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[2024] PBRA 191

Application for Reconsideration by Keel

Application

~~1.~~ This is an application by Keel (the Applicant) for reconsideration of a MCA decision dated 10 June 2024 refusing to release the Applicant (the MCA decision).

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 Decision of a single member panel dated 10 June 2024 making no direction for the Applicant's release (the MCA Decision), the Duty Member Decision refusing to grant an oral hearing (the Duty Member Decision), the Application for Reconsideration of the MCA Decision and the email from Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) offering no representations in response to the Reconsideration Application relating to the MCA Decision.

Request for Reconsideration

4. The application for reconsideration was received on 28 August 2024.

5. The grounds for seeking a reconsideration are that the MCA Decision refusing to release the Applicant or direct an oral hearing was procedurally flawed and irrational because:

   (a) an oral hearing should have been ordered in the light of the principles set out in the case of Osborn, Booth & Reilly v The Parole Board [2013] UKSC 61 (Osborn) and subsequent decisions (Ground 1); and that

   (b) the MCA member should have appreciated that they did not have key pieces of information which were necessary to make a proper decision such as past psychological reports on the Applicant and should have adjourned making the decision until that information was received (Ground 2).

Background

6. On 14 July 1997, the Applicant, who was then 19 years old, was sentenced to life imprisonment for the murder of a friend of his younger sister. He went looking for the victim. When he located the victim, he produced a knife before inflicting 10 stab wounds before leaving his victim to die. He contested the case, and the trial judge took the view that there was no hint of remorse on the Applicant's part. His minimum term was set at 12 years less time spent on remand.

7. The Applicant has been released on licence on 5 occasions after different Parole Board hearings and he has been recalled on each occasion. On 3 occasions he was recalled because of substance misuse, and he was last released in April 2023 and recalled on 26 January 2024, but he remained unlawfully at large until 13 March 2024.

Current parole review

The MCA Decision

8. The Applicant's most recent parole hearing was conducted on paper on 10 June 2024 after the Applicant had not sought an oral hearing. It was noted that after his return to prison in March 2024 after being unlawfully at large for more than 6 weeks having lost contact with probation, he had received a proven adjudication for assaulting another prisoner and that he had also accrued a number of negative entries.

9. The Applicant's Community Offender Manager (COM) did not support his release as he assessed that the Applicant would not comply with licence conditions. He also considered that the Applicant needed to complete a "*significant amount of work in custody to address Class A relapse prevention and mental health issues as well as undertaking [a specific programme which would improve his thinking]".*

10. The panel found that there were a number of factors which would increase his risk of reoffending and causing harm and they included "a *willingness to use the most extreme violence involving a knife and his continued involvement with, and possession of potentially lethal weapons and a longstanding history of chronic intravenous Class A drug misuse and associated lifestyle, significant mental health vulnerabilities, an inability to demonstrate consistent compliance, considerable difficulties with accommodation and relationships, poor emotional management, impulsivity and maladaptive coping strategies, pro-criminal attitudes and associates and poor problem solving, thinking skills and decision making*."

11. The panel explained that each of the factors set out in the last paragraph (when present in the Applicant's life alone or in combination) might *"increase [the Applicant's] motivation he has to offend, the frequency or likelihood that he might reoffend, and that this may affect the impact that his offending might have on others".*

12. The panel did not find it possible to identify any protective factors of the Applicant at that time.

13. The COM assessed the Applicant as posing a high risk of serious harm to the public and medium risk to a known adult and a child in the community.

14. The Applicant's assessment by the Offender Group Reconviction Scale was that he posed a high risk of a probability of proven reoffending and a very high on the

probability of non-violent reoffending. The panel regarded that these assessments constituted "*reliable assessments of the level of harm which the Applicant would pose in the community at the present time*".

15. The panel also noted that there was no professional support for the release of the Applicant or for a progressive move for him to open conditions at the time of the Decision and that "*it is clear that he has considerable outstanding treatment needs which must be completed in the closed estate".* The panel also applied the appropriate test and concluded that the most recent recall was *"entirely appropriate",* and that it was hoped that the Applicant *"will engage with the proposed programmes of work in prison and will complete them successfully. Thereafter, there will need to be a period of stability and consolidation before consideration is given to the most appropriate progressive move".*

16. Having read the dossier, the panel concluded that the Applicant was *"unable to evidence any reduction in the high level of risk which he [then presented] and further time and work [was] required in custody".*

17. The panel concluded in relation to the Applicant that: *"Accordingly, in the light of his history, the very serious nature of the index offence, the need for him to be recalled from licence on five occasions involving, most recently, another relapse into drug misuse and a lengthy period spent UAL, his unimpressive prison conduct since his return to prison, his significant, outstanding risk factors for which further treatment is required and the considerable risk which the Panel finds that he currently poses together with the absence of a recommended risk management plan and suitable accommodation which would enable him to be safely managed in the community, the Panel, applying the appropriate test, makes no direction for release".*

18. It was pointed out by the panel that before concluding the Applicant's case on the papers, it had considered his case in the light of the principles set out in the case of **Osborn** for determining the requirements for an oral hearing but it did not find "*suitable reasons for directing such a hearing nor has [he] submitted any reasons for doing so or shown that examining oral evidence would be appropriate".* Therefore, the Panel declined to send the review to an oral hearing, but it pointed out that the Applicant "*may apply in writing for a panel at an oral hearing to determine the case."* or apply for reconsideration. The Applicant has applied for reconsideration.

