

[2023] PBRA 56

## Application for Reconsideration by Kerr

### Application

1. This is an application by Kerr (the Applicant) for reconsideration of a decision made by a paper panel dated the 20 January 2023 not to direct his release.
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:
  - a) The Decision Letter dated the 20 January 2023;
  - b) The Applicant's application for reconsideration, comprising of 5 pages of representations, together with documents and letters attached to those representations; and
  - c) The dossier, numbered to page 213, of which the last document is a letter dated the 23 January 2023 from the Applicant. The panel had a dossier numbered to page 204. The panel's Decision Letter references a dossier of 207 pages, although it would seem that this included the three content pages.

### Background

4. The Applicant is now 59 years old. On the 6 January 2020, when he was 56 years old, he received an extended determinate sentence, comprising of 6 years in custody and a 3-year extended licence. The sentence followed the Applicant's conviction for stalking a person to cause fear of violence (the Index Offence).
5. It is indicated that the Applicant maintains his innocence of the Index Offence and he has been pursuing appeals against his conviction. Denial is not a barrier to consideration of release by the Parole Board. At the time of the panel's review the Applicant had been charged with further offences and there had been concerns that the Applicant had been breaching non-contact conditions from custody.
6. The Applicant's case was referred to the Parole Board by the Secretary of State on the 15 July 2022 to determine whether his release could be directed prior to his automatic release date in June 2025. The Applicant becomes eligible to



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be considered for release by the Parole Board on the 5 June 2023 and this was the first referral of the case to the Parole Board.

7. In written representations from the Applicant's legal representative dated the 31 October 2022, the Applicant accepted that there may be a need to delay the review of his case pending the outcome of the criminal matter. He had outlined his wish to be released and had submitted, if this could not be directed on the papers, that an oral hearing should be directed.
8. The panel first considered the case on the papers on the 11 November 2022 and adjourned for further information about the outstanding criminal matters to be provided. The Applicant had been in court in September 2022 and a trial was fixed for January 2023. In January 2023, the panel further adjourned the case for the outcome of the trial. The panel had noted that the allegation was relevant to risk.
9. The trial in January 2023 was subsequently vacated and a new trial was listed for July 2023. On the 5 January 2023, the panel received a letter from the Applicant in which he provided information about the allegation before the court. The Applicant sent a further letter to the panel in January 2023 which detailed the proceedings in the court.
10. On the 18 January 2023, the Applicant's legal representative presented further written submissions. It was submitted that the Applicant was seeking an oral hearing and that the case was no further forward since the initial adjournment because the court matter remained outstanding. It was suggested that by the time any oral hearing was listed, the trial at court, set for July 2023, would have concluded.
11. The panel considered the case on the papers on the 20 January 2023 and did not direct the Applicant's release. The panel determined that an oral hearing panel would not be in a position to make a finding of fact about the matters currently awaiting trial and it determined that the outstanding matter goes directly to the Applicant's risk. The panel considered whether to adjourn its review of the Applicant's case but it determined that it should conclude the review because any further adjournment would lead to an unreasonable delay.

### **Request for Reconsideration**

12. The application for reconsideration is that the panel's decision was irrational, in that:

*"The panel concluded the case without directing the Applicant's release and he has produced evidence to outline why he believes he is innocent of current charges before the court, or in the alternative why the court should dismiss those charges".*

### **The Relevant Law**

13. The panel correctly sets out in its decision letter dated the 20 January 2023 the test for release.



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14. 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.

#### *Parole Board Rules 2019 (as amended)*

15. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

16. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

#### *Irrationality*

17. 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."*

18. 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.

19. 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*

20. 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



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applications for an oral hearing. Their conclusions are set out at paragraph two 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.

21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

### **The reply on behalf of the Secretary of State (the Respondent)**

22. In an emailed reply of the 14 March 2023, the Respondent confirmed that he had no representations to make.

### **Discussion**

23. In his representations, I note that the Applicant believes that earlier representations he had submitted in December 2022 had been delayed or had gone missing. The evidence before me shows that the panel did receive and consider those representations.

24. Much of the Applicant's representations seek to rehearse the allegation due to be considered at trial in July 2023 and the Applicant's view of the case, including his belief that he should be acquitted. It seems to me that the Applicant expected the panel to make its own finding of fact in terms of the pending trial and, if it supported his assessment of the case, to then direct his release.

25. It would not have been appropriate for the panel to have made findings of fact when there is a pending trial. The panel had determined that the allegation was relevant to the consideration of risk and therefore the pending matter needed to be resolved. Another panel may well have decided to delay the review for the outcome of the trial, however, the fact that this panel did not does not make its decision not to direct the Applicant's release irrational.

26. The panel properly considered the delay in this case and the need for a timely review of the Applicant's detention in custody. I note that the Applicant has not furthered the argument put forward by his legal representative that the case should have proceeded to an oral hearing. However, even if he had, it



was open to the panel to conclude the case as it did. The panel's approach ensured a timely review of the case and it remains open to the Secretary of State, if he chooses to do so, to refer the case back to the Parole Board once the criminal trial has concluded. The Applicant can of course make his own representations to the Secretary of State about any further referral of his case in due course.

27. The Applicant may disagree with matters before the criminal court and he may have wanted the Parole Board to have agreed with his assessment of the pending trial. However, this does not establish that the panel's decision not to direct his release was irrational.

## **Decision**

28. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**Robert McKeon**  
**29 March 2023**

