

[2019] PBRA 52

Application for Reconsideration by Mahajan

Application

1. This is an application by Mahajan (the Applicant) for reconsideration of a decision of the Parole Board dated 27 September 2019 not to direct release.

Background

2. The Applicant, who is now 65 was sentenced to an indeterminate sentence for public protection with a minimum tariff of 5 years. He was convicted of attempting to inflict grievous bodily harm with intent. His tariff expired in October 2013.

Current parole review

3. In September 2018 this case was referred to the Parole Board to consider whether it be appropriate to direct his release.
4. In January 2019 an MCA member directed an oral hearing. The MCA member considered the most effective way of progressing the review in the light of the fact that there had been a request by the Applicant to consider over a thousand pages of dossier, and in the light of the Applicants' decision to represent himself, and taking account of his medical condition, was that the case should be sent initially to a Directions Hearing.
5. In March of 2019 a Directions Hearing was listed, however the Applicant was unable to attend the scheduled date for medical reasons, and the matter was adjourned to a suitable date in April 2019.
6. At the April 2019 Directions Hearing the Applicant was not represented. The Offender Supervisor, Offender Manager and an Officer were present. The panel considered representations made by the Applicant relating to the forthcoming hearing. The panel made decisions as to relevant material and witnesses. The matter was adjourned to a date in August 2019.
7. At the Oral Hearing in August 2019 the Applicant was unrepresented and applied for a further adjournment for a number of reasons which included the fact that he



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had not had sufficient time to consider the dossier; the fact that some reports had not been removed; the fact that he had lodged notification of a Judicial Review and that he wished the present panel to recuse itself due to 'anomalies in the process'.

8. The panel responded at the hearing to this application by indicating that it accepted the Applicant's request not to proceed and to (his request) to recuse itself from further proceeding in his case.
9. The panel went on to note (in the adjournment directions) that it then explained to the Applicant that because he was not willing to have an Oral Hearing where reports were written and risks assessed based upon his conviction, and for various other reasons it would be in his 'best interests' to conclude the current review on the papers and for the case to be re-referred once the outstanding matters had been settled.
10. The panel then invited the Applicant to submit further representations relating to how he wished his case to proceed, namely whether it should be deferred to a new panel or it should be concluded on the papers without further review.
11. The Applicant responded to the invitation to make representations in a document dated 10 September 2019. In summary he made the following representations:
 - a. That the directions notices (presumably issued by the panel) were untrue and discriminatory.
 - b. That the Parole Board was not the correct judicial tribunal to deal with his case.
 - c. That it was morally and ethically and legally wrong for the Parole Board to make a decision in his case.
 - d. That the board should refer his case back to the Secretary of State for appropriate action.
12. Additionally, the Applicant included within these representations draft grounds of a Judicial Review; details of his claim against the Criminal Cases Review Commission (CCRC); and a copy of his appeal against deportation.
13. On the 27 September 2019 the panel issued an Oral Hearing Decision Letter. The letter referred to the two earlier hearings in April and August 2019 and also indicated that the Applicant had been invited to submit further representations following the August hearing. The panel then indicated that the Decision Letter represented the panel's decision to conclude the Applicant's case on the papers.
14. The Decision Letter also noted that the Applicant had chosen to represent himself at both hearings at the prison and noted that the Offender Supervisor and Offender Manager were present. The panel noted that the Applicant did not make any formal



application for release, but repeatedly challenged the legitimacy of the parole process and repeated his request to cross-examine psychologists and psychiatrists.

15. The panel went on to conclude that because of the risk to the public there would be no direction for release.

Request for reconsideration

16. The Applicant lodged an application for reconsideration on 17 October 2019. The application consisted of 66 pages. Pages 1 to 22 were a signed document headed "Notice of application for reconsideration of provisional decision and notice of judicial review". The remaining pages appeared to be a draft document relating to a Judicial Review.

17. In summary the application was as follows:

- a. A request for an oral hearing by an independent panel.
- b. A request for an opportunity to cross-examine the reports relied upon in making the original decision.
- c. A note that the Applicant intended to apply for Judicial Review without further notice.

18. The Applicant set out the reasons for his application being as follows (in summary):

- a. That the Parole Board is unfit to carry out fair and honest reviews of cases for prisoners who are wrongly convicted (as the Applicant believes he is), and additionally the Parole Board is an organisation unfit for purpose in the Criminal Justice System.
- b. That the Parole Board is complicit in denying hearings in appeal courts.
- c. That the Parole Board has failed to carry out radical reforms therefore cannot carry out fair honest and just reviews.
- d. The Applicant further questioned the independence of the Parole Board because of its connection with the Secretary of State for Justice.
- e. The Applicant challenged the actions of one of the panel members as being hostile rude and abusive.
- f. That the Parole Board had shown "callous disregard" to the Applicant's human rights in failing to acknowledge that he had been wrongly convicted and unlawfully sentenced.
- g. That the Panel Chair had given directions which were unjust and unfair and that she had failed to give reasons for her decision.
- h. That a transcript of the Directions Hearings in April was not provided by the chair of the panel.
- i. The Applicant listed various complaints relating to members of the legal profession who appear to have represented the Applicant in the past.
- j. That in one of the directions notices irrelevant matters concerning the Applicant's nationality and deportation status were included.



