (COM) nor the Prison Offender Manager (POM) supported release.

12. The Applicant did not submit any legal or personal representations to the Parole Board, although the dossier did contain a letter which he had written to the PPCS caseworker on 8 November 2020 asking questions about his review.

13. The single member panel decided that there was sufficient information in the dossier to make a decision and that it was not necessary to direct the matter to an oral hearing. The panel made no direction for release and did not recommend transfer to open conditions.

14. Following the decision, the Applicant made an application for an oral hearing on 27 January 2021 which included written representations from his solicitor dated 26 January 2021.

15. The request was considered by an experienced Duty Member of the Parole Board on 4 February 2021. An oral hearing was not granted.

**The Relevant Law**

16. The panel correctly sets out in its decision letter dated 15 January 2021 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*

17. 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)).

18. 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**.

19. 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*

20. 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."*

21. 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.

22. 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*

23. 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.

24. 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.

25. As indicated in paragraph 19 above, an application can properly argue that the lack of an oral hearing amounts to a procedural unfairness.

26. 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 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**

27. The Secretary of State responded to the application by way of email on 25 February 2021. The response was focussed on the point made in the application that the Applicant has been informed that the specific offending behaviour programme for which he has been found suitable will not be available until the end of 2021 or into 2022 and professionals have not provided an alternative programme which is available in open conditions or in the community.

28. The Secretary of State responded to say the particular programme which the Applicant is suitable for is only available in custody. A pathway in open conditions or the community is not recommended by professionals given that his outstanding needs require a high intensity intervention. In addition, the programme is not available in the prison where the Applicant currently is and so he will need to move prisons in order to complete it. Due to the pandemic, a timeframe cannot be given.

**Discussion**

Ground 1

29. The thrust of the Applicant's complaint under the first ground is that the panel acted irrationally and there was also procedural unfairness in deciding there was sufficient information in the dossier to make a decision and in refusing to direct the case to an oral hearing.

30. The case of **Osborn** is clear that fairness does not require an oral hearing on every occasion and it is also clear that a mere assertion on behalf of a prisoner that he should have an oral hearing will not entitle a prisoner to one, providing fairness can be achieved on the papers. Of course, I remind myself that it is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

31. The case of **Osborn** sets out helpful guidance as well as illustrative examples of situations where fairness to the prisoner does require an oral hearing. The Applicant submits that he has not had an opportunity to put his views forward and therefore is relying on the principle that a hearing was necessary for him to properly put his case.

32. The panel confirmed in the decision letter within section one that the principles laid down in **Osborn** were considered and that the panel found no reasons for an oral hearing. The same conclusion was drawn by the Duty Member who considered the subsequent application.

33. The Applicant submits that the MCA member who made the decision incorrectly put that his case was considered at an oral hearing in January 2020 when in fact it was concluded on the papers. The Applicant is not correct in this assertion. He is asking for the decision dated 15 January 2021 to be reconsidered. It is not the decision of the Duty Member who refused to grant a hearing which is the relevant decision for the purposes of this application (see paragraph 19). Within the relevant decision, the MCA panel member sets out that the Applicant's case was last considered in January 2020 which is correct. It does not suggest that there was a full hearing.

34. The Applicant had an opportunity in January 2020 for a hearing where he could put his views across, and he asked that the matter be concluded on the papers. In doing so, he was accepting that there was sufficient evidence for a panel to conclude his case without hearing from him in evidence. At that review, the panel considered both the circumstances of his recall and the fact that the Applicant had completed a training programme to address decision making and better ways of thinking. Following full consideration of the case and all that had happened up to that point, the panel concluded there were outstanding risks which needed to be addressed before the Applicant could progress.

