

[2020] PBRA 64

## Application for Reconsideration by Fathers

### Application

1. This is an application by Fathers (the Applicant) for reconsideration of a decision by the Parole Board dated 24 April 2020 not to direct her release.
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. The papers I have considered are the decision letter, the application for reconsideration, the dossier and the directions and submissions which resulted in the review being conducted on the papers. The directions and submissions are not contained in the dossier.

### Background

4. On 18 April 2007 the Applicant was convicted of murder and sentenced to life imprisonment with a minimum period to serve of 14 years less time spent on remand. The tariff expiry date is 13 May 2020. The parole hearing was due to coincide with the tariff expiry date. The case was directed to an oral hearing by an MCA panel on 24 December 2019. The MCA panel said that it made the direction 'in order to be fair' and following the guidance given by the Supreme Court in the case of **Osborn and others -v- the Parole Board [2013] UKSC 61**. Before the oral hearing could take place the Covid-19 outbreak happened, and the prison service ceased all face to face parole hearings. Because there was likely to be a substantial delay before face to face parole hearings would recommence, the Parole Board issued guidance as to how members should address this new situation. The Parole Board requested all panel chairs to review any outstanding cases directed to an oral hearing to consider whether an alternative method of disposal could be adopted. The possible alternatives were a decision on the papers; a hearing held by telephone conference or by video link. It was made clear that alternative methods should only be adopted if there could be a fair hearing. As a result of the Chair's review and the determination of the panel, the decision in the Applicant's case was made on the papers.

### Request for Reconsideration

5. The application for reconsideration is dated 30 April 2020.

6. The grounds for seeking a reconsideration are as follows:

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The Applicant complains that by depriving her of an oral hearing the panel has acted unfairly and irrationally. She also complains that the panel were in breach of their duty under s.6 of the Human Rights Act 1998 by failing to act compatibly with Article 5(4) of the European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms. By virtue of these failings, she also argues that the panel acted irrationally. In support of her application, the Applicant relies on the decision of the Supreme Court in the case of **Osborn and others -v- the Parole Board 2013 UKSC 61**.

## Current parole review

7. The Applicant's case was referred to the Board on 30 April 2019. It was sent to an oral hearing on 24 December 2019. The date for the hearing was fixed for 24 April 2020 at the prison. On 3 April 2020 the Applicant was notified that the panel chair was considering dealing with the case remotely or making a decision on the papers. By 3 April, it was clear that an oral hearing face to face in the prison could not take place on 24 April or for some time thereafter. By representations dated 8 April the Applicant's legal representative submitted that a remote hearing was not possible because of the Applicant's learning difficulties. He also argued that it would not be fair to decide the matter on paper as there were issues of fact which were in dispute which could only be resolved fairly by an oral hearing. The Applicant's legal representative therefore submitted that the case should be deferred until such time as it was possible to hold a face to face oral hearing. On 11 April 2020 the Chair adjourned the hearing on 24 April and stated that the panel would now review the evidence and the legal representations and decide how to proceed with the case. In the event, the panel determined to decide the case on the papers.
8. By a decision letter dated 24 April 2020 the panel accepted that it was not possible to hold a fair hearing either by telephone or video link but decided that the review could be completed fairly on the papers. The decision of the panel was not to direct release or recommend a transfer to open conditions.

## The Relevant Law

### *Parole Board Rules 2019*

9. 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)).
10. 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

11. 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."*
12. 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.
13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

## 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.

## Other

16. In the case 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

17. The Secretary of State has made no observations on this application.

## Discussion

18. While this application is put both on the basis that the procedure adopted by the panel in deciding the case on the papers was unfair and, on the basis that the decision was irrational, I consider that the real issue is whether the procedure was unfair. The suggestion of irrationality does not add anything. The decision taken on the papers was not arguably irrational, the Applicant's case is that it was unfair to make it in that way.