- k. That the Panel Chair indicated in the directions notice that the Applicant had applied for an adjournment. The Applicant indicated that this was not the case and that it was the Chair's decision to adjourn.
- l. The Applicant challenged the indication in the Oral Hearing Decision Letter that the Applicant was not willing to have an Oral Hearing.
- m. The Applicant pointed out that in the MCA directions, the MCA member had indicated that "an oral hearing is appropriate in fairness to (the Applicant)"
- n. The Applicant challenged the decision to conclude the case on the papers following the two hearings. The Applicant argued that the earlier hearings were not in relation to the review but were directions hearings.
- o. The Applicant challenged the basis upon which the decision regarding suitability for release had been made, in particular indicating that the panel failed to demonstrate an evidence base for its decision.

19. The Secretary of State made no representations.

The Relevant Law

20. Rule 21 and 28 of the Parole Board rules 2019 apply in this case.

21. Rule 28 (1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

22. Rule 21 sets out procedures that must be followed before a decision can be made on the papers after a direction for an oral hearing.

23. Rule 21 (1) provides... "*Where further evidence is received by the Board after the panel directed the case should be determined at an oral hearing... A panel chair can direct that the case should be decided on the papers if an oral hearing is no longer necessary*".

24. Provision is made under Rule 21 (3) to allow the parties to make representations as to whether the case should or should not be considered on the papers.

25. In **R (on the application of 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 paragraph 16: '*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*'. 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 Board in making decisions relating to risk. The Board when considering whether or not to direct a reconsideration will adopt the same high standard for establishing 'irrationality'.



26. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial Review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the Parole hearing was unfair to either of the parties.

Discussion

27. Although the Applicant in this case has provided lengthy written representations, he has not in fact particularised whether any individual decision was irrational and/or procedurally unfair.

28. In this case the decision to proceed to decide the case on the papers was governed by Rule 21. The starting point for a decision to conclude on the papers after a direction for an Oral Hearing is that "further evidence" is received by the Board. In this case the panel failed to specifically identify the further evidence upon which it was relying to invoke this rule. The decision by the panel relating to concluding on the papers appears to have been based, not upon the receipt of further evidence, but on the basis of matters set out in the adjournment notice of August 2019 namely; that the Applicant was (a) not willing to have an Oral Hearing which was based upon reports, risk assessment and his conviction (b) did not appear to want to consider release, which would necessarily be focused on a release and Risk Management Plan in the context of a Deportation Order in place and, (c) was seeking advice from the prisoner's advice service.

29. Although these reasons may create difficulties in reaching a conclusion at an Oral Hearing, they do not appear to me to amount to 'further evidence' upon which the panel could conclude that an Oral Hearing "is no longer necessary".

30. Rule 21 (3) indicates that "*within 14 days of notification of the receipt of further evidence... The parties may make representations on (a) the contents of the further evidence and (b) whether they agree to the case being decided by the panel on the papers...*"

31. In this case the Secretary of State appears not to have been invited to make representations, the Secretary of State does not raise this issue, however it amounts to a breach of the Rules.

32. The Applicant was invited to make representations however the nature of any 'further evidence' relied upon by the panel was not specifically referred to or identified. Additionally, the Applicant in his response gave no indication as to whether he agreed or disagreed with the case being decided on the papers. He reiterated once again his belief that the Board was an inappropriate tribunal to hear his case and demanded that the matter should be sent back to the Secretary of State for 'appropriate action as justice demands'.



