

[2020] PBRA 165

## Application for Reconsideration by Hall

### Application

1. This is an application by Hall ("the Applicant") for reconsideration of a decision of a single panel member dated 7 September 2020, upon consideration of the papers, not to direct his release on licence.
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. This application has been allocated to me as one of the members of the Board who are authorised to make decisions on reconsideration applications. I have considered the application on the papers.
4. The documents provided to me were:
  - (a) The dossier considered by the panel, which contained 202 numbered pages, which also now contains:
    - (i) The panel's decision of 7 September 2020;
    - (ii) The application dated 15 September 2020 by the Applicant's solicitors for an Oral Hearing ("OH"), and
    - (iii) The decision of a Duty Member dated 22 September 2020 that an OH was not required.
  - (b) The application for reconsideration, dated 29 September 2020 from the legal representative on behalf of the Applicant.
  - (c) Confirmation dated 7 October 2020 that the Secretary of State has no representations to make.

### Background

5. The Applicant is 47 years of age. On 13 June 2006 for four counts contrary to **s. 9(1)(a) Sexual Offences Act 2003** he received a sentence of imprisonment for public protection with a minimum term of three and a half years. The minimum



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term was reduced on appeal to the Court of Appeal (Criminal Division) on 3 February 2009 to 30 months. The Tariff Expiry Date is given as 13 December 2008.

6. The offences related to the use of internet chat rooms by the Applicant in order to access underage girls of whose ages he was aware, with a view to meeting them and engaging in sexual activity. The victims were under 16 years of age. They were both groomed to the point where they, on separate occasions, engaged with the Applicant in sexual activity.
7. At the time of this offending the Applicant was on licence from a sentence of three months' imprisonment imposed in October 2003 for possession of indecent images of children. He was also attending a training course addressing sex offending and subject to the requirements of the Sex Offender Register.
8. During his sentence, the Applicant has completed a large number of interventions including accredited risk reduction programmes.
9. On two occasions (2017:2018), which are not referred to in the decision, the Applicant was released to designated accommodation but recalled each time for persistent breaches of the rules.
10. The Applicant had also been transferred to open prison conditions on four occasions and on each time returned to the closed estate.

### **Request for Reconsideration**

11. The application for reconsideration is dated 29 September 2020.
12. The grounds for seeking a reconsideration are as follows:

The Applicant makes a number of complaints that the decision was irrational which I will address in due course but which are in essence:

- (a) that the panel was wrong in finding that an OH was not required and that an OH should have been directed;
- (b) that the panel failed to obtain all relevant evidence, in particular from the Applicant's partner; and
- (c) further submissions in support of the Applicant's request for a direction for release.

### **Current parole review**

13. The case was referred to the Parole Board in October 2019 when the Applicant was 46 years of age 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.
14. The matter came before an experienced member of the Board for Member Case Assessment on 7 September 2020. The dossier was paginated to 202. Neither the Community Offender Manager ("COM") nor the Prison Offender Manager ("POM") supported release, recommending instead another move to open conditions despite



the recent history of the Applicant once again moving from such conditions (Prison **A**) via two other prisons to Prison **B** on 29 January 2020.

15. The move from open conditions was due to an adjudication from 22 November 2019 when the Applicant was said to have failed to present scripted medication when requested by a Prison Officer. This adjudication was not fully processed and thus remained unproven.
16. However, on 20 April 2020 the Public Protection Casework Section ("PPCS") wrote to the Applicant stating that, after considering the circumstances, the Secretary of State found there to be no evidence of a significant increase in the Applicant's risk of harm and it had been decided that the level of risk that he currently presented could be managed in open conditions. It had therefore been decided that no further action would be taken, and arrangements would be made for his transfer back to open conditions.
17. It was expected that the Applicant would therefore move back to Prison **A** on 6 August 2020 but the POM reported on 13 August 2020 that this prison had refused to accept the transfer based on the Applicant's past behaviour and expressed negative attitudes towards the establishment and its staff.
18. Therefore as at the date of the decision on 7 September 2020 he remained on a waiting list to transfer out of Prison **B** to the first available placement within the Category D estate and the POM reported that the timings for this were unclear due to backlogs relating to space and the COVID situation.
19. The legal representations dated 7 July 2020 argue strongly for an OH so that the Applicant could have the opportunity of putting his case clearly to the panel and discussing progress since his last review. Although these representations do not directly address the question of release, it can be inferred from the substance of the submissions that this is an option which the panel would be invited to consider at an OH.
20. The 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 OH.

