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**[2024] PBRA 129**

## Application for Reconsideration by Tyhurst

### Application

1. This is an application by Tyhurst (the Applicant) for reconsideration of a decision of a single-member panel dated 28 May 2024 to consider whether or not it would be appropriate to terminate the IPP licence in the Applicant's case. The decision was not to terminate the licence. The panel also decided not to suspend the supervisory element of the licence.

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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the Decision, the Application for Reconsideration, the email of 26 June 2024 in which the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) notified the Parole Board that the Secretary of State was not making any representations in response to the Applicant's reconsideration application and the Dossier totalling 74 pages.

### Request for Reconsideration

4. The application for reconsideration is dated 18 June 2024.

5. The grounds for seeking a reconsideration are as follows:

    a) The decision of the panel not to hold an oral hearing was a breach of the principles of procedural fairness set out in the decision of **The Queen (on the application of Osborn and Booth) v the Parole Board** [2013] UKSC 61 (the Osborn Decision) and Article 5.4 of the European Convention for the Protection of Human Rights (the ECHR) especially as the decision in the present case fails to give any reasons for departing from principles set out in the Osborn decision (Ground 1); and

    b) The decision of the panel not to terminate the Applicant's licence was procedurally unfair as the Applicant had been deprived of the opportunity of

having an oral hearing which would have provided an independent assessment of his continuing dangerousness (Ground 2).

**Background**

6. On 4 July 2011, the Applicant, who was then 15 years of age was sentenced to detention for public protection (which is the equivalent punishment for children of imprisonment for public protection) with a tariff of 1 year and 43 days for an offence of attempted rape and 4 offences of sexual assault.

7. The Applicant had been released subject to licences after decisions by panels of the Board on 6 occasions since he was originally sentenced. He has been recalled on each occasion on which he had been released as is shown by the table below.

   Release 1 on 18 July 2013 but recalled on 3 June 2015.
   Release 2 on 22 December 2015 but recalled on 21 April 2016.
   Release 3 on 17 March 2017 but recalled on 5 May 2017.
   Release 4 on 24 July 2017 but recalled on 12 January 2021.
   Release 5 on 9 August 2021 but recalled on 14 April 2023.
   Release 6 on 29 February 2024 but recalled on 30 May 2024.

8. As more than 10 years has passed since his first release the Applicant is eligible for consideration of the termination of his IPP licence.

9. He has sentence planning objectives to find secure accommodation, to develop his work-related skills, to increase his stability with regard to emotional well-being, to develop his decision making and thinking and behaviour, and to improve his strategies at confronting his substance abuse issues.

10. So far, it is said that he has encountered a number of difficulties engaging with substance misuse services. His compliance with signing in times and curfews has been varied and he has received a warning for attending a probation appointment under the influence of illicit substances. He also received a Notice of Concern from the Approved Premises for drinking alcohol on the first evening that he was released from custody.

**Current parole review**

11. On 8 January 2024, a panel consisting of 2 members directed the release of the Applicant to an Approved Premises. He was released on 29 February 2024. He was recalled on 30 May 2024.

**The Relevant Law**

12. The panel correctly sets out in its decision letter dated 28 May 2024 the test for determining a sentence of detention for public protection.

*Parole Board Rules 2019 (as amended)*

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).

14. 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)).

*Procedural unfairness*

15. 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.

16. 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;
    (e) the panel did not properly record the reasons for any findings or conclusion; and/or
    (f) the panel was not impartial.

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

*The Role and Importance of Oral Hearings for Prisoners*

18. 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 before setting out its conclusions. The Supreme Court did not decide that there should always be an oral hearing, but it explained said there should be an oral hearing if fairness to the prisoner required 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 consider 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.

*Reconsideration as a discretionary remedy*

19. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having considered the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

**The reply on behalf of the Secretary of State**

20. In an email dated 26 June 2024, PPCS, acting on behalf of the Respondent informed the Parole Board that the Respondent would not be making any representations in response to the Application for Reconsideration

**Discussion**

*Ground 1*

22. The case for the Applicant is that the Panel ought to have ordered an oral hearing in the light of the approach of Lord Reed in **Osborn** that in relation to many offenders:

> " 87 ...*an independent assessment of their continuing dangerousness will require a judgment to be made of the extent to which they have developed over the period since their conviction: a matter which cannot normally be independently and fairly assessed without seeing the person concerned."*

23. In support of this contention, it is stressed that almost 13 years have elapsed since the Applicant's initial sentence for detention for public protection in 2011 when he was 15 years old. The fact that the Applicant has been released on 6 occasions, but that he has then been recalled on each occasion shows the criminal justice system has failed to appreciate the nature and extent of the danger the Applicant would and did pose on release. Nothing has been put forward to show that this conclusion is incorrect, and I agree that this demonstrates an urgent need for an assessment in an oral hearing of the dangerousness that the Applicant poses.

21. I have been fortified in reaching that conclusion by the further statement of Lord Reed in **Osborn** in paragraph 2 (iii) that "*in order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide".* I have concluded that this statement provides additional support for ordering an oral hearing for three different reasons which are that:

    (a) the fact that the Applicant was released and recalled five times shows that the Board still do not understand the risk posed by the Applicant when released and how that risk can be managed and addressed. That shows that the Applicant's case "*may benefit from the closer examination which an oral hearing can provide";*

(b) the statement in **Osborn** in paragraph 2 (iii) set out earlier in this paragraph shows that the condition for ordering an oral hearing is satisfied if adopting such a course **may** benefit from the closer examination which an oral hearing can provide. The condition is satisfied even if there is **no certainty or probability** that adopting this course will benefit from a closer examination; and/or that

(c) no specific reason has been put forward by the panel member or by PPCS in its submissions to show that an independent of risk and the means by which it should be managed and addressed **might** not benefit from the closer examination which an oral hearing can provide.

*Ground 2*

22. I now have to consider whether the decision of the panel not to terminate the Applicant's licence was procedurally unfair as the Applicant was deprived of the opportunity of having an oral hearing which would have provided an independent assessment of his continuing dangerousness.

23. I consider that my conclusion that the decision of the panel not to permit the Applicant to have an oral hearing was procedurally unfair means that the subsequent decision of the panel not to terminate the Applicant's licence was also procedurally unfair.

**Decision**

24. Accordingly, whilst I have found there to have been a procedural irregularity, I do consider, applying the test as defined in case law, that the decision not to hold an oral hearing and then the decision not to terminate the Applicant's IPP licence to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

25. I have given careful consideration to whether this case should be reconsidered by the original panel member or whether it should be considered afresh by another panel.

26. I have no doubt that the original panel member would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

**Sir Stephen Silber**
**10 June 2024**