33. In its paper Decision Letter the panel made no reference to the fact that the Applicant had neither agreed to nor challenged the question of concluding on the papers and recorded no reasons as to why it had concluded that the case should proceed on the papers.
34. Additionally, the panel indicated that the matter was being concluded on the papers following 'hearings'. The panel did not make it clear that both hearings were related to directions, and that no evidence had been received or tested at these hearings.
35. In **Osborn [2013] UKSC 61** the Supreme Court gave guidance as to the type of cases where the Parole Board should conduct an Oral Hearing. Lord Reed identified as one category of cases where there should be an Oral Hearing, as one where there are conflicts on the evidence. He also said that the Parole Board should guard against any temptation to refuse Oral Hearings as a means of saving time trouble and expense. The case of Osborn and other associated cases concerned appeals by prisoners against a refusal by the Board to hold Oral hearings, but it seems to me that the same principle should apply in any case. I do not see how the matters which the Applicant wished to air could have been properly resolved without a hearing. The fact that the Applicant did not recognise the Parole Board as a decision-making body or the fact that the Applicant was challenging his initial convictions and challenging deportation decisions could not amount to a reason for denying the Applicant an Oral Hearing. The panel had adequate powers to ensure that the evidence it received was focused and relevant to the statutory criteria.
36. The decision to proceed on the papers therefore appears to have been in breach of the rules in that:
- No representations were invited from the Secretary of State.
 - The decision to proceed on the papers did not appear to be made on the basis of 'further evidence' being received (a requirement of the Rules).
 - The panel failed to clearly identify whether (before making its decision to proceed on the papers), it had considered Rule 21 (3) (b) as to whether either the Secretary of State or the Applicant agreed (or disagreed) to the case being decided on the papers.
37. I have also considered the Adjournment Decision dated 28 August 2019. In the adjournment directions the panel set out the fact that the Applicant (at the hearing) had been invited to read out the reasons for him applying to adjourn. Those reasons are recorded and listed in the directions. This list was followed by the following comment "*The panel accepted his request not to proceed and to recuse itself from any further proceedings in his case*".
38. Recusal is a determination by a decision-making body to withdraw itself from particular proceedings. It is commonly made where there is an actual or perceived conflict of interest and is based upon the need for decision-making bodies to ensure



that their decisions are both impartial and seen to be impartial. The panel did not explain why it had decided, at that point, to recuse itself and may have used an incorrect term. However, once a panel recuses itself, it then has a duty to withdraw and arrange for a fresh panel to be appointed. In this case the panel appears to have recused itself, but thereafter continued to act in a decision-making capacity. I conclude that it was illogical for the panel to recuse itself and to continue acting as a decision-making body.

39. The panel also noted in its reasons relating to the adjournment on 22 August 2019 that *"the panel explained that it would therefore be in his (the Applicant's) best interests to conclude the current review on the papers, and for the case to be re-referred once the above matters have been settled"*. Where a prisoner is unrepresented, the panel clearly have a role in assisting the prisoner by ensuring that the prisoner is able to make representations and to raise any challenges or issues during the course of the hearing. However, the panel must guard against the possibility of proffering advice in circumstances where the panel itself would be making a final decision. In this case it would be expected that a panel may point out to the Applicant both the advantages and disadvantages of proceeding to an Oral Hearing or having the matter concluded on the papers, but would make it clear to the Applicant that it was for him to make representations, and for the panel thereafter to reflect upon those representations, and any representations by the Secretary of State and to reach a just conclusion. I conclude that there was potential unfairness to the Applicant in his being advised that a paper hearing was 'in his best interests'.
40. Further, the adjournment direction dated the 28 August is headed 'This case will be concluded on the Papers'. The implication of this heading was that the panel had reached its conclusion relating to the paper decision before receiving representations. Rule 21 (4) provides as follows ' After the 14 day period for the parties to make representations under paragraph (3) the Panel Chair will consider the further evidence and any representations made, and make a direction that the case should (a) be decided by the panel on the papers, or (b) continue to be determined by a panel at an Oral Hearing under Rule 25. By heading the adjournment direction as indicated above, the panel appears to have made the decision to proceed to a paper conclusion before considering representations which is a breach of the above Rule and, I find, procedurally unfair.
41. In light of my determinations above, I consider that there is no alternative but to order reconsideration. The failure to comply with the Rules was procedurally unfair. I therefore direct that there should be a reconsideration of this decision before a fresh panel. I have set out below directions relating to the hearing

Directions



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- a. This matter should be reconsidered by a fresh three member panel. In the light of the legal issues relating to deportation and transfer of prisoners, one of the panel should be a Judicial member or a member with a legal background.
 - b. A Directions Hearing should be listed in advance of the Oral Hearing to ensure that orders have been made relating to the management of the final hearing. The hearing should focus specifically upon the statutory criteria rejecting the introduction of any material which is irrelevant to that issue.
 - c. To assist in managing this case, and taking account of the psychiatric background, and the Applicants' unrepresented status, the Parole Board should request that the Secretary of State consider instructing a Legal representative to act on behalf of the Secretary of State and attend the Oral Hearing.
 - d. The hearing is likely to require an all-day listing.
42. This Decision relates to the matters listed above at Paragraph 17 (l, m and n). In the light of my decision to order reconsideration, I do not determine it necessary or helpful to make specific findings in relation to the matters listed as a-k and o. Those matters can be addressed (if relevant) at the Oral Hearing.

HH S Dawson

06 November 2019