## The Relevant Law

21. The panel correctly sets out in its decision letter dated 7 September 2020 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*

22. 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

23. 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."*

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

## Other

26. In the cases of **Osborn and others 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; 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 reply on behalf of the Secretary of State

27. The Secretary of State had no representations to make in response to this application for reconsideration.

## Discussion

## IRRATIONALITY



28. The gravamen of the Applicant's complaint is that the panel acted irrationally in deciding there was sufficient information in the dossier to make a decision and in refusing to direct the case to an OH.
29. The panel first deals with the request for an OH at paragraph 1.2. Quite properly the case of **Osborn** is considered but the panel goes on to say:
30. *"There was no support for an immediate release of this case, although there was support for [the Applicant] to return to open conditions and to begin a progression process. The panel member therefore took the view that it was not necessary for this matter to be referred to an oral hearing panel."*
31. The fact that there was no professional support for release would not appear to be an appropriate reason for refusing a request for an OH and the panel thereafter fails to consider the factors which might point to the necessity for one.
32. Later, the panel in its conclusion properly considers firstly the question of release, finding that the Applicant's risk remained at a level which made it necessary for him to be confined and praying in aid of this conclusion "a question mark over your ability to manage both prescribed and illicit drugs".
33. This would appear to be a reference to the incident which led to the Applicant's removal from open conditions in November 2019 which was unproven and in relation to which the Applicant denied any wrongdoing.
34. I find that the Applicant should have been heard in relation to this incident which might have permitted the panel to thereafter make a more definite finding than the existence of "a question mark".
35. In the dossier there is a handwritten letter from the Applicant received by the Board on 4 August 2020 requesting that his partner attend an OH to give evidence pertaining to her support in the community. There does not appear to be any reference to this letter in the decision and, as the panel states that it is unclear whether his partner would be a protective factor in the long term, an OH would, I find, have served to allow the Applicant to adduce evidence which might have allowed the panel to make a more informed finding on this point.
36. The more recent "report" from the COM is in fact a very short email dated 15 July 2020 stating there have been no major developments in the case since January 2020. In fact, the decision of PPCS of April 2020 and of Prison **A** to refuse to take the Applicant were important developments, neither of which the COM addresses.
37. I find that the panel should have sent the case to an OH to allow a detailed exploration of the current sentence plan (which appeared to be "stuck") and, more generally, to permit a close examination of the Applicant's risk and the proposed progressive move given that the proposals of both the COM and the POM which were approved by the panel's decision were not on 7 September capable of being put into operation.
38. The case of **Osborn** is clear that fairness does not require an OH on every occasion and it is also clear that a mere assertion on behalf of a prisoner that he should have



an OH will not entitle a prisoner to one, providing fairness can be achieved on the papers.

39. **Osborn**, does, however, also provide helpful guidance as well as illustrative examples of situations where fairness to the prisoner does require an OH.
40. The panel rightly notes that the Applicant was in an unusual position in that he had been told in April 2020 that the prison was starting to make arrangements to transfer him back to open conditions while at the same time the Secretary of State had sent his case to the Board for review.
41. There was accordingly a real risk that the fact that the Executive had already decided that the Applicant should move to open conditions would obscure the panel's primary focus which was the decision as to whether or not to direct release.
42. In this regard, I find that the panel did not fully engage with the test for release, the adequacy of the documentation before it and the guidance provided by **Osborn** to ensure a fair hearing.
43. Consequently, by refusing an OH the panel deprived the Applicant of the opportunity to present his account of the incident which led to his return to closed conditions in November 2019, to put forward evidence of his partner as a protective factor in the community and to have the panel receive full and up-to-date information from the COM, particularly in respect of the current impasse reached in relation to his move to open conditions.
44. In the same way, the panel deprived itself of the ability to make an informed and clear finding in relation to: (a) the November 2019 incident and (b) whether his partner was or was not a protective factor and also to examine the current state of the Sentence Plan with current information, given that the COM had not filed anything of substance since January 2020.
45. I find that the panel did not have sufficient information in the dossier to make a determination on the papers and that fairness to the Applicant required that the matter be directed to an OH.
46. Given these findings, it is not necessary for me to go on to consider the other issues raised in the Application save to note that they seem to me, whether individually or taken together, to take the matter no further in satisfying the stringent test for a finding of irrationality.

## Decision

47. Accordingly, I do consider, applying the test as defined in case law, that the decision not to direct release was irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be considered by another MCA Panel.

**PETER H.F. JONES**  
**30 October 2020**

