

[2023] PBRA 169

Application for Reconsideration by the Secretary of State for Justice in the case of Carter

Application

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a paper review decision, dated 14 August 2023, at the Member Case Assessment (MCA) stage, to direct the release of Carter (the Respondent).
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (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 –
 - The Paper Decision (the Decision);
 - The Application for Reconsideration dated 4 September 2023;
 - The Dossier, which now consists of 199 numbered pages, the last document being the Decision.
4. I have not received any representations on behalf of the Respondent, who has a legal representative. The deadline for such representations passed on 11 September 2023 (Rule 28(3)). I have delayed dealing with this matter to give some leeway for late representations.

Background

5. The Respondent is now 19 years old. In December 2018, when he was only 14, he received an extended determinate sentence of 7 years' detention, made up of a custodial term of 5 years and an extension period of 2 years, for two offences of wounding with intent to cause grievous bodily harm. For linked offences involving his possession and use of a knife he received no separate penalty. The motive for the offences was the enforcement of a drugs debt. The sentence will expire in August 2025.
6. The Respondent was released automatically in December 2021. His licence was revoked and he was recalled to custody on 2 February 2023. He had breached his licence by staying at the address of his girlfriend rather than that of the relative



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whose address was the approved one for the purposes of his licence and curfew. After the revocation the Respondent was unlawfully at large for 2 months, until he was arrested while a passenger in a car, with what are described as “4 other negative associates”, the driver having no licence. The driver took evasive action when it was realised the police were following. In the car the police found a considerable amount of wraps of white powder, balaclavas and offensive weapons. The Respondent had a mobile phone and £140 cash on him. After investigation the police took no further action against the Respondent.

7. The Respondent has other convictions, all but one evidencing a propensity for violence, aggression and weapons.

Request for Reconsideration

8. The application for reconsideration is dated 4 September 2023.
9. The grounds for seeking a reconsideration are as follows:
10. It was irrational on the limited written evidence provided to conclude that the Respondent was safe to release via a paper hearing. Specifically:
 - (1) There was a lack of custodial behaviour information, despite the panel having requested a report on any work done since recall and the Respondent’s behaviour in the custodial estate. The Community Offender Manager (COM) reported that she did “*not have much any [sic] information on this*” as she had not had time to contact the Offender Management Unit for information.
 - (2) There is no security report or update from the prison about the Respondent’s behaviour. This is despite the dossier containing information that the Respondent had been removed from his job in prison due to his behaviour, but no details of the alleged behaviour.
 - (3) The Respondent had been tried for rape in 2017 and acquitted. A further allegation of rape had resulted in a No Further Action decision. There was insufficient evidence within the dossier to enable the panel to conduct a thorough risk assessment and be satisfied that the test for release was met.
 - (4) An oral hearing would have more appropriate to hear the case thoroughly and fairly. An oral hearing panel would have fully considered the COM’s recommendation for release. It would also have explored the recall incident.
11. Not specifically advanced by the Applicant, but in my view relevant, is that the COM reports at p105 of the dossier that just before the Respondent was transferred from one prison to another, according to what the Respondent says, there was “*an altercation with another prisoner*”. The COM further reported that the Respondent was currently working as part of the gardens team, but had refused to attend on two successive days at the end of July, just before the date of the report. The dossier contains no further information about these matters.

Current parole review

12. The Applicant referred the Respondent’s case to the Parole Board, by way of an undated referral document, for consideration of a direction for release.



13. The MCA member directed release on the papers in a Decision dated 14 August 2023.

The Relevant Law

14. The panel correctly sets out in its decision letter the test for release.

15. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

16. The case of **Johnson [2022] EWHC 1282 (Admin)** does not change the test, but adds the following gloss:

"The statutory test to be applied by the Board when considering whether a prisoner should be released does not entail a balancing exercise where the risk to the public is weighed against the benefits of release to the prisoner. The exclusive question for the Board when applying the test for release in any context is whether the prisoner's release would cause a more than minimal risk of serious harm to the public."

Parole Board Rules 2019 (as amended)

17. This decision is eligible for reconsideration. It is made by a paper panel under Rule 19(1)(a). It is an extended sentence: Rule 28(2)(b).

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.

21. In **R (Wells) v Parole Board [2019] EWHC 2710** Saini J. articulated a modern approach to the issue of irrationality: "A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before



it and to ask whether the conclusion can (with due deference and with respect to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied. ... [T]his approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury ... but it is preferable in my view to put the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion."

22. In the cases 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. The Court's 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 prisoner

23. No reply has been submitted by or on behalf of the Respondent.

Discussion

24. This is an unusual case, where I have had to look into the Rules to see that we are following the correct procedure. We are. The remedy for a prisoner who challenges a decision to decline to direct release at the MCA stage is to apply under Rule 20 for a panel at an oral hearing to determine the case. This is not available to the SSJ where an MCA panel directs release. His remedy is under Rule 28, reconsideration.

25. Applying the law as set out above, I am in no doubt that this decision can properly be described as irrational. My principal reason is that the MCA panel simply did not have enough information on which to base a release decision.

26. The Respondent's risk factors plainly include association with criminally-minded peers, to use the jargon. Any decision to release the Respondent would, in my judgement, have to be based on some understanding of how he had spent his time both on licence and while unlawfully at large, and of the circumstances of him being in a car with this group of people and the items that were found there, whether he was responsible for them or not.

27. On these matters the dossier, and therefore the evidence available to the MCA panel, was silent. This was a case which called for an oral hearing: in terms of **Osborn v Parole Board [2013] UKSC 61**, the panel needed to see and hear from the prisoner in order properly to assess risk.



28. I also accept that the indications in the dossier are that the conduct and attitude of the Respondent following his recall raise unanswered questions relevant to risk, which in all probability called for an oral hearing. It was irrational not to investigate those matters further before deciding that the Respondent passed the test for release.
29. To put the matter in terms of **DSD** above [the *Worboys* case], the conduct that led to recall, the period of being unlawfully at large and the absence of evidence as to what the Respondent was doing during that period, the circumstances of his arrest and the evidence of his conduct after recall, separately or together, should have led the MCA panel to deem further inquiry, by way of an oral hearing, to be necessary to assess risk in this case.
30. In my judgement the matters found by the MCA panel to justify release (the Respondent's acceptance to his COM that he needs to change, "*to walk a different and pro-social pathway if he wants to avoid the revolving door of prison and community for the rest of his life*", and the strengthening of the Risk Management Plan by residence at an appropriate hostel and GPS trail monitoring) do not compensate for the absence of adequate evidence for a proper risk assessment in this case.

Decision

31. Accordingly, I do consider, applying the test as defined in case law, the decision to direct release on the evidence before the MCA member to be irrational. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

HH Patrick Thomas KC
25 September 2023