19. In order to decide this case, it is necessary to look in more detail at the case of **Osborn** referred to above. It is important to remember, as is clear from the speech of Lord Reed, that what is fair in any individual case is fact specific. All the relevant facts have to be taken into account when deciding whether it would be unfair to decide a case on the papers. At para 2(1) Lord Reed says *'in order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release.....whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake.'* Lord Reed then goes on to give examples of cases where the circumstances will often make an oral hearing necessary. They include occasions where there are issues of fact and, where a face to face encounter with the board is necessary in order to enable the prisoner to put her case effectively or test the views of those who have dealt with her.

20. Lord Reed says that these principles arise from the common law duty of fairness which, if followed, will enable the Board to act in accordance with its duty under the Human Rights Act to comply with the ECHR.

21. Article 5(4) of the ECHR was engaged by this hearing. It is not engaged in all Parole Board hearings, but it is engaged when the Board is deciding whether to release a prisoner serving an indeterminate sentence.

22. Article 5(4) provides: *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'*

23. The review must be carried out in accordance with a procedure which has a judicial character. One of the requirements of that under the common law is that



the procedure adopted by the body carrying out the review must be fair. It is also a requirement under the ECHR and the common law that the decision on the lawfulness of the detention must be made speedily.

24. The panel had to take into account the following additional and highly unusual facts when considering whether it was fair to decide the matter on the papers. A face to face oral hearing could not take place for some time. While it is difficult to be sure, it is unlikely that such a hearing could happen before September. It is likely as well that, when oral hearings are able to re-start in prisons, there will be a backlog of cases. Deferring cases such as this one could lead to unfairness for others who may have to wait for longer than normal to have their hearings. One of the consequences of the decision in **Osborn** was that a backlog of cases waiting for oral hearings built up as there weren't enough members of the Board to hear them. This led to unfairness to a significant number of prisoners and a number of breaches of Article 5(4).
25. In the circumstances that existed at the time of this review, the fact that an application for release looked on paper to be certain to fail is a fact on which some weight has to be placed in order to cope pragmatically with the problems that Covid-19 has caused. To suggest otherwise is unrealistic.
26. It is submitted on behalf of the Applicant that an oral hearing was necessary as the decision is based on facts which were in dispute and which the Applicant had no opportunity to respond to. Whilst it is correct that allegations which were disputed by the Applicant resulted in further treatment from a psychologist and in the Offender Manager and the Offender Supervisor changing their recommendations, it is not something that the panel took into account. In paragraph 8 of the decision letter the panel makes clear that it makes no findings of fact on these allegations '*as there are no statements of complaint and you have not been afforded the opportunity to contest the information*'. The panel does however conclude that at the time of their decision work was required, which was on-going with the Applicant to assist her with the management of her personal relationships and emotions. That finding is not dependent on the truth of the allegations. The Applicant has herself accepted that she could benefit from this work as is clear from the latest psychologist's report. The panel referred to the letter the Applicant had written apologising for any offence she might inadvertently have caused.
27. The panel concluded that on all of the evidence, the Applicant needed to complete the course of one to one meetings with the psychologist; have a period of consolidation to see whether they had had an effect and, a further assessment from a psychologist. That would all take time and it is uncertain how long. In those circumstances the panel were entitled to conclude that a deferment was not suitable, and they should refuse the application for release. That was certainly not an irrational decision on the information in the dossier.
28. Was it fair to make that decision without an oral hearing? Bearing in mind the unique circumstances at the time; the impossibility of holding a face to face hearing for the foreseeable future or of holding a telephone or video link hearing, I think it was fair to decide the matter on paper. As I have said the decision



whether it was fair to decide the matter on paper is fact specific and on these facts, in my judgment, a fair procedure was followed.

29. By implication, if not expressly, Lord Reed says in his judgment that, as a matter of fairness to a prisoner, it may be necessary on occasion to hold an oral hearing even when there is no realistic prospect of a release decision being made. The present circumstances make it less likely that a panel could or should agree to that when, as in this case, it would involve a lengthy adjournment.

## Decision

30. For the reasons I have given, I do not consider that the decision making process was procedurally unfair and accordingly the application for reconsideration is refused. For the avoidance of doubt, I also do not consider that the decision was irrational.

**John Saunders**  
**13 May 2020**