

[2020] PBRA 102

Application for Reconsideration by Weatherson

Application

1. This is an application by Weatherson (the Applicant) for reconsideration of a decision of a panel, taken on the papers, on the 19 June 2020 not to direct release or to recommend a transfer to open prison.
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. These are the dossier including the provisional decision letter amounting to 774 pages and the grounds for reconsideration.

Background

4. On the 16 February 2007, the Applicant was sentenced for two offences of robbery to imprisonment for public protection with a minimum period to serve of 18 months (less time on remand) before he was eligible to apply for parole.
5. The minimum period expired on the 13 April 2008.
6. The Applicant was first released on licence on the 3 July 2017 but was recalled and returned to prison on the 15 July 2017.

Request for Reconsideration

7. The application for reconsideration was received on the 13 July 2020 and is made on the basis that the decision not to release him was both procedurally unfair and irrational.
8. The Applicant submits:
 - (i) That written submissions made by way of a Stakeholder Response Form (SHRF) dated the 11 June 2020 and other documents were not put before the panel and/or included in the dossier;
 - (ii) The panel placed undue weight on information contrary to the Applicant's application in the absence of evidence from him and oral representations from his solicitor; and

(iii) The decision to adjourn the oral hearing of the 21 July 2020 was "inexplicable".

The Relevant Law

9. I have come to the conclusion that I can deal with this case on the ground of procedural unfairness only.

Procedural unfairness

10. 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.

11. 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.

12. It is unnecessary to reproduce the relevant part of the Parole Board Rules 2019 in its entirety. Rule 21 states that where a case has been directed to an oral hearing and further evidence is then received which would enable the case to be decided on the papers, a panel chair or duty member can, after hearing representations from the parties, direct that the matter be concluded on the papers.

The reply on behalf of the Secretary of State

13. The Secretary of State has chosen not to make representations in response to this application for reconsideration.

Discussion

14. This case has had a long and tortuous history.

15. The Secretary of State referred the case to the Parole Board on the 19 August 2017 and a three-member panel purported to conclude the case on the 19 June 2020. During that very long period of 2 years 10 months, the Applicant has been represented by two firms of solicitors and the panel chair has had to conduct several no doubt arduous reviews on paper.

16. It is clear from reading the dossier that misunderstandings have crept into the case management. Very much with the benefit of hindsight, it might have been better

for everyone to confine themselves to short simple numbered statements setting out what was being sought and what was being directed.

17. The case had been listed for an oral hearing thus creating in the Applicant's mind a legitimate and reasonable expectation that in due course such a hearing would actually take place. In fact, on the 9 May 2019 the panel convened at a prison in an attempt to conduct the oral hearing.
18. On the 17 February 2020, the panel chair directed that the oral hearing should be adjourned and that the case would be reviewed on the 1 June 2020. The reason for this was that criminal proceedings against the Applicant were pending in a magistrate's court.
19. Given that the case had then been pending for 2 and a half years, it was unsurprising that, on the 21 February 2020, the solicitor for the Applicant applied to rescind the direction to adjourn.
20. The application anticipated that the panel would be able to view scars sustained by the Applicant and spoke of "*live issues*", clearly indicating the Applicant was still expecting an oral hearing.
21. The Secretary of State did not object to the application.
22. The panel chair's response implicitly but not explicitly refused the application but then, in my view, strangely, went on to say "*If it is the case that a request is now being made to finalise the Applicant's hearing on the papers that should be made clear.*" As far as I can ascertain, up to that point there had been no mention by anyone, least of all the Applicant, of a final disposal on paper.
23. The next significant document is a Stakeholder Response Form (SHRF) dated the 14 May 2020, from the Secretary of State asking for an extension of time to produce information about the pending criminal case.
24. The Applicant, through his solicitor, made his response within the SHRF on the 15 May 2020 arguing that it was unnecessary for the Parole Board to wait for either the information or, indeed, the outcome of the criminal proceedings. His application included this sentence "*The panel can then either release him [the Applicant] on the papers, as per their covid-19 policy, ahead of his listed hearing, or otherwise do so at the hearing itself.*"
25. That is the only reference in the dossier that I can find to the Applicant's position on a paper hearing. The only construction that can be put on that sentence is the Applicant would consent to a paper decision only if it were to direct his release and not otherwise.
26. The panel chair's response, contained within the SHRF, is dated the 17 May 2020. It contains seven numbered paragraphs. Paragraph 1 is a recital of the panel's understanding of the Applicant's position. The relevant part reads as follows "*The Panel Chair knows the strong representations made by [the Applicant's solicitor] which argue that:.... c. That the Panel may, on the basis of the information now to hand, decide [the Applicant's] case on the papers or at an oral hearing.*"

