

Application for Reconsideration by Sullivan

Application

1. This is an application by Sullivan (the Applicant) for reconsideration of a decision of an oral hearing dated 1 September 2020 not to direct release but to recommend progression to 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.
3. I have considered the application on the papers. These are the dossier of 513 pages including the decision letter and the representations made on behalf of the Applicant.

Background

4. On 7 December 2009, the Applicant was sentenced to an indeterminate sentence of imprisonment for public protection for offences of rape and sexual activity with a child. The minimum term the Applicant had to serve before he could make an application to the Parole Board was four and a half years, less time spent on remand; this expired on the 5 December 2013.
5. The Applicant was sentenced on the basis he targeted a boy, befriended the mother and then groomed the child. At the time of sentence, the Applicant was 42. The child was 10 at the start of the offending and 11 at its conclusion. The Applicant was aged 53 at the time of the review.

Request for Reconsideration

6. The application for reconsideration is dated 28 September 2020.
7. The application is made both on the basis the decision not to release the Applicant was procedurally unfair and that it was irrational.
8. The grounds for seeking a reconsideration are as follows:
 - (a) The Applicant was prevented from having a fair hearing because he was prevented from putting his case properly;
 - (b) There should have been an oral hearing in accordance with the guidance in

Osborne v Parole Board [2013] UKSC 61;



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



- (c) The Panel Chair Directions dated the 9 June 2020 said "*in the unusual circumstances*" it would be "*unfair to conclude [the Applicant's] parole review at this stage*;
- (d) Once the panel had decided that the proposed risk management plan was insufficient to manage the Applicant's risk, it ought to have adjourned to take evidence from the Community Offender Manager or to hold a case conference; and
- (e) It was irrational to recommend progression to open conditions, given that the Applicant did not intend to transfer to open conditions, the representations made on his behalf categorically stated open conditions were not being sought and the professional witnesses did not recommend open conditions.

Current parole review

9. The Secretary of State referred the Applicant's case to the Parole Board In January 2018.
10. The panel hearing the Applicant's application on 1 September 2020 consisted of two independent members and a specialist psychologist member.

The Relevant Law

11. The panel correctly sets out in its decision letter dated the 9 September 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.

Irrationality

12. 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."

13. 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

14. 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.

15. 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.

The Reply on behalf of the Secretary of State

16. The Secretary of State has made no representations in respect of this application.

Discussion

17. Dealing with the first two grounds in support of the application, at an earlier stage, the Parole Board must have applied correctly the principles set out in the case of **Osborn** because the matter was not only listed for oral hearing, but an oral hearing took place on the 9 October 2019 and was adjourned for further information, namely an up-to-date psychological assessment of the Applicant.

18. Rule 21 empowers a panel to decide an oral hearing case on the papers (a) where further evidence has been received, (b) the parties have the opportunity (in the way stipulated by Rule 21) to make representations on the contents of the further evidence and (c) to make representations on whether they agree to the case being decided on the papers.

19. Those conditions were satisfied in this case.

20. The reconsideration process is a review of the decision made by the oral hearing panel on the evidence before it. The application for reconsideration refers the reconsideration panel to a number of documents which were not in the dossier and were therefore not seen by the panel (as opposed to the Chair). Those documents cannot be considered on an application for reconsideration.

21. The documents included the Applicant's application for release to be decided on the papers. I have drawn the inference that the application was unconditional, that is, not conditional, for example, on the panel deciding to release. I have relied on the fact that in the Panel Chair Directions dated the 9 June 2020, the Chair said, "*The panel gave very careful consideration to [the Applicant's] application for release*" and in the following paragraph "*The panel makes it clear that all options as part of this review remain open*". The representations made on behalf of the Applicant

dated the 4 June 2020 and the 28 August 2020 do not suggest that the Chair had misunderstood the position.

22. The Applicant faces considerable, if not insuperable, difficulties in respect of his first two grounds, because the guidance in **Osborn** was followed and, not only was Rule 21 correctly applied, it was applied at the Applicant's request. Thereafter, the Applicant did not ask the panel to abandon the hearing on paper and return to an oral hearing.
23. It is quite clear that the panel warned the Applicant that all options remained open and that therefore it could not be assumed that there would be a direction for release. Indeed, the rest of the directions made it clear the panel was taking a pessimistic view of release and wanted to explore the prospects of the Applicant going to open conditions. It is also clear the panel was very anxious that the Applicant's case should be put properly.
24. Ground (c) takes a sentence in the Panel Chair Directions out of its context, which was a decision to adjourn to obtain further information without which it would have been unfair to make a decision on release.
25. As to ground (d), there is no rule of procedure or principle of Natural Justice which requires a panel to adjourn a paper hearing simply because it does not agree with part of the evidence before it. The essential question is whether the panel has sufficient evidence before it to make the findings it did.
26. The panel dealt with this point very well at paragraph 2.5 which I reproduce in its entirety.

"In written representations dated 28 August 2020 she suggested that a case conference between professionals may assist in progressing your case if the panel was not minded to direct your release on the papers. The panel gave careful consideration to this suggestion but concluded that this would not be necessary. This is because the panel has thought very carefully about your case and taken a number of steps to ensure that your paper review has been conducted fairly. For example, the panel has met in camera on a number of occasions over recent months; it has directed up to date reports and representations and it has adjourned for clarification as to whether the proposed risk management plan could actually be delivered in practice given the limitations imposed as a result of the coronavirus pandemic."

27. As to the last ground, the exercise the panel had to undertake was not a balancing exercise between release and a recommendation for open conditions. It was first to consider whether or not to direct release. The panel approached the application correctly as a two-stage procedure and decided not to direct release and gave clear reasons for so doing. Those reasons are largely set out in section 7.
28. The panel then proceeded, as it had been requested to by the Secretary of State, to consider whether to recommend open conditions. The panel set out its reasons for making the recommendation in paragraph 8.4 of the decision. The panel remarked with justification that the recommendations of the professional witnesses had fluctuated over time and the professionals regarded the Applicant's case as "not

straightforward". The panel recorded that the two Prison Offender Managers recommended release. The Community Offender Manager had recommended open conditions in January but now supported release; however, as an alternative, she recommended the Applicant should remain in closed conditions and wait for a place at the progression unit at an appropriate open prison.

29. This ground speaks more of disagreement with the decision than establishing irrationality within Lord Diplock's definition. There is no suggestion that the panel took into account irrelevant material, failed to take into account relevant material, or misunderstood the evidence, or that the conclusion was one to which no reasonable panel could have come to on the evidence. By contrast, the panel produced a decision letter which was well crafted, well thought out, comprehensive and balanced and which explained and supported the decision it had reached.

Decision

30. For the reasons I have given, I do not consider that the decision was irrational/ procedurally unfair and accordingly the application for reconsideration is refused.

James Orrell
21 October 2020