

[2021] PBRA 58

Application for Reconsideration by Uddin

Application

1. This is an application by Uddin (the Applicant) for reconsideration of a decision of a panel on the papers dated 16 February 2021 not to direct 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. The reality of this case is that there should have been an application for a direction for an oral hearing, following the panel's decision not only not to direct release but also not to direct an oral hearing. Such an application could have been made pursuant to Rule 20 of the Parole Board Rules 2019 (the Rules). An application under Rule 20 must be served, with reasons for making it, within 28 days of the written decision. No such application was made.
4. However, a decision not to release which is eligible for reconsideration under Rule 28 remains provisional for a further 21 days. This application for reconsideration, although undated, was received in time to be considered under Rule 28.
5. Under Rule 20 there is no limitation on the discretion of the Parole Board member considering whether to direct an oral hearing despite the earlier decision. Such a discretion must, as a matter of general principle, be exercised judicially, which I interpret to mean "in the interests of justice". The limitations on the discretion of the Parole Board member considering an application under Rule 28 are set out below. In a nutshell, reconsideration can only be granted if the decision under discussion was irrational or procedurally unfair. If the decision properly falls within one of those categories then reconsideration can be directed, notwithstanding that the more direct route to rectification under Rule 20 has not been taken.
6. I have considered the application on the papers. These are:
 - The dossier, which consists of 148 numbered pages. Apart from the Decision Letter, which appears at the end of the dossier, it seems to be identical to that seen by the panel;
 - The Decision Letter separately; and

- A Request for a Full Oral Hearing before the Parole Board, undated, and in the version I have, bearing no representative's name or profession, but received by the Parole Board on 7 April 2021.

Background

7. In January 2020 the Applicant was released from a sentence of imprisonment imposed for an offence of racially or religiously aggravated harassment. He was served with a Terrorism Prevention Investigation Measures notice at that time. On 7 February 2020 he was sentenced for 12 breaches of that notice to the term of imprisonment he is currently serving, 2 years' imprisonment with a parole eligibility date of 18 May 2021 and a sentence expiry date of 16 January 2022.

Request for Reconsideration

8. The application for reconsideration is undated. It was received on 7 April 2021
9. The grounds for seeking a reconsideration are as follows:
 - a) It is 'irrational' and/or 'procedurally unfair'. The Applicant was not afforded the opportunity to make representations and/or to challenge any submissions/evidence considered by the Board in opposition to his release.
 - b) When considering the Applicant's suitability for Parole, there appears to have only been a consideration of the State's evidence against him. The representatives understand that he was not informed of the parole hearing. He is unaware of the full extent of the documentation that was before the Parole Board when considering his case. In particular, it is unclear what the nature of the material considered by the Board was. He is unaware of whether the material relied upon consists of that which has been served upon his legal team in relation to the TPIM proceedings or whether this included other/ secret evidence.
 - c) In any event, he was not asked to make oral or written representations in this matter. Indeed, he has not had the opportunity to make representations in any proceedings, whether in the criminal courts (other than a plea in mitigation), the High Court or before the Parole Board.
 - d) Those involved in this matter will understand that this is a complex case involving breaches of a TPIM Order imposed on the Applicant by the Secretary of State for the Home Department (SSHJ). Whilst the Applicant is now categorised as a 'Terrorist Offender', as a result of breaches of the Order, unlike other 'Terrorist Offenders', he has not committed any actual acts of terrorism prior to, during, or after the breaches of the Order. Thus, the need to hear representations from the Applicant is imperative.



- e) It is noteworthy that this matter was prosecuted in the criminal courts before a s.9 TPIM Act 2011 Review Hearing was held to determine the necessity and proportionality of the measures imposed. The criminal case ought to have been stayed until a final determination had been made as to the necessity of the said measures. Consequently, whilst it is not within the remit of the Parole Board to consider the 'legality' of the TPIM Order, it nevertheless is a material consideration when deciding whether the Applicant is fit for parole or whether he should continue serving the remainder of his sentence.

Current parole review

10. The Applicant's case was referred to the Parole Board so that his release could be considered in advance of his parole eligibility date. He is now 34 years old.
11. The case was dealt with on the papers by a single-member panel of the Parole Board. The decision letter is dated 16 February 2021.

The Relevant Law

12. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

13. 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)).

Irrationality

14. 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."

15. 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.



16. 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

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 focuses 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.

19. In the cases of **Osborn and others 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 has not made any representations with regard to this application.

Discussion

21. It is neither necessary nor desirable for me to discuss the matters raised on behalf of the Applicant.



22. What is not raised is a matter that in my judgement establishes a clear issue of procedural unfairness. The panel that decided not to direct the Applicant's release made no mention in its decision letter of the principles established by the case of **Osborn and others**, discussed at Paragraph 19 above, which gives authoritative guidance on the approach that should be taken by the Parole Board when considering whether to direct an oral hearing. The approach laid down involves consideration of issues other than the merits of a decision to release, such as fairness to the prisoner. Lord Reed said at Paragraph 2(v) of **Osborn**:

'The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood.'

23. It follows, in my judgement, that if a panel assessing a case on the papers does not direct release, it is a procedural error leading to unfairness not to consider whether an oral hearing should be directed by applying the **Osborn** criteria.

24. I am not making a finding that the decision not to direct an oral hearing was necessarily wrong. I am making a finding that the decision not to direct an oral hearing in this case was flawed by the apparent failure of the panel to consider **Osborn**. I stress "apparent failure": it may very well be that the panel did consider the principles established in that case – it is second nature for a panel to do so – but in the absence of any reference to, or more importantly discussion of, those principles it is impossible to be satisfied that the panel turned its mind to the relevant issues.

25. In the circumstances the decision of the panel is fundamentally flawed and must be reconsidered.

Decision

26. Accordingly, I consider, applying the test as defined in case law, that the decision not to direct release was procedurally unfair in that express procedures laid down by law were not followed in the making of the relevant decision. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh MCA panel by way of a paper hearing.

Directions

27. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

28. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh single-member panel.



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11 May 2021

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