

[2020] PBRA 191

## Application for Reconsideration by Marshall

### Application

1. This is an application by Marshall (the Applicant) for reconsideration of a decision of a single member panel dated 20 October 2020, upon consideration of the papers, not to direct his release on licence.
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; the decision letter; the application; and the email response from the Secretary of State on 8 December 2020.

### Background

4. On 6 July 2000, the Applicant was sentenced to life imprisonment following conviction for Murder. He was 35 years old when sentenced.
5. The index offence involved a sustained attack on a vulnerable male victim. It is reported that the Applicant was heavily under the influence of alcohol and drugs at the time he committed the offence.
6. His minimum tariff was set at 11 years and one day and expired on 8 December 2010.
7. At his previous review, following an oral hearing, a panel of the Parole Board recommended his transfer to open conditions. That recommendation was accepted by the Secretary of State and the Applicant moved to open conditions in March 2019. He commenced periods of temporary release, but these were then paused following the national lockdown due to COVID-19. The Applicant has therefore not yet undertaken a period of overnight temporary release.

### Request for Reconsideration

8. The application for reconsideration is made in the form of a letter to the Parole Board dated 29 November 2020 from the Applicant's legal team. It was not made on the published CPD 2 form, however that does not mean that it was not validly made.



9. The application was made in time. With a paper decision the Applicant had 28 days in which to apply for an oral hearing. The 21 day time frame to enable an application for reconsideration to be made then ran from 19 November 2020.

10. The grounds for seeking a reconsideration are summarised as follows:

That the decision was irrational, and a deferral should have been granted so that more information could have been obtained regarding COVID-19 restrictions and the impact of the same.

## Current parole review

11. The Applicant is now 55 years of age. His case was referred to the Parole Board in October 2019 for the panel to consider whether it was appropriate to direct his release or, if not, whether he remained suitable for open conditions.

12. The matter came before a member of the Parole Board for Member Case Assessment (MCA) on 16 April 2020. The Applicant provided written representations via his legal team requesting a deferral for three months, submitting that this time would allow updated information about the availability of periods of temporary release. The member of the Parole Board who dealt with that application allowed a deferral for an extended period of five months and directed updates from report writers.

13. Following the deferral and updated reports, the matter came before another member of the Parole Board for MCA on 20 October 2020. The dossier was paginated to 281. Neither the Community Offender Manager ("COM") nor the Offender Supervisor in prison ("OS") supported release, recommending that he complete further periods of temporary release to ensure that the risk management plan could be robustly tested and he has further opportunity to consolidate his skills to manage his risk.

14. The Applicant's legal representative provided further written representations at that stage requesting a further deferral for three months because periods of temporary release were not taking place.

15. The single member panel at MCA decided that there was sufficient information in the dossier to make a decision and that it was not necessary to direct the matter to an oral hearing or to defer the case as requested in the legal representations.

16. The Applicant was told at the time of this decision that he had an opportunity to apply for a full oral hearing within 28 days of the decision letter. He could have done so by virtue of Rule 20 of the Parole Board Rules. The Applicant did not do so.

## The Relevant Law

17. The panel correctly sets out in its decision letter dated 20 October 2020 the test for release.

### *Irrationality*



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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. 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.

20. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

#### Other

21. 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

22. The Secretary of State had no representations to make in response to this application for reconsideration.

#### Discussion

23. The Applicant sets out in his application that the decision to conclude the matter by paper review was irrational. He repeats his request for a deferral. He submits that the Parole Board has 'assumed' in its decision that the country will get back to normal following the COVID-19 pandemic and that periods of temporary release will recommence. The Applicant submits that there are no guarantees regarding a vaccine and the country will be adopting a tier system of restrictions which will affect any periods of temporary release.



24. That tier system is now in place and is to be the subject of regular reviews by the Government. I fail to see within the decision where any assumption is made about the future and when periods of overnight temporary release may be available. The panel clearly sets out in its conclusion that, having considered all the evidence, there is further risk reduction work needed.
25. The Applicant made an application for a second deferral for 3 months '*until the New Year*' on the basis of waiting and seeing what will happen with the pandemic. He appears to accept that overnight periods of temporary release would be the next step in his progress and wanted the case deferring to see when they might be reinstated. It would seem to me therefore that it is the Applicant who made assumptions that matters would be different '*in the new year*'.
26. The panel deals with the Applicant's deferral request in the decision letter under section 7 and again under the conclusion. The panel sets out why a deferral would not be adequate in the circumstances given its agreement with the OS and COM that he needs adequate testing in a community setting and needs to evidence his ability to maintain his progress when restrictions ease.
27. Furthermore, the panel deals with the issue of whether an oral hearing should be granted by correctly identifying that the principles in **Osborn** must be considered in the first section of the decision.
28. The case of **Osborn** is clear that fairness does not require an oral hearing on every occasion and it is also clear that a mere assertion on behalf of a prisoner that he should have an oral hearing will not entitle a prisoner to one, providing fairness can be achieved on the papers. **Osborn**, does, however, also provide helpful guidance as well as illustrative examples of situations where fairness to the prisoner does require an oral hearing.
29. I do not find that this case falls under any of those situations and the Applicant has not set out any reasons as to how it does in either his representations at MCA stage or within his application for reconsideration. In fact, the Applicant did not ask for an oral hearing during the MCA stage at all and does not appear to do so now. He repeats his request for a deferral.
30. When the case was deferred in April, the situation with COVID-19 was relatively new. The member made an entirely appropriate decision to defer the case.
31. The member that dealt with the case in October was not bound to follow the previous assessment. The panel considered the representations as is made clear within its letter. In my judgment, the decision to conclude the case on the papers at that stage cannot be said to meet the test for irrationality. The panel gave a clear and reasoned decision.

## Decision

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



**Cassie Williams**  
**15 December 2020**

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