

[2022] PBRA 147

## Application for Reconsideration by Wood

### Application

1. This is an Application by Wood (the Applicant) for reconsideration of a decision of a Panel of the Parole Board dated 25 July 2022 not to direct his 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, (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 Application for Reconsideration with representations; the MCA Paper Decision dated 25 July 2022; the Duty Member Decision; the Case Dossier of 181 pages; and the email sent on behalf of the Secretary of State confirming that no representations were made on his behalf.

### Background

4. On 29 November 2013, the Applicant received an 11-year extended sentence, comprising a custodial term of 9 years and an extended licence period of 2 years, for manslaughter. The sentence expiry date is 17 March 2024. The victim was a man unknown to him. On the evening of 10 March 2013 both of them had been at the same nightclub. The victim and his partner left after raising objections with security staff about an accusation of illicit drug use. The victim then returned alone and a verbal altercation took place between him and door staff with whom the Applicant and his brother were standing. The victim went off but the Applicant and his brother chased after him and the Applicant subjected him to a sustained and brutal attack with repeated punches to the head and kicks to the head and body after he had fallen to the ground. The victim died as a result of his injuries.
5. The Applicant pleaded not guilty to murder claiming that he had acted in self-defence and, following a trial, he was convicted by a jury of manslaughter. The effect of that verdict is that the jury will have found that he had intended neither to kill nor to inflict grievous bodily harm.
6. The Applicant was born on 4 September 1989 and was 24 at the time of the index offence. He had previous convictions dating from 2004, when he was a juvenile, for criminal damage, failing to surrender to custody, handling stolen goods, battery, assault occasioning actual bodily harm, assaulting a constable, motor vehicle interference, racially aggravated assault, and wounding with intent.



7. On 28 March 2021, the Applicant was released on licence under the provisions of Chapter 6 of the Criminal Justice Act. The Secretary of State revoked the licence and recalled him to prison on 6 May 2022 for breaching the condition to be of good behaviour and not to do anything which could undermine the purpose of the licence period.
8. There were no issues concerning the Applicant's attendance for supervision or engagement with his supervising officer whilst on licence. He had secured employment as a welder and had settled accommodation.
9. The recall decision was triggered by an incident on 4 May 2022 at a hospital to which the Applicant's ex-partner had been admitted after going into labour. It was reported that he went onto the maternity ward where he shouted, swore and was abusive towards the ex-partner. He went on to verbally abuse members of staff and was asked to leave. The Applicant is said to have punched and/or kicked the exit door causing damage to the door itself and a crack in the wall behind it.
10. Probation were informed and initially considered an Approved Premises placement and the imposition of additional licence conditions. However, safeguarding concerns were raised at a Social Services Strategy Meeting as a result of the reported level of violence and abuse and perceived risks to hospital staff on home visits to the ex-partner who resided in the property next door to the home of the Applicant's father. Probation concluded that the planned alternatives to recall would not be sufficient to manage the risk which the Applicant poses to his ex-partner and therefore put the recall process in place.
11. In the event, after due investigation, the Applicant was not charged with any criminal offence arising out of the 4 May 2022 incident. Confirmation of that fact was included in the supplemental written representations from the Applicant's solicitors dated 17 August 2022. When interviewed by the police under caution, he had accepted responsibility for damaging the hospital door, albeit not deliberately, and offered to pay for it.
12. The Applicant is reported in the past to have admitted assaulting a female prison officer during a previous sentence and has also assaulted two female police officers in the past when resisting arrest. The conviction for racially aggravated assault in 2007 involved an attack on a black male accompanied by monkey chants in the presence of that victim's young daughter. The Applicant has, in the past, planned a revenge attack by ambushing his then target using weapons including a knife.

### **Request for Reconsideration**

13. The Application for Reconsideration is dated 16 September 2022.
14. The grounds for seeking a reconsideration are as follows:
  - (a) Irrationality. The Applicant submits that, having considered the legal representations and a significant update, it was irrational for the Duty Member to have concluded that an oral hearing was not required in the interests of fairness. The Duty Member should also have sought an addendum report from the COM.



- (b) Procedural unfairness. The Duty Member's decision not to grant an oral hearing was based on a negative recommendation from the COM. It is submitted that the Duty Member failed to take into account the Applicant's written representations which stated that the COM had changed her view and a further report should therefore have been directed.
- (c) It is further submitted that both the original Panel and the Duty Member failed to consider the principles set out in the case of Osborne, Booth and Reilly concerning the circumstances when an oral hearing is required in the interests of fairness.

## Current parole review

15. The Applicant's case was referred to the Parole Board by the Secretary of State in order to decide whether to direct his release. It was not asked to comment on or make any recommendation about the prison in which he might be detained, any specific treatment needs or offending behaviour work required or the date of the next review.
16. On 25 July 2022, an MCA single member Panel (the Panel) considered a dossier containing 159 pages, ending with a note from Her Majesty's Prison and Probation Service (HMPPS) dated 17 June 2022 stating that the Crown Prosecution Service Documents for this case are not available. This was the first post-recall review. The latest report from the COM was dated 25 May 2022 and was a Post Recall Risk Management Report in Part B Form. The COM's assessment was that the Applicant was not at that time suitable for re-release. There was no Part C Report.
17. The Panel found that, on all the evidence available to them, the recall had been appropriate. It concluded that the Applicant had failed to evidence his ability or willingness to comply with conditions that had been put in place to manage his risks and that these could not be safely managed in the community. The panel expressly noted that the supervising officer (the COM) was not recommending release and stated that the panel placed a great deal of weight on their written evidence. The panel was satisfied that it was necessary for the protection of the public that the Applicant remain in custody and made no direction for release.
18. Pursuant to Rule 20 of the Parole Board Rules 2019 (as amended) the Applicant, by his solicitors, applied in writing for a panel to determine the case at an oral hearing. That application was dated 9 August 2022. It referred to the COM's acknowledgement that the Applicant had taken the initiative in apologising to her for an outburst during an interview by video-link. It also stated that the COM was now supporting release whereas initially she had expressed a need to undertake in custody the further work needed to address his offending behaviour.
19. Further written representations were submitted dated 17 August 2022. The Applicant's solicitors stated they had received written confirmation from Essex Police that no further action was to be taken in respect of the 4 May 2022 incident at the hospital which had prompted the recall.
20. On 30 August 2022 a Parole Board Duty Member considered the Oral Hearing Request. The case dossier then ran to 178 numbered pages and included the MCA Decision dated 25 July 2022, the submissions by the Applicant's solicitors dated 9