27. This assertion contains a fundamental misunderstanding of the Applicant's position.
28. The response continues and appears to direct the solicitor for the Applicant (but apparently not the Secretary of State) to make representations within 14 days (that is, by the 1 June 2020) about proceeding with "*a Panel Remote Assessment (a panel review on the papers)*". The reason for this is given as the restrictions introduced during the pandemic, although it should be noted that from April 2020, the Parole Board had been conducting oral hearings remotely.
29. The direction is in bold type but with great respect could be a good deal clearer. What is written is "***The Panel Chair therefore invites views on any further representations from [the solicitor] prior to conducting a Panel Remote Assessment of this case. Any such representations must be submitted by noon on Monday, 1st June 2020.***"
30. The direction does not make it very clear whether the representations were representations to be considered at the hearing, or representations as to whether the hearing should be oral or on paper. Subsequent directions make the position even less certain.
31. The next direction in the case is a Panel Chair Direction dated the 22 May 2020. The rubric in bold type at the head of the direction states "***This case will be concluded on the papers.***"
32. However, in the body of the directions it is stated "*These PCDs [Panel Chair Directions] confirm that [the Applicant's] case will now be considered at a Panel Remote Assessment on 19th June 2020. Accordingly, the oral hearing listed on 21st July 2020 is adjourned pending the outcome of the Panel Remote Assessment*".
33. It is difficult to see, if the case was to be concluded on the papers on the 19 June, why it would be necessary to adjourn the oral hearing "*pending the outcome of the Panel Remote Assessment*".
34. The direction is ambiguous and admits of a number of interpretations. One perfectly reasonable interpretation is the panel intended to review the case and decide whether to proceed on the papers or have an oral hearing and then announce that decision so that the parties could make representations before the case was finally listed.
35. Certainly, the only situation where it would be necessary to adjourn the oral hearing would be if the panel, having considered the papers, felt an oral hearing was still required.
36. The direction is insufficiently precise and cannot operate to remove the legitimate and reasonable expectation that an oral hearing would take place.
37. The panel directions dated the 26 May 2020 deal with a number of irrelevant matters raised by the Applicant's solicitor. However they do refer to an email dated the 26 May 2020 from the solicitor saying "*Further to the Panel's recent directions, please note that my intentions remain as stated in the SHRF of 15th May 2020, namely to*

make an application to the Parole Board and, prior to that, to challenge the prison's failures to refer [the Applicant] for a compassionate temporary release assessment."

38. It seems that the solicitor for the Applicant was still expecting an oral hearing during which he would be able to make representations.
39. Perhaps more importantly, the directions, which were also headed "***This case will be concluded on the papers***" and which had to be read in conjunction with the directions made on the 17 May 2020 and the directions dated the 22 May 2020, stated "*The previous Directions have made clear that [the Applicant's] case will be considered at a Panel Remote Assessment on 19 June 2020*".
40. The only sensible construction to be placed on all three sets of directions is the decision to hold a paper hearing may have been made as early as the 17 May 2020 but certainly no later than the 26 May 2020.
41. The fact the decision to proceed by way of a paper hearing was made before the 1 June 2020 leads inexorably to the conclusion that the direction of the 17 May 2020 was an invitation to make written representations to be considered at the Panel Remote Assessment and not to make representations as to whether an oral hearing was still necessary.
42. The directions do not mention Rule 21. In particular, they do not indicate whether the panel ever identified the further evidence referred to in Rule 21 (1) or asked the parties to make representations on the contents of that further evidence or (specifically) whether they agreed to the case being decided by the panel on the paper – Rule 21(3).
43. The procedure set out in Ruling 21 is clear. 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. Only at the end of that period can the panel chair direct that the matter will be considered on the papers- see the observations of Sir John Saunders in **Hart [2019] PBRA 41**.
44. Representations must precede the decision by the panel chair; it is not good enough for the panel chair to make the decision and then invite representations about that decision.
45. A failure to comply with the Rules is irrational – see **Hart**.
46. On any viewing the decision was made prematurely.
47. On about the 16 June 2020, the Secretary of State indicated that he had no objection to the case being heard on the 19 June on the papers although he pointed out why he thought to do so would be premature.
48. The provisional decision letter dated the 22 June 2020 is headed "***Oral Hearing Decision Letter – Finalised by Way of Remote Panel Assessment***" which is a hybrid type of hearing not envisaged by the Parole Board Rules 2019.

