

[2024] PBRA 3

Application for Reconsideration by Young

Application

1. This is an application by Young (the Applicant) for reconsideration of a decision of a MCA (member case assessment) panel dated the 10 October 2023. The decision of the panel was not to direct release.
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, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the dossier consisting of 339 pages; the application for Reconsideration submitted by the Applicant's legal representative; and the response by the Secretary of State (the Respondent).

Background

4. On the 12 April 2012 the Applicant was sentenced in relation to an offence of robbery. The Applicant was sentenced to an indeterminate sentence of imprisonment for public protection. The minimum term fixed by the judge was twenty nine months. The tariff expired in September 2014.
5. The robbery was the tenth committed by the Applicant in the 3 year period before he was sentenced in 2012. The Applicant, with others, approached a 16 year old in the street and demanded his bike. He then held a knife to the 16 year old's throat, while a second male took the bike. The Applicant was, at the time, on licence for an earlier robbery. The Applicant was 22 years old at the time of sentence, he is now 33 years old.
6. The Applicant was noted to have an extensive history of criminal offending and a substantial number of robbery offences which followed a similar pattern to the index offence.

Request for Reconsideration

7. The application for Reconsideration is dated the 18 December 2023.
8. The grounds for seeking a reconsideration are set out below.



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Current parole review

9. This was the Applicant's fifth review of his sentence by the Parole Board. The last review had been by way of an oral hearing in July of 2022.

The Paper Hearing

10. The review was conducted by an independent MCA panel member of the Parole Board.
11. A dossier consisting of 319 pages was considered.

The Relevant Law

12. The panel correctly sets out in its decision letter dated 10 October 2023 the test for release.

Parole Board Rules 2019 (as amended)

13. Pursuant to 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)).
14. 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

15. 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."

16. 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.
17. 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

18. 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.
19. 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.
20. The overriding objective is to ensure that the Applicant's case was dealt with justly.]
21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

The reply on behalf of the Respondent

22. The Respondent offered no representations.

Reconsideration grounds and discussion

General

23. The decision not to direct release in this case was made by a single Parole Board member. That member is referred to as an "*MCA member*". Members of the Parole Board initially consider references from the Secretary of State in a process called *Member Case Assessment*. At this stage of the parole process the MCA member will assess whether there is sufficient material upon which to progress and make a decision. The MCA member will also consider whether the case is one which can be fairly concluded on the basis of a decision on paper without an oral hearing, or whether the case should be scheduled for an oral hearing, at a future date. In this case the MCA member made an initial assessment, adjourned the case, ordered further evidence and information, and also allowed for representations from the solicitor acting for the Applicant.
24. Having considered the totality of the evidence the MCA member concluded that the matter was one which could be concluded with a paper decision, rather than sent

for an oral hearing. It is that paper decision which is the basis of this application for reconsideration.

25. It is noted that in support of the representations made by the Applicant's solicitor a number of paragraphs of the case of Osborn (**Osborn v Parole Board [2013] UKSC 61**) are cited. Those paragraphs are not repeated here but are well understood and known by those practising in the area of Parole.

Grounds and Discussion

Ground 1

Procedural unfairness - failure to apply the relevant law.

26. The Applicant's solicitor argues that the MCA member, in the decision not to direct release, made the assertion that "*little had changed*" since the last parole review. By implication the MCA member failed to take account of the current position and relied upon a past decision which the Applicant's solicitor argues was unfair.

Discussion

27. The duty member's decision at paragraph 2.4 is set out below. The duty member's contention in that paragraph was that the Applicant's behaviour, preceding the last parole review (2022) indicated that the Applicant had demonstrated difficulties in maintaining prosocial behaviour when in situations or environments that challenged him.

28. The duty member in the 2023 decision was, in my view, entitled to analyse the historical progress of the Applicant in his prison behaviour and to refer back to earlier examples of behaviour, to assess whether there was evidence of change. However the point being made by the duty member in the 2023 decision, was that the behaviour concerns identified in 2022, were continuing. The duty member indicated the following:

"Since that review, there have continued to be concerns about [the Applicant's] behaviour and he has spent time on the basic regime. He received a proven adjudication in August 2022 for refusing to return to his cell, stating that he would 'smash the officer's face in'. There had been one isolated incident of substance misuse in January 2023 when [the Applicant] said that he was struggling to sleep and thought that spice might help him. [The Applicant] did demonstrate a more settled behaviour for a period, but this was not sustained. An allegation of assaulting two officers in June 2023 has been reported to the police. Whilst this remains outstanding, the panel put no weight on it. [The Applicant] was found under the influence of substances on several occasions."

