

[2020] PBRA 124

Application for Reconsideration by Pettitt

Application

1. This is an application by Pettitt (the Applicant) for reconsideration of a decision of an Oral Hearing Panel dated 5 August 2020 not to direct release or recommend open conditions.
2. 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. This application is made on the basis that the decision was procedurally unfair.
3. I have considered the application on the papers. These are:
 - The dossier of 322 pages;
 - An e-mail sent by the Panel Chair to the Parole Board case manager on 25 February 2020;
 - The decision letter; and
 - The application for reconsideration.

Background and Current Parole Review

4. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) imposed on 30 July 2009 for an offence of s18 wounding committed on 29 February 2008. The minimum tariff of three years and 343 days expired on 7 July 2013. The Applicant was aged 36 at the time of offence and 48 at the time of this review.
5. He is therefore now seven years over tariff. This is the sixth review of his case. All previous reviews have been completed by way of a paper review. He has never had an oral hearing.
6. During this review, the Applicant has been subject to further criminal proceedings as a result of disclosures and confessions he has made during his sentence. When this case was first considered at the MCA stage, the Parole Board Member who first considered the case was aware that there were ongoing investigations. After an initial adjournment, that Parole Board Member sent the case to a Directions hearing to help to set direction ready for an Oral Hearing.
7. Following that, the Panel Chair ('Chair') completed his first set of Panel Chair Directions ('PCDs') on 3 March 2020. The Oral hearing had been set for 25 March



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2020 and the Chair indicated that it was proceeding to an oral hearing but had been made aware that the Applicant 'may have' been given a further sentence. The Chair set directions for the Applicant's legal representative to make any representations on the 'appropriateness of holding an oral hearing' for the Applicant's current review by 12 March 2020.

8. There were further PCDs issued on; 12 March 2020 which granted an adjournment of the Oral Hearing and set a review date; 6 May 2020 which set a further review date; 19 June 2020 which indicated the case would be concluded on the papers and adjourned the case to 10 July 2020; and 15 July 2020 which indicated that the case would be reconvened for a remote panel assessment on 30 July 2020.
9. A remote panel assessment involves the Oral Hearing Panel discussing the case and making a decision. No witnesses are called and no one else is present. The decision was issued following the remote panel assessment. There was therefore no oral hearing held.
10. As a result of the disclosures and investigations mentioned above, it is important to note that on 28 May 2020 the Applicant was sentenced to a discretionary life sentence with a tariff of seven years for serious sexual offences including rape. The previous sentence for the index offence is eligible for reconsideration as part of these proceedings however the later conviction is not at this time because no referral has been made in respect of it. Therefore, it is important to highlight that if the Applicant was granted release on the IPP sentence, he would not be released until the expiry of the tariff of the later sentence. The Applicant has recognised this and even prior to the further sentence being imposed, he made it clear that his application was for an independent assessment of his risk rather than for a recommendation for open conditions or a direction for release.

Request for Reconsideration

11. The application for reconsideration is dated 17 August 2020. It is a document that runs to seven pages and was submitted by the Applicant's Solicitor.
12. The grounds for seeking a reconsideration are summarised as follows:
 - The decision was procedurally unfair as:
 - The Panel should have proceeded with a hearing as a matter of fairness and to assess the Applicant's current risk.
 - That the panel failed to provide any cogent reasons as to how they properly gave weight to the Osborn points set out in multiple written representations.
 - That the Panel, in revoking the decision to hold a hearing, did not adhere to the principles of natural justice.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 30 July 2020 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

14. 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)).
15. 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**.
16. Rule 21 of the Parole Board Rules 2019 allows for a decision on the papers after there has been a direction for an Oral Hearing but only if certain criteria are met. Rule 21 states;

"21.—(1) Subject to the provisions of this rule, where further evidence is received by the Board after a panel have directed that a case should be determined at an oral hearing under rule 19(1)(c) or 20(5), a panel chair or duty member can direct that the case should be decided on the papers if an oral hearing is no longer necessary.