49. The text of the letter makes it clear that the hearing on the 19 June was a paper exercise and the Applicant played no active part in it.
50. Unhappily, the letter reveals a rather confused state of affairs.
51. On page 3, it is stated "*on 17 May 2020, the panel chair invited further representations from your legal representative (to be received by 15 June 2020) prior to completing the Panel Remote Assessment on 19 June 2020 but received no such representations*". However, on the following page, it is stated "*the panel chair confirmed in PCD's set on that date that any further representations should be received by 15 June 2020 prior to the Panel Remote Assessment on 19 June 2020. The panel received an email from [the solicitor] on 18 June 2020...*" The email appears to have contained some representations.
52. That email and the document referred to in the Applicant's representations, namely the SHRF dated the 11 June 2020 are not in the dossier and ought to be.
53. Again, on page 3 it is said "*[the solicitor] described the delays in your Parole Hearing as 'outrageously long' and indicated that the Panel has sufficient information before it to assess your case on the papers*". On page 4, this paragraph appears "*The Secretary of State had confirmed no objections to your case being heard on the papers but drew attention to the outstanding police and CPS reports. The Panel noted your legal representative's view that your case should proceed without awaiting these reports which would have been provided after your criminal trial.*"
54. Those two passages appear to be the only reference to the Applicant's position on whether his case should be concluded on the papers. Given the passages I have cited in paragraphs 19, 23, 24 and 31, those passages could not be relied upon as indicating that the Applicant conceded that his case should now proceed without an oral hearing.
55. The fact that they are the only two passages set out in the provisional decision letter makes me deeply anxious that the panel proceeded on what would have been a completely erroneous basis that both the Secretary of State and the Applicant were consenting to their concluding the case in this way. My anxiety is not lessened by the fact there is no reference in the decision letter to the solicitor's position that he would accept a paper decision only if it was for release and is increased by the misunderstanding referred to in paragraph 27.
56. On page 3, it is stated "*The Panel Chair therefore completed a neutral assessment of your case and determined that a Panel Remote Assessment of your case could be completed. In making this decision the Panel Chair was cognisant of the principles set out in the case of **Osborne, Booth & Reilly [2013] UKSC 61** concerning oral hearings*".
57. However, the letter does not cite any passage from the case nor does it say how its principles were applied to the instant case and there is nothing to show that an intellectual assessment had been carried out as opposed to a formulaic mention of an important decision. In my opinion, **Osborne** is a very strong support for conducting an oral hearing in circumstances such as these.

58. The pressures on the panel overseeing a case where the delay has been inordinate (as it has been in the present case) are not to be underestimated. There is a great deal of material to be husbanded and the overriding concern must be to bring an end to the delay. I am very sympathetic to the panel's predicament.
59. However, the recent progress of the case has been both confusing and confused. I find (i) there was a failure to comply with Rule 21; (ii) that the principal in **Osborne** has not been applied satisfactorily; (iii) I cannot eliminate the very real possibility that this panel proceeded to a paper hearing on the basis that all the parties were consenting; if I am wrong about that, the provisional decision letter fails to make the position sufficiently clear, and (iv) the Applicant's legitimate and reasonable expectation of an oral hearing was never addressed by the panel.
60. In addition, documents either referred to in the written representations or in the provisional decision letter itself do not appear in the dossier.

Decision

61. I find there has been a procedural irregularity. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by way of an oral hearing.

**James Orrell
03 August 2020**