

[2023] PBRA 101**Application for Reconsideration by Maher****Application**

1. This is an application by Maher (the Applicant) for reconsideration of a decision of a duty member dated the 15 March 2023 not to direct his case to an oral hearing following a provisional paper decision issued on the 7 March 2023.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
 - a) The duty member decision dated the 15 March 2023;
 - b) The application produced by the Applicant's legal representative dated the 16 March 2023; and
 - c) The dossier numbered to page 235, the last page of which is the duty member's decision dated the 15 March 2023.

Background

4. The Applicant is now 27 years old and, in 2017, when he was 22 years he was sentenced to a Sentence for Offenders of Particular Concern (SOPC) comprising of five years and four months in custody and a one year extended licence. The sentence was imposed following the Applicant's conviction for an offence of engaging in conduct in preparation for terrorists acts. The Applicant had purchased tickets to travel to Turkey, intending to go to Syria to fight against the Assad regime. He was arrested before he could leave.
5. On the 24 June 2021, the Applicant's case was considered by the Parole Board at an oral hearing. The Applicant had been eligible to be released on licence at that time ahead of the automatic release point on his sentence. At that review the Parole Board refused to direct the Applicant's release.
6. On the 9 September 2022, the Applicant was automatically released on licence as was required by law. On the 25 January 2023 he was recalled to custody. The recall took place due to concerns about the Applicant's behaviour and his breach of licence.



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7. The Secretary of State then referred the Applicant's case to the Parole Board for it to consider whether his re-release could be directed.
8. On the 28 February 2023, the Applicant's legal representative submitted written representations to the Parole Board. The Applicant asked that he be re-released prior to the end of his sentence in August 2023. If the Parole Board was not prepared to direct his release on the papers, the Applicant asked that his case be directed to an oral hearing.
9. On the 7 March 2023, the Parole Board considered the Applicant's case on the papers and did not direct his re-release and did not direct an oral hearing. The paper panel had indicated a wish to direct an oral hearing but stated that one could not be convened prior to the Applicant's sentence end in August 2023. This was because of the need for further professional assessment and reports that would need to be produced and added to the dossier of written evidence. It was said that this and a listing for an oral hearing would be unlikely to be achieved prior to sentence end. In the absence of oral evidence to consider the circumstances leading to recall and the Applicant's level of risk, the panel was not persuaded that it could direct his release.
10. The paper decision of the 7 March 2023 was provisional, as set out in the Parole Board Rules. It was then open to the Applicant to apply in writing for a panel at an oral hearing to determine the case, under Rule 20 of the Parole Board Rules. The Applicant was required to submit his application to the Parole Board within 28 days of the date the provisional paper decision was sent to him. If the Applicant made an application for an oral hearing, the paper decision of the 7 March 2023 would remain provisional as the case would be eligible for Reconsideration under Rule 28 of the Parole Board Rules.
11. On the 8 March 2023, the Applicant's legal representative asked that the case be considered at an oral hearing under Rule 20. The Applicant had indicated that the provisional paper decision had not complied with Parole Board guidelines. Those guidelines indicated that cases where sentence end was 20 weeks or less away would be unlikely to receive a listing for an oral hearing. The Applicant noted that his sentence end was more than 20 weeks away. In his view, it was possible that an oral hearing could have been listed in his case.
12. The Applicant also stated that there should have been a presumption in favour of release (often referred to as the 'SIM' test) because he was now in the extended term of his sentence. He also submitted that the provisional paper panel had access to more pages of evidence than those seen by his legal representative.
13. In the Applicant's view, the provisional paper decision was procedurally unfair and irrational, however, his application at this point was under Rule 20 for the case to be directed to an oral hearing.
14. On the 15 March 2023, the Applicant's Rule 20 request was considered by a duty member of the Parole Board. The duty member noted the written representations made by the Applicant's legal representative and refused to direct an oral hearing. I note that the duty member indicated that their decision was provisional for 21 days on the basis that an application for reconsideration could be made. This is an



error because Rule 20 decisions are not eligible for reconsideration. However, the provisional paper decision made on the 7 March 2023 remained provisional at this point because it was eligible for an application for reconsideration.

Request for Reconsideration

15. On the 16 March 2023, the Applicant's legal representative submitted an application for reconsideration of the duty member's decision of the 15 March 2023. The basis of that application is that the duty member's decision was irrational and procedurally unfair because it did not detail why the grounds for an oral hearing had been rejected, save for simply saying the representations did '*not make a material difference to the position*'.

The Relevant Law

16. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

17. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

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.



Procedural unfairness

21. 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.

22. 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.

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

The reply on behalf of the Secretary of State (the Respondent)

24. On the 23 March 2023, the Respondent confirmed that he had no representations to make.

Discussion

25. The Applicant's application can be dealt with swiftly. Rule 20 decisions are not eligible for reconsideration. The Applicant has made it clear that he seeks reconsideration of the duty member's decision of the 15 March 2023, and it is this decision, refusing to direct an oral hearing, that was made under Rule 20. The only decision that was eligible for reconsideration was the paper panel's decision of the 7 March 2023, however, the Applicant's application is not made against that decision. Nevertheless, I accept that the duty member's decision of the 15 March 2023 should have addressed the individual grounds raised in the Applicant's application and explained why they were not considered to necessitate an oral hearing being directed.

26. In fairness to the Applicant, given that at the time he made his application the paper decision of the 7 March 2023 was still provisional and remained eligible for reconsideration, I have considered whether the grounds he put forward in his representations of the 8 March 2023 might have met the criteria for reconsideration.

27. The paper panel of the 7 March 2023 had indicated that it would have directed an oral hearing in the Applicant's case if there had been time to do so. The Applicant has said that there was time to do so because there were more than 20 weeks before the end of his sentence and the Parole Board's guidance on where oral hearings might not be listed was confined to cases where sentence end was 20 weeks or less away.



28. At the time of the paper panel's review there were about 24 weeks remaining until the end of the Applicant's sentence. At first glance therefore it would seem that there was time for an oral hearing to be convened. However, the paper panel noted that there would be a need for further professional reports and an expert assessment. The paper panel determined that the time needed for these reports to be produced and the time needed to list an oral hearing would mean that a hearing could not take place prior to sentence end. This was a reasonable conclusion, it was not irrational, and there was no procedural unfairness in that approach.
29. The Applicant appears to be right in that the paper panel had sight of further written material after the Applicant had submitted his written legal representations of the 28 February 2023. However, I am not persuaded that this led to procedural unfairness because the paper panel had wanted to direct an oral hearing, which the Applicant had also wanted if his release could not be directed on the papers. There was little within the additional evidence that might have persuaded the paper panel to direct the Applicant's release on the papers.
30. I accept that the paper panel might have done better to address the 'SIM' test, in that there would have been a presumption in favour of release unless the panel was satisfied that the Applicant would be likely to commit a further serious offence prior to sentence end. However, the paper panel had determined a) there needed to be an oral hearing and b) in the absence of oral evidence it could not direct the Applicant's release. Noting the detail of the case, including the events that led to the Applicant's recall to custody, this was a reasonable conclusion for the paper panel to reach. It was not an irrational decision and it was not procedurally unfair.
31. Even if the Applicant had made his application for reconsideration of the paper panel's decision of the 7 March 2023, for the reasons I have given, I am not persuaded that the paper panel's decision was irrational or that its approach was procedurally unfair.

Decision

32. The application for reconsideration is refused.

Robert McKeon
30 May 2023

