the Parole Board

working with others to protect the public

[2022] PBRA 19

Application for Reconsideration by Firth

Application

1. On 13 June 2005, Firth (the Applicant) was sentenced to life imprisonment for offences of rape x2, false imprisonment, dangerous driving, and driving without insurance with a tariff of 5 years and 4 months and 2 days which expired on 13 October 2010. He was 29 years old when he committed these offences, and the victim of the rape and false imprisonment counts was his partner.

2. On 8 April 2021, the Secretary of State referred the Applicant's case to the Parole Board:

    a) To consider whether it would be appropriate to direct the Applicant's release if it was satisfied that it was no longer necessary for the protection of the public that the Applicant should be confined; and

    b) If the Parole Board does not direct the Applicant's release, to advise on the Applicant's continued suitability for open conditions if relevant whether it would be appropriate for the Applicant to be transferred to open conditions and if so to comment on the degree of risk involved.

3. By a decision dated 18 November 2021 a Panel of the Board at the MCA stage considered the Applicant' s application for parole on the papers. It concluded that an oral hearing was not required and then reached a decision refusing to direct the release of the Applicant but permitting the Applicant to apply for an oral hearing within 28 days of the date of that letter (the First Decision).

4. On 9 December 2021, the Applicant's solicitors made a request as provided for in the First Decision for an oral hearing. By a decision of a Panel dated 21 December, this request for an oral hearing was refused (the Second Decision).

5. The Applicant has sought reconsideration of the decisions refusing to direct release of the Applicant and refusing to order an oral hearing on the grounds of procedural unfairness linked with irrationality.

6. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

7. I have considered the application on the papers. These are:

a) The Secretary of State's terms of referral to the Parole Board dated 8 April 2021;
b) The First Decision;
c) The request dated 9 December 2021 by the Applicant's solicitor for an oral hearing;
d) The Second Decision;
e) The application for reconsideration dated 6 January 2022;
f) The notification from the PPCS that the Secretary of State did not intend to make any submissions in response to the Application for Reconsideration; and
g) The Applicant's dossier comprising of 296 pages.

Request for Reconsideration

8. The application for reconsideration is dated 6 January 2022.

9. The grounds for seeking a reconsideration are:

a) It was procedurally unfair or irrational for the Panel not to order an oral hearing when giving the First and/or the Second Decisions in the light of the principles laid down by the Supreme Court in **Osborn and Others v Parole Board** [2013] UKSC 1 (the Osborn Decision). Those principles will henceforth be referred to as "the Osborn Principles". (Ground A)

b) It was procedurally unfair or irrational for the Panel not to order the release of the Applicant when giving the First and/or Second Decisions in the light of the Osborn Principles. (Ground B)

10. The Second Decision cannot be the subject of a reconsideration under the relevant provisions in the Parole Board Rules and so I will consider the grounds only in relation to the First Decision.

Current parole review

The First Decision

11. In the First Decision, the Panel, consisting of one member, explained that it had considered whether there should be an oral hearing in the light of the **Osborn** Principles. It noted that at the time of the First Decision in November 2021 an oral hearing ordered at that time might not have been listed until May or June 2022.

12. The Panel explained in relation to a possible oral hearing that:

"The reality of listing means a hearing may not be listed until May or June 2022.

There is time for you to complete [a training course addressing the use of violence and sex offending] and for updating reports. There is an argument all core work will have been completed. It would be 'wholly unfair' for the review to conclude now as you are starting [the training course addressing the use of violence and sex offending] imminently and have a good argument for progression. Reference is made to the case of Osborn, Booth and Reilly and the need for procedural fairness and the role of an oral hearing.

The Panel has considered this carefully. This case has already been deferred and the Panel took into account guidance to members that delays of over 4 months would be considered exceptional. The delay here appears to have allowed a resolution of a treatment pathway for you and was a fair route given the outstanding Programme Needs Assessment that professionals wanted to see.