35. Since that review, there is very little which has changed other than the Applicant has recently been assessed as suitable for a high intensity programme. It is to the Applicant's credit that he accepted that there is a need for the work. The Applicant indicates within his application that he is *"ready to complete any intervention to show that he can be trusted in less stringent conditions and not to offend in the same way".* Unfortunately, he has not yet completed such an intervention and the

considerations relating to that are dealt with in the second ground below. Suffice to say, it is clear from the dossier and response by the Secretary of State that the programme would not be completed prior to any hearing date and there is not an alternative available currently outside of the closed estate. There would be little point in directing a hearing, then deferring the hearing until such time as a programme can be completed.

36. For this review, the Applicant had the opportunity to put forward his views in written submissions. He did so at the point of making a request for an oral hearing and those points were carefully considered by the Duty Member who did not think there was a need for a hearing.

37. It is not clear what is relied upon by the Applicant for him to suggest that his case could be fairly concluded 'on the papers' back in January 2020 but cannot be concluded that same way on this occasion, especially when he accepts that further core risk reduction work which was deemed necessary by that panel has not been completed and he is willing to complete it. I accept that, had a much longer period of time passed, there may be an argument to suggest there had been other changes for a panel to assess in evidence given by him but I am not persuaded that it was irrational for the panel to conclude on this occasion that there was sufficient evidence to make a risk assessment and there remains core risk reduction work to complete.

38. For the same reasons, I am not persuaded that the decision not to grant a hearing and conclude on the papers was procedurally unfair. Accordingly, this ground fails.

Ground 2

39. The Applicant argues that the decision was irrational as he is being told that he must complete a course to address his offending behaviour which is not currently available, there is no clear pathway for progression for him and the recommendations from professional witnesses have not set out why further time in closed conditions would reduce his risk and why he cannot be managed under a stringent risk management plan.

40. The Applicant appears to put forward contradictory arguments within his application. He submits that professionals are requiring him to do a course to address offending behaviour which is currently not available due to Covid-19 restrictions and associated delays, but then goes on to submit that his pathway for progression is not clear. It would seem to me that it must be either one or the other.

41. The assessment of need was completed in November 2020 and the Applicant was deemed suitable for a particular intervention to address his use of violence within relationships. That is a relatively recent assessment.

42. The COM and POM both recommended he remain in custody and the panel agreed with their opinions that core risk reduction work remained outstanding. I do not accept the submission that the COM and POM have not set out why they consider further time in closed conditions will reduce risk. The COM and POM do not suggest that there is a need to simply spend more time in custody, they very clearly set out that further work is needed to reduce risk and that work needs to be done before

the Applicant progresses. The panel is not required to accept the recommendations of professional witnesses but chose to do so after considering all of the dossier.

43. Similarly, the COM set out reasons why the Applicant could not be managed in the community. The panel considered these, made its own risk assessment and concluded, as set out in the decision letter, that *"the risk of further offending is too high to be managed in the community".*

44. It is outside of the terms of the referral for a panel to dictate a particular programme is completed. The panel was mindful of this and did not say that such a programme was the only way to achieve the necessary risk reduction but that it was a possible way forward. It is a matter for the Applicant and the prison service as to whether he completes that specific course.

45. Whilst I have no doubt that it is both disappointing and frustrating for the Applicant that Covid-19 has had a significant impact on the availability of programmes, I do not accept that this delay is sufficient to render the decision irrational. Whilst there may have been a delay with assessing his suitability, this has now taken place. It is not the case, as is argued by the Applicant, that his sentence plan is unrealistic or that he is "stuck". Whilst it is accepted that he is beyond tariff, that must be seen within the context of the history of the case where he was released and recalled due to further offending. It is not the case that the pandemic has completely removed any future opportunity to complete offending behaviour work. This situation is temporary and there will be an opportunity for the Applicant to participate in further offending behaviour work if he so wishes.

46. The Reconsideration Mechanism is not a process whereby the judgement of a panel when assessing risk can be lightly interfered with. It would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. I do not accept that the Applicant has provided compelling reasons and therefore this ground fails.

**Decision**

47. 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.

**Cassie Williams**
**3 March 2021**