

[2021] PBRA 190**Application for Reconsideration by Poyser****Application**

1. This is an application by Poyser (the Applicant) for reconsideration of a decision made by a single-member Member Case Assessment (MCA) panel dated 19 October 2021 not to direct his 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, the dossier and the application for reconsideration.

Background

4. The Applicant is serving an extended sentence comprising a nine-year custodial period with a four-year extension period imposed on 3 May 2016 following conviction for 22 counts of making/possessing indecent images of children, two counts of inciting a female child aged between 13 and 15 to engage in sexual behaviour and breach of a sexual harm prevention order.
5. His parole eligibility date was 3 July 2021. His conditional release date is in July 2024 and his sentence end date is in July 2028. This is his first parole review.
6. The Applicant was aged 48 at the time of sentencing. He is now 53 years old.

Request for Reconsideration

7. The application for reconsideration is dated 13 December 2021 and has been submitted by solicitors acting for the Applicant.
8. It advances three grounds for reconsideration:
 - (a) The decision was irrational because the MCA panel did not consider the possibility of alternatives to custodial offending behaviour programmes;
 - (b) The decision was irrational because it incorrectly refers to the Applicant having a history of sexual attraction to male children; and/or



(c) The decision was procedurally unfair as the Applicant was not able to fully take part in his review since it was concluded on the papers and not after an oral hearing.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in October 2020 to consider whether or not it would be appropriate to direct his release.

11. The case was deferred (by a different MCA panel) for a psychological risk assessment (PRA) on 18 February 2021. The dossier seen by that panel contained legal representations dated 8 February 2021 seeking an oral hearing.

12. The PRA was completed on 9 July 2021 by a prison psychologist. It did not recommend the Applicant's release, assessing him as having a high risk of future sexual violence (but with low imminence) and concluding the Applicant should engage with further core risk reduction work via accredited interventions prior to release into the community.

13. A report was also submitted by the Applicant's Community Offender Manager (COM) dated 27 July 2021. This report agreed with the recommendations of the PRA and did not support the Applicant's release.

14. Further representations were submitted on 10 August 2021 seeking an oral hearing. These noted that the Applicant wished to challenge the recommendations in the PRA.

15. The MCA panel considered the Applicant's case on the papers on 19 October 2021. It did not direct the Applicant's release.

16. An MCA decision is provisional for 28 days to permit an application to be made for an oral hearing in the interests of fairness. An application was made and considered by a Duty Member. The application was refused.

The Relevant Law

17. The panel correctly sets out the test for release in its decision letter dated 19 October 2021.

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**.

Procedural unfairness

20. 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.

21. 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.

22. The overriding objective is to ensure that the Applicant's case was dealt with justly.

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 **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. Its 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; 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 has submitted no representations in response to this application.

Discussion

Ground (a) – Irrationality: failure to consider alternative community options

28. It is first submitted that the decision was irrational as the MCA panel did not consider the possibility that the Applicant's risk could be reduced and/or managed by means alternative to completing a custodial offending behaviour course. By way of example, the application refers to possible treatment via medication which is only available in the community.

29. The decision notes that community release was fatally undermined by the absence of an identified alternative to accredited custodial offending behaviour courses. The PRA does note several other considerations which could be considered to manage the Applicant's risks if release was directed. These include the option of medication raised in the application.

30. However, the PRA goes on to say that there is no guarantee that the Applicant would be considered suitable for such medication, that he may not be able to access it imminently on release and that he is somewhat ambivalent about the use of medication.

31. The decision notes the Applicant's lack of capacity and motivation to engage with community work, or acceptance that it is necessary, before concluding that a community-based risk management plan could not be effective.

32. The fact that the MCA panel did not explicitly list various community options in its decision does not mean that it did not consider them. It had the benefit of the PRA and gave weight to its very clear recommendation. It cannot be said that its decision not to direct release was outrageously defiant of logic. There is no irrationality here and this ground fails accordingly.

Ground (b) – Irrationality: history of sexual attraction to male children

33. It is next submitted that the decision was irrational since it refers to the Applicant having a history of sexual attraction to male children. The application notes that the Applicant has no convictions relating to contact offences against male children and the PRA identifies an outstanding need around attraction to female children.

34. The dossier notes that the Applicant's mobile phone contained still images and videos of both male and female children aged between five and fifteen years. Proposed additional licence conditions in the event of release seek to limit contact to both male and female children. He is assessed as presenting a risk to both females and males in relation to indecent images. The Applicant has denied having a sexual interest in male children.
35. The MCA panel assessed the Applicant as presenting a risk to both male and female children. While it is true that he has not been convicted of contact sexual offences against male children, he has been found in possession of indecent images of male children. It is not irrational for the MCA panel to conclude that there is a history of sexual attraction to male children, neither is it irrational for the panel to give that matter weight in its overall decision not to direct the Applicant's release. Again, there is no irrationality here and this ground fails accordingly.

Ground (c) – Procedural unfairness: conclusion on the papers

36. Finally, it is submitted that the decision was procedurally unfair since the Applicant was not able to take part fully in his review and he had a legitimate expectation that he would be granted an oral hearing. It is argued that both the MCA panel and Duty Member failed to apply **Osborn**.
37. It is only the decision of the MCA panel not to direct release that is subject to the reconsideration mechanism afforded by rule 28. The decision of the Duty Member not to direct an oral hearing is not justiciable under rule 28 and any submissions regarding it must automatically fail.
38. Returning to the decision of the MCA panel, it clearly acknowledged the Applicant's representations (seeking an oral hearing), noted that this was his first review, and considered the elements of the written evidence that the Applicant had challenged. It concluded that even if it accepted the Applicant's position in its entirety, it would make little difference to the panel's assessment of risk or its conclusion. It offered a number of very clear reasons why it made no direction for release.
39. The submissions put before the Duty Member seeking an oral hearing are largely repeated in the application for reconsideration. The Duty Member dismissed the Applicant's request for an oral hearing on **Osborn** principles finding that the MCA panel had considered and applied those principles correctly, as do I. This ground also fails.

Decision

40. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
23 December 2021