(2) Where further evidence is received under paragraph (1), the Board must notify the parties of the receipt of the evidence as soon as practicable.

(3) Within 14 days of notification of the receipt of further evidence under paragraph (2), the parties may make representations on— (a) the contents of the further evidence, and (b) whether they agree to the case being decided by a panel on the papers.

(4) After the 14-day period for the parties to make representations under paragraph (3), the panel chair or duty member will consider the further evidence and any representations made, and make a direction that the case should— (a) be decided by a panel on the papers, or (b) continue to be determined by a panel at an oral hearing under rule 25."

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

Osborn

19. 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.

The Reply on behalf of the Secretary of State

20. The Secretary of State did not submit any representations in response to the application.

Discussion

21. Although the Applicant has provided detailed grounds, he has not in fact submitted that the decision did not comply with Rule 21. However, the decision to proceed on the papers is governed by Rule 21 and I therefore have to consider whether it complies.
22. The original MCA in this case envisaged an oral hearing and made a direction that a 'Directions Hearing' be held. It appears that a Directions Hearing was never held and that an Oral Hearing was listed, with the first PCDs confirming that the case was proceeding to oral hearing.
23. In the PCDs of 3 March 2020, the Chair referred to some information received regarding a possible further sentence. He directed representations from the Applicant's Solicitor regarding the appropriateness of still having an Oral Hearing. He had previously sent an email on 25 February 2020 to the Case Manager asking for the view of the Solicitor which I have seen but it is not clear that this was ever sent on to the Solicitor. The Chair did not at this stage highlight the further evidence required to fulfil Rule 21, although I must say at this stage that a further conviction could of course be sufficient to amount to further evidence for the purposes of triggering the Rule. However, the Chair was unclear what had occurred and directed information regarding the possible further conviction as part of the same PCDs. The Chair did not indicate that any of the directions were part of a Rule 21 consideration, he did not allow the specified 14 days and he did not make a direction for both parties to make representations as required by Rule 21(3). The PCDs indicated that the case remained listed for a hearing.

24. The next PCDs on 12 March 2020 granted the Applicant's application for an adjournment of the Oral Hearing indicating that it was to enable information to be obtained 'in order to assist the panel in its considerations'. At that stage it was clear from the representations made by the Applicant's Solicitor that the Applicant still wished to have his hearing. The Chair explained that the timetable for obtaining further information including regarding any continued police investigations was unclear and so it was 'not possible to set a date for the resumption of the hearing at this time', thereby giving the impression that a hearing in the future may still be held.
25. By the time of the next PCDs on 6 May 2020 the Panel had been provided with updates including confirmation that there had been further charges relating to serious sexual offences and court appearances following those charges. There were also further ongoing investigations. The Chair indicated that all these matters ought to be resolved before the Panel was in 'a position to make a proper assessment of risk'. Again, the Chair invited representations from the Applicant's Solicitor on the 'continuing need for a hearing' and went on to say that 'the Chair intends to reconsider the need for a hearing'. Representations were invited 14 days thereafter, however, there was no mention of Rule 21 and no identification of the 'further evidence' required, although it could be inferred that the updates regarding court and the police had led to the comments made. Representations from the Secretary of State were not directed in accordance with Rule 21.
26. Following those PCDs, the Applicant's Solicitor sent in further representations again asking that there still be an Oral Hearing and asking that consideration be given to a direction for a psychological risk assessment to assist the risk assessment and establish a treatment pathway.
27. The next PCDs on 19 June 2020 are significant. By that stage the Order for Imprisonment for the new Life Sentence was in the dossier. The Chair notes the further evidence received including a previous risk assessment from 2019 completed by an independent psychologist. The Chair refers to undertaking a 'neutral review' and being 'cognisant' of the principles in **Osborn** and states that he is now in a position to complete the decision 'on the papers as an intensive paper review' and sets a date for that paper decision. Whilst he then goes on to invite any further legal representations, there is no mention of Rule 21, no direction for representations from both parties as required and the Chair has already reached his conclusion and stated it.
28. Further PCDs are then issued on 15 July 2020. By that point there has been further written representations from the Applicant via his Solicitor and reaffirming his request for an Oral Hearing to go ahead. The Chair explains that there are now two psychological reports in the dossier but accepts that they were completed prior to the Applicant's new convictions. The Chair states that the new convictions are for historic offences but accepts that the panel has not received detailed information about them. He accepts that the new convictions have not been subject to any significant degree of assessment or exploration but goes on to say that he is aware of the delays for face to face psychological assessments and the delays for face to face oral hearings. The Chair states that he has "*considered the request for a hearing to discharge section 3(iii) of the current referral and has considered both*



