

[2022] PBRA 146

## Application for Reconsideration by Hill

### Application

1. This is an application by Hill (the Applicant) for reconsideration of a decision of a Member Case Assessment (MCA) panel dated the 9<sup>th</sup> August 2022 not to direct the release of the Applicant, nor to direct o an oral hearing but to recommend to the Secretary of State that he be transferred to open conditions.
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 application for reconsideration dated 22 October 2022, the MCA decision dated 9 August 2022 and the dossier.

### Background

4. On 5 April 2017 the Applicant was sentenced to life imprisonment for two offences of kidnapping and committing an offence with intent to commit a sexual offence. The minimum period before he was eligible for parole was set at 6 ¼ years less time spent on remand. The Applicant was, at the time he committed the index offences, on licence from a 64-month sentence of imprisonment for a similar offence. The nature of the offences was that the Applicant had grabbed women in the street who were strangers to him and dragged them off to a secluded place with the intention of sexually assaulting them. His case was first considered by the Board at an oral hearing on 1 March 2022. His case had been referred to the Board by the Secretary of State before the expiration of his tariff to consider whether to recommend that the Applicant be transferred to open conditions. The reference did not include considering release. Following an oral hearing on 1 March 2022, by a decision letter dated 8 March 2022, the Board recommended to the Secretary of State that the Applicant should be transferred. The Applicant's case was further referred for an on tariff review which first came before a MCA panel on 9 June 2022. By that time the Secretary of State had not decided whether to transfer the Applicant to open conditions. On 9 June 2022 the MCA panel adjourned the hearing. The panel concluded when adjourning the case: *'the panel will adjourn this case to allow for clarity to be sought from [the Applicant] regarding his wishes for this review and whether any progress has been made regarding his transfer to open conditions'* A report was directed from the Community Offender Manager (COM) who would



speak to the Applicant and the Prison Offender Manager to provide *'updates regarding [the Applicant's] progression to open conditions; any custodial behaviour updates and to discuss with [the Applicant] whether he wants his current review to take place on the papers'*.

5. The MCA panel considered the matter on the papers on 2 August 2022. By then it had an updated report from the COM. The update on the move to open was that the matter was being pursued by prison staff and the letter should arrive soon. The COM reported that The Applicant wanted the review completed on the papers and that he did not want to be released into the community. The Applicant is reported as saying that he considered that there were many benefits in going to open conditions and in particular it would assist him to consolidate the learning he had completed to date. He had been offered a place at an open prison subject to the Secretary of State's approval and he was enthusiastic about going there. Having considered that information, the panel refused to direct the release of the Applicant; recommended a move to open which it regarded as 'essential' and did not adjourn the case for an oral hearing, as it didn't see any good reason to do so. It is to be noted that the MCA decision was entirely in accordance with the wishes expressed by the Applicant. On 8 September 2022 the Secretary of State issued his decision on the Parole Board recommendation and decided that the Applicant was ineligible and unsuitable for open conditions. In the application for reconsideration, the Applicant's legal representative has indicated that the decision of the Secretary of State is 'likely to be challenged by a potential action of Judicial Review'.

### **Request for Reconsideration**

6. The application for reconsideration is dated 22 October 2022. The time allowed to make an application for reconsideration is 21 days from the date of publication of the decision. The application seems to be out of time although I have not considered any submissions as to that. I have however seen some correspondence between the Applicant's legal representative and the Board which seems to suggest that the application could still be made.
7. Under Rule 9 of the Parole Board Rules *'A panel chair.....may alter any of the time limits prescribed by or under these rules .....in the interests of justice'*. As the lateness of the application is caused entirely by the length of time it has taken the Secretary of State to decide whether to transfer the Applicant to open conditions, I consider that it is in the interests of justice to extend the time limit so that this application can be considered.
8. The grounds for seeking a reconsideration are as follows:
  - a. The decision letter fails to correctly apply the law when considering whether to direct the application to an oral hearing.
  - b. The Board should have waited until the Secretary of State had made his decision on the first recommendation to transfer to open conditions before starting the second parole hearing. To carry on without it was unfair.



- c. The Board were under an obligation to consider whether the Applicant should be released but failed to do so. They did not have adequate information to carry out that inquiry properly. That renders the decision procedurally unfair.
- d. The Board failed to properly consider whether the matter should be adjourned to an oral hearing. If it had applied the decision of the Supreme Court in **Osborn [2013] UKSC 61** correctly it would have done so.
- e. Had the Applicant known that he was not going to be transferred to open conditions he would have asked for an oral hearing.

### **Current parole review**

- 9. This is the first on tariff review of the Applicant's case referred by the Secretary of State for the Board to consider release as well as transfer to open.
- 10. In making its decision the MCA panel considered the dossier which included the previous parole decision that had recommended a move to open conditions and an updated report from the COM.

### **The Relevant Law**

- 11. The panel correctly sets out in its decision letter dated 2 August 2022 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. The panel also says in its decision letter that it has considered the issue of whether to direct to an oral hearing in accordance with the decision of the Supreme Court in **Osborn**.