There is no dispute that there is core risk work to complete. The narrow issue for a hearing is to allow further time for you to complete this. The timescale for the modules of a [training course addressing the use of violence and sex offending] is not fixed, there may need to be a sensible consolidation period and assessment as envisaged by [the independent psychologist] and in the view of this Panel the need for a full psychological risk assessment. That assumes you complete the programme which may be challenging given the issues you had in discussion of the Programme Needs Assessment. While the Panel notes the further assumptions about listing it was not persuaded that unfairness is created by this review now concluding with clear sentence planning objectives for you. It will be a matter for the Secretary of State to decide on the appropriate review period and what is expected. The Panel did not require an oral hearing to complete a risk assessment and did not conclude it was now required on grounds of fairness having considered the representations about this.

In making this decision the Panel has considered your case against the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 concerning oral hearings. The Panel does not find that there are any reasons for an oral hearing, and you have not submitted any reasons for an oral hearing. Therefore, your case is being concluded on the papers."

13. As has been explained, the Applicant took advantage of the offer made in the First Decision that he could apply for a full oral hearing before a panel of the Board within 28 days of the date of the letter containing the First Decision.

The Second Decision

14. The Applicant's solicitors on behalf of the Applicant duly made an application for a full oral hearing before a Panel of the Board in a document dated 9 December 2021. On 21 December 2021, this application for a full oral hearing was refused by a Panel comprising of one member when giving the Second Decision. As has been explained, the Second Decision cannot be the subject of a Reconsideration Application and so it will not be considered further. The fundamental issue on this application is whether the **Osborn** principles were properly considered and applied by the Panel in its First Decision in reaching its decision to refuse to order an oral hearing.

The Relevant Law

15. The Panel correctly set out in its decisions 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

16. Under 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)).

17. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Irrationality

18. 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."*

19. His 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 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

20. 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.

21. 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.

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

The Reply on behalf of the Secretary of State

23. The Secretary of State stated that he did not wish to make any representations in response to the Grounds for Reconsideration.

Discussion on the Correct Approach to Reconsideration Applications

24. In dealing with the grounds for reconsideration in this matter, it is necessary to stress three matters of basic importance. First, the Reconsideration Mechanism is not a process by which the judgment of the Panel can be *lightly* interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his own views of the facts in place of those found by the Panel, unless, of course, it is *manifestly obvious* that there was an error of fact of an egregious nature which can be shown to have *directly contributed* to the conclusion arrived at by the Panel.

25. The second matter of material importance is that when deciding whether a decision of the Parole Board was procedurally unfair, *due deference* must be given to the *expertise* of the Board in making decisions relating to parole.

26. The third matter is that there is frequently not one correct answer for a Panel to arrive at. Such a situation would rise where the Panel would be entitled to reach 2 or 3 reasonable decisions when dealing with a set of facts.

The Grounds of Appeal

Ground A

27. At the forefront of the Applicant's case on Ground A is the contention that an oral hearing should have been ordered in the light of the **Osborn** Principles The case for the Applicant is that the Panel failed to consider and /or apply the **Osborn** Principles which emphasises the various factors which Panels were obliged to consider as "*express procedures laid down by law*" in determining whether oral hearings should be ordered. Indeed, as has been explained in paragraphs 20 and 21 above, a failure to comply with such procedures can constitute procedural unfairness.

28. Lord Reed (with whom other members of the Supreme Court agreed) set out the **Osborn** Principles when he explained that:

> *"(iii) 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.*
>
> *(iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist in its decision making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.*
>
> *(v)The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions and cannot be answered by assessing that likelihood.*

(vi)When dealing with cases concerning post-tariff indeterminate sentences, it should scrutinise even more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.

(ix) The board's decision, for the purpose of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions but includes any aspect of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.

(xi) in applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not."

29. The Applicant's case is that an oral hearing should have been ordered in the First Decision as it would have enabled the Panel at an oral hearing to carry out its independent assessment of risk of the risk posed by the Applicant, and of the means by which it should be managed and addressed especially as that exercise might well have benefitted from the closer examination which an oral hearing can provide as explained in the **Osborn** principles. So, it is contended that his future progression could then be considered with the benefit of his oral evidence in which he could correct what he considers to be inaccurate information in the dossier.

30. In summary, the Applicant contends that the decision of the Panel refusing an oral hearing in the First Decision fails to apply the **Osborn** Principles and is therefore irrational and procedurally unfair. I have concluded that there are three reasons which whether considered individually or cumulatively show why the reconsideration application must succeed in relation to the First Decision.