August 2022 and their further submissions dated 17 August 2022. The Duty Member noted that the request had been made within the prescribed time limit. It was further noted correctly that no legal submissions had been made prior to consideration of the case by the Panel on 25 July 2022.

21. The Duty Member referred to the additional information provided in the 17 August 2022 submissions about the closure of the police investigation but concluded that this did not fundamentally change the position outlined in the 25 July 2022 decision. The Duty Member concluded that the submissions made by the solicitors "*did not bring forth any new information that was not available to the 25 July 2022 panel*". In contradiction to that statement, the Duty Member's determination as expressed was "*that there was information in the submissions that make a material difference to the paper decision made on 25 July 2022*". The Duty Member went on to conclude as follows "*The Duty Member therefore refuses the request for an oral hearing*".

### **The Relevant Law**

22. The 25 July 2022 panel correctly sets out in its decision letter the test for release.
23. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. This test is automatically set out within the Parole Board's template for oral hearing decisions.

#### *Parole Board Rules 2019 (as amended)*

24. 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)).
25. 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).
26. Rule 19 (1) provides that where a panel has been appointed under Rule 5(1) to consider the release of a prisoner, as in this case, the panel must decide on the papers either that (a) the prisoner is suitable for release (b) the prisoner is unsuitable for release or (c) the case should be directed to an oral hearing.
27. Rule 20 (1) provides that where a panel appointed under Rule 5 (1) has made a decision that the prisoner is unsuitable for release, the prisoner may apply in writing for a panel at an oral hearing to determine the case. Such an application must under Rule 20 (5) be dealt with by a duty member.
28. Rule 20 (6) provides that if the decision taken by the duty member is that the case should not be determined at an oral hearing, a provisional decision under Rule 19 (1)



(b) remains provisional if it is eligible for reconsideration under Rule 28. Under Rule 28 (1) and (2) where a decision in an extended sentence case has been made under Rule 19 (1) (a), a party may apply to the Board for the case to be reconsidered on the grounds that the decision contains an error of law, is irrational or is procedurally unfair.

29. If made and served no later than 21 days after the decision, an application for reconsideration must, pursuant to Rule 28(5), be considered on the papers by an assessment panel. The decision not to direct release having remained provisional, it follows that the application for reconsideration dated 16 September 2022 was submitted within the 21 days prescribed.
30. Under 28(6) the assessment panel must either direct that the provisional assessment should be reconsidered or dismiss the application. If it directs reconsideration, the assessment panel must direct, pursuant to 28(9), that the case should be reconsidered on the papers or at an oral hearing by the previous panel or a new panel appointed under Rule 5(2).
31. The matter has been referred to me as an assessment panel.

### *Illegality*

32. An administrative decision is unlawful under the broad heading of illegality if the panel:
  - (a) misinterprets a legal instrument relevant to the function being performed;
  - (b) has no legal authority to make the decision;
  - (c) fails to fulfil a legal duty;
  - (d) exercises discretionary power for an extraneous purpose;
  - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
  - (f) improperly delegates decision-making power.
33. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.
34. No issues of illegality arise in this case.

### *Irrationality*

35. 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."*

36. 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.
37. 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*

38. 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.
39. 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.
40. The overriding objective is to ensure that the Applicant's case was dealt with justly.

#### *Other*

41. In the cases of **Osborn, Booth and Reilly 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.
42. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the





panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

### **The reply on behalf of the Secretary of State**

43. By email dated 30 September 2022 from the Public Protection Casework Section of HMPPS, it was confirmed that the Secretary of State offers no representations in respect of the Application.

### **Discussion**

44. The Decision of the Duty Member is not relevant to the Application for Reconsideration except to the extent that its process delayed the time during which the Panel's decision remained provisional. The Application was therefore made within the period prescribed by the Rules.
45. The Panel did not specifically refer to the cases of Osborne, Booth and Reilly v The Parole Board nor, crucially, does the decision it made take into account the important principles those cases laid down. I accept the Applicant's submission that an oral hearing was required: to allow for a fair and proper assessment of risk and how it could be managed; to allow the Applicant's case to be fully enunciated; for him to answer personally the allegations made against him; and for evidence to be scrutinised by cross-examination.
46. An oral hearing would have enabled evidence of current risk to be fully tested in a manner not possible by consideration on the papers alone.

### **Decision**

47. Accordingly I do consider, applying the tests as defined in case law, that to have proceeded to a make decision on the papers without an oral hearing was both irrational and procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be heard by a fresh panel by way of an oral hearing.

**HH Judge Graham White**  
**22 October 2022**