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

- 12. 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)).
- 13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These include indeterminate sentences (Rule 28(2)(a)).
- 14. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28.

#### *Illegality*

- 15. An administrative decision is unlawful under the broad heading of illegality if the panel:



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- (a) misinterprets a legal instrument relevant to the function being performed;
- (b) has no legal authority to make the decision;
- (c) fails to fulfil a legal duty;
- (d) exercises a discretionary power for an extraneous purpose;
- (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
- (f) improperly delegates decision-making power.

16. The task in evaluating whether a decision is unlawful is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be a published policy, or some other common law power. A decision may also be unlawful if it does not apply correctly a decision of the High Court or above.

#### *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.

#### *Procedural unfairness*

19. 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.

20. 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.

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

#### Other

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. Their 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.

23. 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.*"

24. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

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

25. The Secretary of State has made no representations.



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## Discussion

26. There is no doubt that at the time of the MCA decision, the Applicant did not know whether or not the previous recommendation to the Secretary of State by the Board to transfer him to open conditions would be granted. In view of what had happened, he may even have believed that it was going to be granted. For that reason I am not unsympathetic to the Applicant at the position he now finds himself in. It may be that proper criticism can be directed at the Secretary of State for failing to make a decision earlier. I make no finding on that as I have not had submissions directed to that issue but I am not concerned with whether the Secretary of State was unfair or did not act properly; that may be for another court to decide. It needs to be remembered that what I am concerned with is whether the decision making of the Board was procedurally unfair, or unlawful or irrational. Of course actions of the Secretary of State could render the proceedings unfair but my focus has to be on the proceedings before the Board taken as a whole.
27. In deciding the issue of whether the proceedings were unfair it is important to have in mind, as I have said in para 5, that the decision of the Board and the procedure it adopted was entirely in accordance with the Applicant's expressed wishes. While that doesn't mean that the proceedings must have been fair, it may be difficult in those circumstances to conclude that in making decisions in accordance with the Applicant's express wishes the Board was being unfair to him. The Applicant's wishes were that there should be a recommendation to transfer him to open conditions. He did not want to be released because he thought there was more work to be done before he could be safely released and he wanted a paper decision; he did not want an oral hearing. His views have now understandably changed but the Board had to deal with the situation as it was at the time and could not be expected to take into account a fact that was not known then: that the Secretary of State was not going to agree to a transfer.
28. It is not correct to say that the panel did not consider release. It did. Everyone agreed that at that moment of time, namely the date of the hearing, the Applicant could not be safely released. He needed to consolidate his learning and be tested in open conditions. The offences committed by the Applicant were very serious and, having failed once when he was released on licence and re-offended, it was a perfectly sensible view to take that before he could be released again he needed to have a period in open conditions. That was not only the view of the witnesses but also the view of the Applicant. The panel said at 4.1 *'[the Applicant] needs time to consolidate his learning and put his skills into practice in the community. His confinement is therefore currently necessary to protect the public.'* The panel went on to say at 4.2 *'His progression to open conditions is considered essential'*. In those circumstances it was unnecessary for the panel to adjourn for the preparation of a risk management plan focussing on release. It was unnecessary to seek reports from the witnesses dealing with management of the Applicant in the community. The Parole Board will not adjourn a hearing unless it is convinced that it is important to do so in order to produce a just result. Here it had already adjourned for specific pur-



poses which had been complied with. It had been given an update on the consideration of the recommendation for open conditions. No decision had yet been reached but it was not suggested by or on behalf of the Applicant that there should be a further adjournment to await that decision. The Applicant's views had been obtained and although the Panel was not bound to comply with them they were an important part of its considerations. It was unnecessary to adjourn to obtain further evidence and the panel did properly consider the issue of release in my judgment.

29. It is argued that in reaching its decision on whether to direct an oral hearing the Panel did not follow the guidance in **Osborn**. To that extent it is suggested that the Panel acted unlawfully. It is an unsubstantiated suggestion. What part of the guidance is it suggested the panel did not follow? The panel said it did and there is no basis for saying that it didn't. On the evidence before the Panel the decision it had to make was clear cut. It was difficult to see what would be achieved by having an oral hearing. There was no particular issue that an oral hearing would assist with or clarify. Nor did the Applicant want one. I accept that it is not decisive but it is a factor and an important one in the terms of the judgment. It is not necessary to have an oral hearing in every case as Osborn makes clear and this was one where it was not needed.

30. It is said that the decision of the Panel was '*irrational*'. Quite rightly an Applicant who makes that claim has a high bar to meet. I cannot find anything that approaches irrationality in the decision nor has any specific example of irrationality been suggested.

## Decision

31. For the reasons I have given, the application is refused. I do not consider that the decision was unlawful in failing to follow the guidance in **Osborn**. While I understand the Applicant's feeling that the decision of the Secretary of State was unfair, that does not make the hearing procedurally unfair. I am satisfied that it wasn't. Further I do not think that the decision was irrational.

**John Saunders**  
**21 October 2022**