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[2022] PBRA 86

Application for Reconsideration by Amoura

Application

1. This is an application by Amoura (the Applicant) for reconsideration of a decision of a single member panel of the Parole Board dated the 28 April 2022 not to direct his release on licence nor to recommend transfer to open conditions. 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 293 pages, the written representations in support of the application for reconsideration and an email from PPCS.

Background and Current Parole Review

4. On 30 November 2012, the Applicant, then aged 19, was sentenced following conviction for robbery, rape and other offences. He was 17 when he committed the robbery and rape involving a female victim who was not known to him. He was originally sentenced to an extended sentence for the robbery and rape but, on Attorney General's reference, this had been quashed and substituted with a sentence of Detention for Public Protection. The determinate sentences for other offences remained the same.

5. The minimum term expired on 25 June 2013.

6. This was the fifth review of the Applicant's case. His case had last been considered at an oral hearing in June 2020. The Secretary of State then referred the case to the Parole board in December 2021 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.

7. The matter came before an experienced member of the Board for Member Case Assessment (MCA) on 28 April 2022 when the Applicant was 28 years of age. The dossier was paginated to 266 pages.

8. The Applicant's case had been subject to an ongoing pilot being run by HM Prison and Probation Service which involves cases like the Applicant's being reviewed to consider whether a psychological risk assessment would add value to the parole review in order to aid the Parole Board's decision-making process. In the Applicant's case, the review by a forensic psychologist in October 2021 recommended that a psychological risk assessment was not needed at that time. However, the Community Offender Manager (COM) in their detailed report in February 2022 recommended that an updated psychological and Wechsler Adult Intelligence Scale (WAIS) assessment be completed ahead of any parole hearing, in particular to assist the probation service with a clearer understanding of his needs, "*potential support*" for a progressive move to a particular regime in a different prison and planning any further interventions.

9. The Applicant did not submit any legal or personal representations to the Parole Board at this stage.

10. 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.

11. Following the decision, the Applicant made an application for an oral hearing which included written representations from his solicitor dated 27 May 2022. The request was considered by an experienced Duty Member of the Parole Board on 8 June 2022. An oral hearing was not granted.

Request for Reconsideration

12. The application for reconsideration is dated 27 June 2022. It is a document running to 49 paragraphs submitted on the Applicant's behalf by his solicitor. Much of the document is taken up by quotes from case law and repeating submissions sent after the decision by way of application for an oral hearing. There are then submissions set out which indicate that the application is based on both procedural unfairness and irrationality.

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

    Ground 1. That it was both procedurally unfair and irrational due to not applying the correct legal framework and failing to engage the principles laid down in **Osborn v Parole Board [2013] UKSC 61**.

    Ground 2. That it was both procedurally unfair to consider the case on the papers without giving the Applicant the opportunity to put his case to the Parole Board.

The Relevant Law

14. The panel correctly sets out in its decision reasons dated 28 April 2022 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 (these have since been

amended by the Secretary of State but the decision sets out the issues relevant at the time).

Parole Board Rules 2019

15. 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)).

16. 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**.

17. 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

18. 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."

19. 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.

20. 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

21. 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.

22. 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.

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

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

25. 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

26. The Secretary of State confirmed by way of email dated 1 July 2022 (sent by PPCS on his behalf) that he did not wish to make any representations.

Discussion

27. I remind myself as per paragraph 17, that I am solely concerned with the original decision. I therefore put to one side aspects of the application criticising the duty member's decision not to grant a hearing and I make no comment about that decision.

28. The thrust of the Applicant's complaint 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, in particular due to the fact that he had not submitted any representations himself or via his legal representative.

29. 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. However, I also remind myself that it is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

30. The panel confirmed within section seven of its decision that the principles laid down in **Osborn** were considered and that the panel found no reasons for an oral hearing. It states, *'The panel noted that the facts of the case were clear, and no dispute had been raised, that there was no request for an oral hearing, and that the issues relating to risk assessment were clear. Matters had been extensively considered in June 2020, and there had been little sign of progress since that date.'*

31. Within that paragraph therefore, the panel relied somewhat on the fact that there had not been any request for a hearing or any dispute raised by the Applicant. That is entirely understandable as the process allows for time for a prisoner to send personal representations and/or to instruct a legal representative to send representations in on their behalf. An MCA member cannot know or take account of anything without being informed of it, and cannot assume all prisoners dispute reports, would like an oral hearing or have anything at all they wish to say. There is no requirement on an MCA member to have representations before making a decision.

32. However, the single member when considering the case must take account of the information in the dossier and decide if it is sufficient to make a fair decision.

33. What is particular about this case is the Applicant's vulnerability. There was material before the panel which revealed this including:

a) Involvement with mental health services from a young age as detailed within the pre-sentence report, psychiatric and psychological reports all contained in the dossier. These include references to traumatic childhood experiences.
b) Issues regarding fitness to plead suggestions during the court process and the appointment of an intermediary.
c) Multiple references to "low IQ", the participation on an adapted programme and referencing of a previous WAIS assessment where his intellectual ability was classified as in the 'extremely low' range.
d) The suggestion by the COM and support by the official supervising his case in custody that a further WAIS be completed (as well as a psychological risk assessment which had also been recommended by the panel considering his case in 2020).
e) The COM outlining the need for an oral hearing to commence in the morning to allow him time to speak to his legal representative and to process information fully to aid communication when he talks to the panel at a hearing.

34. From reports in the dossier it was apparent the Applicant did wish to progress to release as he had participated in conversations with those supervising him who then

relayed his thoughts and feelings. It was also clear that he had participated fully in oral hearings at past reviews and had been legally represented.

35. On my reading of the decision reasons it does not sufficiently explain whether the Applicant's vulnerability was considered fully before continuing to make a decision without either adjourning to allow him to seek legal representation and submit written representations or directing an oral hearing to afford him the opportunity to put forward his view and challenge any points.

36. The Applicant submits that he assumed he would be granted a hearing without needing to submit representations. Given his cognitive difficulties and the way his case had proceeded in the past, I accept that this was likely, particularly as the COM's report seemed to also have made that assumption.

37. Considering the issues in this particular case where the Applicant is vulnerable, I am driven to the conclusion that there was procedural unfairness in not allowing the Applicant an opportunity to put forward his case before a decision was reached.

Decision

38. Accordingly, for the reasons I have given, the application for reconsideration is granted and the case should be reviewed by a fresh MCA panel (whilst I have no doubt that the original MCA panel member would be fully capable of approaching the matter conscientiously and fairly, the question of justice being seen to be done arises).

Cassie Williams
15 July 2022