31. The first reason why reconsideration must be ordered is that an oral hearing should have been ordered because.

    a) By the time when such a hearing could be held, the Applicant would have completed the training course addressing the use of violence and sex offending;

    b) In the view of the independent psychological in his Report on the Applicant dated 21 October 2021 that if the Applicant "*is able to complete [a training course addressing the use of violence and sex offending] to a good standard and treatment gains are maintained [then] consideration of a progressive move to open conditions would be his next step, although this would need to be subject to re-assessment at that time*";

    c) The Applicant would then have been ready, willing and able to participate in making decisions on his future including making and pursuing an application to be moved to open conditions;

    d) These matters show why an oral hearing should have been ordered bearing in mind that, as explained in paragraph 28 above, the **Osborn** principles establish that a *critical "purpose of holding an oral hearing is not only to*

assist in its decision making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute";

e) If in applying the **Osborn** principles, the Panel was in any doubt whether to allow an oral hearing, paragraph (xi) of the **Osborn** principles set out above meant that it should have ordered an oral hearing

32. A second or alternative why the Panel erred in concluding that it had *"considered [the Applicant's case against the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 concerning oral hearings* [and] *does not find that there are any reasons for an oral hearing".* The Panel apparently did not appreciate or take into account in reaching its decision its duty under the **Osborn** principles its obligation to *"scrutinise even more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff".*

33. A second or alternative why the Panel erred in concluding that it had *"considered [the Applicant's case against the principles set out in the case of Osborn, Booth & Reilly [2013] UKSC 61 concerning oral hearings* [and] *does not find that there are any reasons for an oral hearing".* The Panel apparently did not appreciate or take into account in reaching its decision its duty under the **Osborn** principles its obligation to *"scrutinise even more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff".*

34. It is of substantial importance in this case that the Applicant's tariff of 64 months and 2 days expired on 13 October 2010 which was more than 11 years before the First Decision. In other words, he has served more than 3 times the tariff period. Yet there is nothing to suggest in consequence, the Panel appreciated that they were duty bound to scrutinise the Applicant's level of risk even more anxiously and to have allowed greater participation and closer examination on these issues by the Applicant by ordering an oral hearing or that they scrutinise the Appellant's level of risk more closely.

35. A third further or alternative reason for ordering reconsideration focusses on the crucial importance attached by the Panel in deciding to refuse an oral hearing to the fact that *"the Panel took into account guidance to members that delays of over 4 months [before an oral hearing] would be considered exceptional*". The significance of this is that the Panel had failed to take account of the **Osborn** principles as has been explained above, it but had instead relied on the 4-month "guidance" period. It is not contended, let alone shown, that the **Osborn** principles have been amended or are to be regarded as subject to this guidance. Indeed, the source of this "guidance" has not been disclosed nor has any justification for this 4 month requirement been shown, let alone established.

36. In consequence, the Panel acted in a procedurally unfair manner and or irrationally when it held that an oral hearing could not be ordered in relation to the Applicant's case merely because there was to be a delay of more than four months notwithstanding that there was no legal requirement to that effect but merely some form of guidance and crucially that in any event, such a requirement was

inconsistent with the **Osborn** principles relating to the matters which required consideration before deciding whether to order an oral hearing.

37. These three reasons (whether considered individually or cumulatively) establish that the Panel acted in a procedurally unfair manner and/or irrationally when it failed to address or to comply in any way with its duty explained by the Supreme Court in the **Osborn** principles which, as has been explained, specified that in considering whether to order an oral hearing, the Panel was obliged to make an assessment of the risk posed by the Applicant on release and then to consider the means by which it could be managed and whether this exercise might benefit from the closer examination which an oral hearing could provide.

38. Consequently, this ground succeeds.

Ground B

39. This ground is that the decision to refuse to order the release of the Applicant is irrational or procedurally unfair. It has become academic in the light of the decision set out above to order reconsideration of the decision to refuse to order an oral hearing. In any event, I do not consider that Ground B would succeed as there is insufficient evidence before me to reach a conclusion that the decision to refuse to order the release of the Applicant is irrational or procedurally unfair.

Decision

40. Accordingly, applying the tests as defined in case law, I conclude that the decision to refuse an oral hearing in the First Decision was irrational and procedurally unfair for the reasons set out above. The application for reconsideration is therefore granted.

Sir Stephen Silber
15 February 2022