29. In assessing future risk and compliance the duty member properly assessed historical behaviour, and made an assessment of whether there had been a change either positive or negative. I am not persuaded that this amounted to irrationality or procedural unfairness. In my determination this was a proper use of the evidence upon which a decision was required to be made.

Ground 1(b)



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30. A second limb of the reconsideration argument, by the Applicant's solicitor, is that the panel's decision was unfair because it failed to allow for a "closer examination" of the Applicant's case and it failed to allow the Applicant his legitimate interest in being able to participate in a decision with important implications for him.

Discussion

31. I have, as indicated above, considered the dossier in this case and the decision. The MCA panel member, who was the author of the decision not to release, initially considered and assessed the case in some detail in August 2023, and subsequently adjourned the matter to secure various updates from the prison. That adjournment provided a detailed updated security report and a report from the Prison Offender Manager (POM). The updated report from the POM included a schedule of the positive and negative behaviour entries recorded against the Applicant. The update also recorded the detail of conversations that had been undertaken between the POM and the Applicant concerning (in particular) the negative behaviour incidents listed in the prison records. It was particularly noted that there had been an increase in negative entries concerning the misuse of substances (illicit drugs).

32. In addition to the updated material regarding behaviour, the Applicant's solicitor submitted representations on behalf of the Applicant. Those representations included an acceptance that the Applicant had "*lapsed into substance use*". It also noted that the substance misuse had not resulted in serious harm to others. The Applicant's solicitor also indicated that the Applicant's behaviour was likely to be associated with damage to his mental health, suggested to be as a result of delays in the Parole Board review and the effect of the particular sentence being served by the Applicant. The Applicant's solicitor also listed a number of reasons why it was felt that the Applicant warranted an oral hearing which included identifying unmet treatment needs, identifying continuing areas of risk, conducting a further assessment of risk and considering the suitability of the proposed risk management plan.

33. As to whether, in order to act fairly towards the Applicant, a closer examination of the evidence in this case was required, I have considered the MCA member's decision and the dossier. Whilst the case of **Osborn** is a strong indication that decision-makers must exercise care when deciding whether or not to order an oral hearing, the decision in **Osborn** does not preclude a (paper) hearing and decision on the basis of the evidence presented within a dossier and within representations made on behalf of a prisoner. In this case there was a substantial amount of evidence that the MCA member could consider in relation to a final decision. Importantly the Applicant neither through his solicitor, nor by way of representations, nor in discussions with his POM was denying the fact that he had relapsed into further drug use which was clearly a high risk factor in connection with the index offence. There were also no clear and unambiguous denials of other issues which were cited in the security reports considered by the MCA member.

34. Of note was that one issue that was specifically excluded from the decision was the matter involving an allegation that the Applicant assaulted a prison officer.

35. Before making the decision, the MCA member, appropriately considered representations from the Applicant. The Applicant's solicitors were arguing for an oral hearing in order to assess the Applicant's current position regarding risk and future progression. The MCA member clearly did not take the view that it was necessary or required pursuant to **Osborn** to order an oral hearing in this case.
36. In the concluding remarks of the decision, the MCA panel member indicated that there had been a history of violent offending both in the community and in custody. It was acknowledged that the Applicant had shown periods of stability, however a major concern was the fact that the Applicant had not had the capacity to sustain stability, for a period, or to a point, where it was felt that his risk could be safely managed in the community. The concluding remarks referred to active risk factors. Those risk factors were well understood by repeated references within the dossier, in particular at paragraph 2.4. The references are noted above at paragraph 27 of this decision.
37. The MCA panel member also noted positive factors. Including the completion of a programme aimed to encourage motivation and engagement and some positive remarks by staff.
38. I am satisfied on the basis of the content of the decision that all the appropriate evidence, as presented within the dossier, and within the representations by the Applicant through his solicitor were considered. I am also satisfied that the decision to proceed in this case, without an oral hearing was neither unfair nor irrational in the sense set out above.

Ground 2

Procedural unfairness - The Applicant was not given a fair hearing and was prevented from putting his case properly.