the information currently contained within the dossier, and the potential implications of the new convictions which are not subject of the current referral from the Secretary of State". The Chair concludes that there is sufficient information to complete a risk assessment by way of a remote panel assessment to 'consider the reports currently to hand'.

29. On 16 July 2020 the Applicant's Solicitors submitted further representations on a final attempt to request that the Panel holds an Oral Hearing, submitting that a psychological assessment may be able to be done remotely and a video oral hearing would be sufficient for what was requested namely a targeted risk assessment.
30. In its decision letter the Panel did not make reference to having concluded its decision on the papers under Rule 21, although it did set out the adjournment history.
31. In its decision letter the panel did not respond to the submissions made by the Applicant regarding the principles laid down in **Osborn**, nor were those points responded to within the multiple PCDs other than to say that regard had been paid to them. Specifically, the Applicant had raised the following points; his case was complex and he had never had a live hearing; his recent convictions were for historic offences that he had aired already as part of his treatment process; he wanted a hearing to establish the extent to which he had addressed his risk factors thus far; and he wanted a hearing to enable the proper discharge of 3(iii) namely the continuing areas of risk that needed to be addressed.
32. In the decision letter the panel identifies that the new convictions are relevant to risk but goes on to say that they need further exploration and understanding. Whilst the panel mentions that the Applicant is now starting to be more open about 'things he has done in the past' it does not specifically say whether it accepts that the Applicant has already addressed or explored any of these offences in past treatment. Under the 'panel's assessment of current risk' section, the panel goes on to say that "*This assessment may be subject to review once professionals have had the opportunity to properly explore with you your recently acknowledged (historic) offending*".
33. I am reminded that when considering whether there was procedural unfairness, the overriding objective is that the case must be dealt with justly. I must look at whether the express procedures are followed, which includes Rule 21. I must look at whether the Applicant was prevented from putting his case across.
34. I am reminded that this is not an application where the Applicant is arguing that the granting of a reconsideration would materially affect the decision. The Applicant accepts that he has a further sentence to serve. However, the Supreme Court in **Osborn** was clear that there does not need to be a realistic prospect of progression in order for an Oral Hearing to be directed. It must therefore be right that the same principles apply to the Reconsideration Mechanism. The fact that an Applicant has a minimum of a further seven years to serve is in part why he seeks reconsideration as he wishes to participate in a thorough risk assessment to enable him to have clarity on his outstanding risks and how they might be addressed.

Decision



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35. I am not satisfied that Rule 21 of the Parole Board Rules was followed at any point by the Panel. Specifically, in the PCDs on 19 June 2020, the Chair acknowledges there has been further evidence and then concludes that the case will be dealt with on the papers before then inviting representations. Whilst there had been previous representations directed and received, there had also then been adjournments and the impression that the Oral Hearing remained in place.
36. I am not satisfied that the repeated and relevant submissions made by the Applicant based on the principles laid down in **Osborn** were responded to sufficiently by the panel in either PCDs or the decision letter. The Applicant submitted to the panel that a targeted hearing where he could give evidence and an updated psychological report could be provided would enable a meaningful hearing to satisfy the referral. The panel did not respond in detail to those points and then accepted in its decision letter that further information is needed about his offending to update the assessment of risk.
37. Accordingly, taking those two conclusions together and applying the overriding objective that a case be dealt with justly and fairly, I do consider that the decision of the panel was procedurally unfair. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Cassie Williams
14 September 2020

