

[2019] PBRA 41

Application for Reconsideration in the case of Hart

Application

1. The Secretary of State seeks a direction for reconsideration of the decision of the Parole Board of 19 September 2019 to direct the release of Hart (the Respondent).

Background

2. Hart (the Respondent), who is now 52, is serving a 10-year Extended Determinate Sentence for offences of making, distributing and possession of indecent images. The custodial period of the sentence is 6 years and the extended licence period is 4 years. The Respondent's conditional release date is 11 December 2019.
3. The Respondent has previous convictions relating to indecent images and for indecent assaults on children.

Current Parole Review

4. By representations dated 29 April 2019 the Respondent's solicitor applied for a direction for an oral hearing. The MCA member agreed and directed an oral hearing. The hearing was due to take place on 26 September 2019 but on 19 September 2019 the panel issued a decision letter directing the release of the Respondent on the papers. The panel had been informed in an updated report from the Offender Manager dated 30 August 2019 that there was Designated Accommodation available for the Respondent from 20 November 2019. In the decision letter the panel concluded that given the short period of time that the Respondent's risk had to be managed (21 days), they were satisfied that they could direct release without the necessity of requiring witnesses, including two psychologists, to attend an oral hearing.

Application for reconsideration

5. The Secretary of State (the Applicant) applies for reconsideration on the basis that the decision to direct release was irrational and that it was procedurally



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unfair. The Applicant submits that it was irrational on the evidence to conclude that the Respondent was safe to release and that there should have been an oral hearing before a decision was reached.

Response from the Respondent's legal representative

6. In helpful submissions, the Respondent's legal representative argues that in view of the very restrictive conditions placed on the licence; the short period which the panel had to consider before the conditional release date and parts of the evidence in the dossier which supported release, the decision to release was not irrational, nor was the procedure adopted unfair. The legal representative further argues that as the application for reconsideration by the Secretary of State has not been completed on the prescribed form, it is out of time.

The Relevant Law

7. Rules 21, 25 and 28 of the Parole Board Rules 2019 apply to this case.
8. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.
9. Rule 21 sets out the procedure that must be followed before a decision can be made on the papers after a direction for an oral hearing. Provision is made under Rule 21(3) to allow the parties to make representations as to whether the case should be considered on the papers.
10. Rule 21(6) provides that '*A direction for a case to be decided on the papers under paragraph (4) (a) cannot be made where there is less than 3 weeks until the oral hearing*'.
11. In **R (on the application of 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 paragraph 16: '*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*'. 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 Board in making decisions relating to risk. The Board when considering whether or not to direct a reconsideration will adopt the same high standard for establishing 'irrationality'.

12. Procedural unfairness has a similar meaning as procedural irregularity does in Judicial review. It is for me to decide whether I consider the procedure adopted by the panel in conducting the parole hearing was unfair to either of the parties.

Discussion

13. While the point has not been taken by the Secretary of State and therefore the Respondent's legal representative has not had the opportunity to deal with it, it seems to me that the panel acted in breach of Rule 21 of the Parole Board Rules in dealing with this case without an oral hearing. The procedure set out in Rule 21 is clear. 14 days after the receipt of further evidence, the panel chair can make a direction that the case should be considered on the papers without an oral hearing. The purpose of the 14-day period is to allow for representations to be made by the parties as to whether there should still be an oral hearing. At the end of that period the panel chair can direct that the matter will be considered on the papers ***provided that no such direction can be made 'where there is less than 3 weeks until the oral hearing'***. The direction that the matter should be considered on paper appears to have been made at the time when the decision was issued; that is 19 September 2019, which was only 7 days before the oral hearing was due to take place.
14. As this decision has been made in, what seems to me to be a breach of the Rules, I consider there is no alternative but to order reconsideration. A failure to comply with the Rules is irrational. As this matter has not been raised by either of the parties, I will allow 7 days for them to make submissions in writing if they wish to argue my conclusion - that there has been a breach of the Rules, is wrong.
15. Irrespective of this apparent breach of the Rules, I am concerned at the decision made by the panel to decide this case on paper. I understand the desire of the panel not to call witnesses to a hearing unnecessarily, but I have real doubts whether this was a case which could properly be decided on paper. Everyone agreed that the Respondent was a high risk of causing serious harm to children; a number of the witnesses including the psychologist who carried out an assessment of risk of reoffending and outstanding needs after the Respondent completed the intervention addressing sex offending concluded that his risk would be more likely to be reduced if he remained in closed conditions until his conditional release date rather than being released to Designated Accommodation. Other witnesses supported this view. The Independent Psychologist believed the high risk of contact offences could be controlled in the Designated Accommodation for 21 days, but never suggested that this would have any effect on reducing his longer-term risk. The new OM (Offender Manager) also supported release on the basis that there was nothing further that could be done in closed conditions, and it was a very short period of time before his conditional release date. In view of the high risk of re-offending and the

differing views of the professionals, I would have expected an oral hearing to have occurred in order to satisfy the panel that the Respondent could be safely released even for such a short period of time.

16. In **Osborn -v- the Parole Board [2013] UKSC 61** the Supreme Court gave guidance as to the type of cases where the Parole Board should hold an oral hearing. Lord Reed identified as one category of cases where there should be an oral hearing, as those where there are conflicts on the evidence. He also said that the Parole Board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense. The case of **Osborn** and other associated cases concerned appeals by prisoners against refusals by the Board to hold oral hearings, but it seems to me that the same principles should apply in any case. I do not see how the disputes between the professional witnesses in this case could have been properly resolved without a hearing. The hearing was arranged; there was no difficulty in going ahead with it. It seems to me that it was only by having a hearing that the true level of risk could be assessed.
17. I am concerned that the manner in which the decision to dispense with the oral hearing was taken, was not procedurally fair. Clearly the aim of Rule 21 is to give the parties the opportunity to make representations as to whether an oral hearing should be dispensed with. That did not happen in this case. It may not have been necessary to consult the Respondent, as the decision went in his favour, but the Applicant is a party to the hearing, and should have been given the opportunity to express a view on whether the oral hearing should have been dispensed with. I accept that there may well have been no response as the Applicant does not very often take an active part in the proceedings, but should have had the opportunity. In light of the terms of Rule 21 I consider that the procedure adopted was unfair.
18. I have considered the submission made by the Respondent that the Applicant is out of time as the application was not completed on the correct form. The Rules do not require that the application should be made on a particular form and the reason for the requirement to fill in the proscribed form is to ensure that all the relevant details are included in the application. All the relevant details are included in the application and I do not consider that there are any grounds for refusing to accept that this is a valid application.
19. Accordingly, I direct that the matter should be reconsidered. I understand that this may be difficult because of the shortage of time but every effort is to be made to ensure that there is an oral hearing completed before 20 November 2019 when the Designated Accommodation becomes available.
20. I will consider any representations on whether there has been a breach of Rule 21 if made within 7 days and, if persuaded, I will amend this Judgment. I will

consider whether it should change the final result, but it may not be decisive for all the reasons which I have set out.

Sir John Saunders
22 October 2019