39. The Applicant's solicitor indicates, at paragraph 35 of the representations in support of reconsideration, the following "*the original MCA decision was made without legal representations*". Also cited in this ground is the fact there was an unreasonable reliance on an earlier Parole Board decision, and a failure to approach the case "open-mindedly". The Applicant's solicitor poses the following question "*it must be asked, if all that was required was to look at previous decisions and current reports (and to presume their accuracy) what would be the point of having an oral hearing in any case ever*".
40. Also quoted are a number of earlier published decisions ordering reconsideration. In essence those decisions emphasise the need for fairness and to take into account representations of prisoners.

Discussion

41. As to the original MCA panel member decision being made without legal representations, on page 3 of the MCA member's decision there is a standard template box asking whether the decision maker has considered representations. That box is answered in the affirmative. Below that box is a request for details. The decision maker has indicated that the details are "Application for an oral hearing".



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Also noted on the dossier are four pages of representations submitted by the Applicant's current solicitors requesting an oral hearing. On the evidence before me, therefore, it appears to be incorrect to submit that the MCA panel member's decision was made without legal representations. The representations were considered by the MCA panel member before reaching any conclusion.

42. As to the complaint relating to the reliance upon earlier Parole Board panel decisions. The role of the parole board panel in assessing risk is clearly to take account of historical evidence. The academic assessment of risk is loosely based upon an analysis of past behaviour, an analysis of any change in behaviour and an analysis of the potential for behavioural difficulties in the future. The analysis of these elements will clearly depend upon historical evidence as well as analysis of ongoing behaviour and the views of professionals and others as to the potential for future behaviour. I am not therefore persuaded that the careful use of historical evidence, in assessing risk, is either unfair or unreasonable. Indeed quite the opposite, the assessment of historical evidence is clearly essential in reaching a holistic decision.

43. In this case, the Applicant himself was not able to make oral representations in an oral hearing format, however, as indicated above, his legal advisers made relevant representations on his behalf in some detail before the decision of the MCA member was issued. The Applicant, through his solicitors, therefore had every opportunity to participate in the decision, to make representations and to challenge any matters which were contested. I am not persuaded that the Applicant was prevented from engaging in the decision-making process. I am not therefore persuaded that the decision was procedurally unfair or amounted to an irrational decision.

Ground 3

44. The MCA panel member failed to properly apply the law as set out in the Applicant's application for reconsideration.

Discussion

45. I have considered the various references to decisions set out in the Application. I have not repeated each of those decisions. As indicated above, this being a reconsideration decision, the issue for me to determine is based upon the two limbs of the reconsideration process. It should also be noted that I am not empowered to make a decision pursuant to section 20 (1) of the Parole Board Rules 2019.

46. As to procedural unfairness. I have considered the representations made in this regard. In essence it is argued that the absence of the ability for the Applicant to make oral representations at a hearing amounted to procedural unfairness. I am conscious of the fact that principles of fairness requires that a prisoner has the opportunity to make representations, where any decision about his future detention is being considered. I am also, as indicated above, conscious of the fact that the case of **Osborn** asserts the need for care in considering how a prisoner might make representations, whether in an oral hearing or otherwise. In this case I am satisfied that the Applicant was given an appropriate opportunity, through the representations of his solicitor, to participate in the decision-making process. I am also satisfied that the MCA panel member considered those representations as well

as the evidence generally contained within the dossier. I am therefore not persuaded that this decision amounts to procedural unfairness.

47.As to whether the decision was irrational in the sense set out above, the MCA panel member took account of the behavioural issues evidenced in the dossier, in particular those concerned with the relapse into drug misuse. It is noted, within the dossier, that the index offences were closely associated with a relapse into drug misuse which then led to violence. The MCA panel member also cites issues regarding compliance and the Applicant's relationship with prison staff. Once again compliance is clearly a crucial issue in terms of assessing risk and managing risk in the future. The MCA panel member sets out in the concluding paragraph of the decision, the fact that the Applicant's more recent behaviour showed a re-emergence of risk factors and hence the decision not to order release.

48.In all the circumstances therefore I find no basis for ordering reconsideration in this case and the application is refused.

Decision

49.I conclude that the decision in this case was not irrational in the legal sense set out above and that the decision was not procedurally unfair. I refuse the application for Reconsideration.

HH S Dawson
8 January 2024