

**[2024] PBRA 64**

## Application for Reconsideration by Cox

### Application

1. This is an application by Cox (the Applicant) for reconsideration of a decision of a member case assessment (MCA) panel dated the 15 February 2024. The decision of the panel was not to direct 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, and/or (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 dossier consisting of 300 pages; the application for reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

### Background

4. On the 7 May 2004 the Applicant was sentenced for the offence of murder. The Applicant was sentenced to life imprisonment. His minimum tariff expired in March of 2020.
5. The facts of the offences were that the Applicant attacked the victim with a knife causing multiple injuries by stabbing.
6. The Applicant was aged 22 when sentenced he is now aged 42.

### Request for Reconsideration

7. The application for reconsideration is dated the 13 March 2024.
8. The grounds for seeking a reconsideration are set out below.

### Current parole review

9. This was the Applicant's third review by the Parole Board.

### MCA Hearing



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10. The review was conducted by a single member panel of the Parole Board. The decision was a paper decision. No oral evidence was adduced.
11. A dossier consisting of 279 pages was considered.

### The Relevant Law

12. The panel correctly sets out in its decision letter dated 15 February 2024 the test for release.

*Parole Board Rules 2019 (as amended)*

13. Pursuant to 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)).
14. 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."*
15. 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.
16. 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

17. 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.
18. 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.

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

20. 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 Respondent

21. The Respondent offered no representations.

### Reconsideration grounds and discussion

22. In this case the Applicant's solicitors argue various grounds in relation to their client. In the main, the argument is that the panel failed to apply the criteria set out in the case of **Osborn & others V Parole Board [2013] UK SC61**. Relating to directing an oral hearing. Also argued is that the Applicant has completed various behavioural interventions and finally that the panel failed to consider the Applicant's written submissions in relation to an oral hearing.

### Discussion

23. As indicated above, the Applicant in this case, is serving a sentence of life imprisonment for the offence of murder. The Applicant's tariff expired in March 2020. In November 2023 the Applicant's case was submitted by the Respondent, to the Parole Board for a review of the Applicant's detention.

24. The matter was considered by a parole board member in the course of a Member Case Assessment (MCA) process. The member noted that the Applicant is potentially subject to a deportation order, but that his return to his country of origin has been delayed because of the absence of travel documents. It was thought that the Applicant may be considered for the Tariff-Expired Removal Scheme (TERS). The scheme is within the Respondent's remit and is not a matter for a direction or orders of the Parole Board, however, it is necessary for a panel to be informed about any such decision relating to prisoners.

25. The MCA member also noted that the Applicant was legally represented. However, the MCA member indicated that no legal or personal representations had been received.

26. The MCA member also indicated that the Applicant had not applied for an oral hearing and that the MCA member did not find there were reasons for an oral hearing. For that reason, the case was concluded by the MCA member on the

papers. The MCA member indicated that the case of **Osborn** had been considered when reaching the conclusion. The MCA member accordingly concluded the matter without an oral hearing and made no direction for release (a paper decision).

27. Also within the dossier are solicitors representations. Those representations are marked with the date six days before the paper decision. It is not clear from the dossier why these representations were not made available to the MCA member in advance of the decision being issued.
28. Subsequently, the Applicant's legal advisers submitted an appeal against the paper decision pursuant to Rule 20 of the Parole Board Rules 2019 (as amended).
29. That application was considered by a Parole Board duty member. The duty member reviewed the decision and indicated that an oral hearing would not be required, and refused the application for an oral hearing. The duty member cited the fact that there appeared to be outstanding consolidation and behavioural work to complete and that there had been few significant developments, in terms of risk assessment, since the last review.
30. Significantly, the duty member did not refer to various matters raised by the Applicant's solicitor in the original submissions requesting an oral hearing. In particular, the Applicant's solicitor had requested that the Parole Board direct the Home Office to submit a report setting out the immigration status of the Applicant. No report had been requested at the MCA stage or later.

### Foreign national prisoners

31. The Parole Board have issued substantive guidance in relation to foreign national prisoners. That guidance is dated December 2023 (V2 .0). That guidance indicates in paragraph 2 and subsequent subparagraphs, the following:

*"There are certain schemes available, such as the Early Removal Scheme (ERS) and Tariff-expired Removal Scheme (TERS) which are explained at section 6 of this guidance, to foreign nationals that allow for early release, or release without consideration by the Parole Board where it would otherwise be necessary, on the condition that they are removed from the UK. While these schemes are separate to a Parole Board review, members need to be aware of them.*

*2.3 It will often be important to obtain accurate, and up to date, information about a prisoner's immigration status. This will need to be considered at the Member Case Assessment (MCA) stage, and again by panel chairs when making their directions for those cases progressing to an oral hearing.*

*2.4 Risk on release is not confined to risk to the general public in England and Wales, but to the general public throughout the whole world.*

*2.5 Panels will need to consider how an individual's risk will be managed in a different country where, in all likelihood, there will be no reciprocal arrangement for supervision or enforcement of licence conditions."*

32. At paragraph 8 of the guidance, there is reference to practice considerations in relation to cases of this sort. The guidance indicates as follows:

*"8.4 The MCA panel, oral hearing panel chair, or duty member should check that there is a current report in the dossier from the HOIE. If not, a copy may be directed (via the Board's Third Party Directions Team). Where the MCA panel is directing the case to an oral hearing, an updated report from the HOIE should be directed because circumstances may have changed. A panel chair setting directions should do likewise, if the HOIE report is not already in the dossier.*

*8.5 The Parole Board panel may find it helpful to direct a report from the HOIE. The HOIE report should set out the current immigration status of the prisoner. It should indicate date of and reasons for entry to the UK, established nationality, how the prisoner came to Immigration Enforcement notice, and the progress in processing deportation orders with specific details about applications, appeals, and court or Tribunal decisions. Where a deportation order has been served and the prisoner has exhausted all appeal rights, the HOIE should comment on the process for arranging travel documentation and any nationality issues. Directions to provide this information, if required, should be made at the earliest opportunity.*

*8.6 The panel's direction may extend to asking the HOIE (via the Board's Third Party Directions Team) for information relating to abscond risk. For example, asking how well the prisoner complied with Immigration Act reporting requirements prior to sentence."*

33. It is therefore apparent that the guidance in relation to foreign national prisoners contemplates the Parole Board securing clear information from the Home Office enforcement agencies about the prisoners status. This is of crucial importance because a Parole Board panel is obliged to consider not only the Applicant's risk in the UK but also the Applicant's risk in any other part of the world, in the event that he is liable to deportation.
34. In this case there appears to have been no request for information from the Home Office in relation to immigration status and deportation. There is no request to update the parole board as to TERS status.
35. In the light of these findings, I have concluded that this decision was procedurally unfair. I reach this conclusion firstly, because the panel failed to reference or (it appears) take into account, the representations of the Applicant's legal adviser, and in particular to take account of the representations relating to foreign national prisoners and secondly because the panel failed to take account of the Parole Board Guidance in relation to foreign national prisoners (referred to above).
36. I have not therefore considered other grounds raised by the Applicant's legal adviser in the light of my decision that this matter should be reconsidered in an oral hearing by a new panel.

## Decision

37. In all the circumstances therefore I conclude that the decision in this case was not irrational in the legal sense set out above but that the decision was procedurally unfair. I grant the application for reconsideration.

**HH S Dawson**  
**28 March 2024**