The Duty Member Decision

19. On 6 August 2024, the MCA Duty Member noted that the Applicant had availed himself of the right to request an oral hearing within 28 days of the MCA Decision and that the basis for the Applicant's request was that *"whilst [he had] been recalled several times, [he had] not committed further offences resulting in serious harm"* and that the principles set out in the **Osborn** case (supra) had not been applied correctly although no details were given of this complaint.

20. The MCA Duty Member explained that an oral hearing was not required in all cases and in the Applicant's case, *"the panel did not view oral evidence as necessary in order that [the Applicant] could put [his] views across effectively".*

21. The Duty Member noted that the Applicant *"had now been recalled several times and before re-release Probation recommend that further work needs to take place [and that]* it would *be premature to list an oral hearing now, as [the Applicant] would not be able to evidence any changes [he had] made to giv[e] confidence that there would not be another recall."*

22. Accordingly, it was recorded that the representations submitted supporting the request for an oral hearing had been considered and the request was refused for the reasons set out. It was then stated that, *"The [MCA] decision is therefore final, and [the Applicant's] current review is now concluded in accordance with the Parole Board Rules".*

The Relevant Law

23. The panel correctly sets out in the MCA Decision 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

Parole Board Rules 2019 (as amended)

24. 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)).

25. Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

26. 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

27. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in **Associated Provincial Houses Ltd -v- Wednesbury Corporation** 1948 1 KB 223 by Lord Greene in these words: *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

28. In **R (DSD and others) -v- the Parole Board** 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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."*

29. In **R (on the application of Wells) -v- Parole Board** 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was *"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 regard 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".* This test was adopted by a Divisional Court in the case of **R (on the application of the Secretary of State for Justice) -v- the Parole Board** 2022 EWHC 1282(Admin). As was made clear by Saini J this is not a different test to the **Wednesbury** test. The interpretation of and application of the **Wednesbury** test in Parole hearings as explained in **DSD** was binding on Saini J.

30. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

Procedural unfairness

31. 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.

32. 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.

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

The reply on behalf of the Respondent

34. PPCS (on behalf of the Respondent) stated that no representations were being submitted in response to the application for reconsideration.

Discussion

Ground 1

35. This issue is whether the MCA Decision refusing to grant the Applicant's application for an oral hearing or to release the Applicant was procedurally flawed or irrational because an oral hearing should have been ordered in the light of the principles set out in cases of **Osborn** and in subsequent decisions.

36. In the case of **Osborn**, the Supreme Court comprehensively reviewed the basis on which the Parole Board should consider applications by a prisoner for an oral hearing. The Supreme Court did not decide that there should always be an oral hearing, but it stated that there should be one if fairness to the prisoner required it. 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.

37. There are four reasons why I have concluded that the MCA Decision was procedurally flawed and\or irrational and that reconsideration should be ordered.

38. First, the MCA Decision fails to appreciate that when dealing with a case concerning post tariff indeterminate sentence prisoners, such as the Applicant, it was explained in **Osborn** that it is necessary to "*scrutinise even more anxiously whether the level of risk is acceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff*". The Applicant's tariff of 12 years less time spent on remand expired in August 2008 more than 16 years ago and that lengthy period of post-tariff detention in itself creates something similar to a very strong rebuttable presumption that he should be entitled to an oral hearing, but that was not recognised in the MCA Decision.

39. Second, a further reason for holding an oral hearing is to consider how the Applicant is performing the treatment work he was required to do as a result of the MCA Decision and what he has learned as result of this work.

40. A third reason for having an oral hearing is to give the Applicant an opportunity to comment on what he believes he has still to learn and what he has learnt to prevent him offending in the future. This point has particular force as the Applicant did not have an oral hearing before the June decision.

41. Fourth, an oral hearing would enable the panel to ascertain what should be included or considered in any Risk Management Plan for the Applicant.

Ground 2

42. As I have ordered reconsideration of the MCA decision dated 10 June 2024 as a result of my conclusion under Ground 1, it is unnecessary to consider Ground 2, and I will not do so.

Decision

43. Accordingly, I do consider, applying the test as defined in case law, that the decision of the MCA panel dated 10 June 2024 to be irrational or procedurally flawed. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and I order that this case should be considered by a panel by way of an oral hearing.

Sir Stephen Silber
27 September 2024