[2022] PBRA 157

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Application for Reconsideration by Manton

Application

1. This is an application by Manton ("the Applicant") for reconsideration of a decision of the Parole Board dated 28 September 2022. The decision was a paper decision declining to release him.

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)) 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: (1) the dossier, now running to some 183 pages including the decision letter; (2) representations in support of the application for reconsideration provided by the Applicant's representative, dated 30 September 2022; and (3) some information on the procedure followed, provided to me at my request by the Parole Board, and summarised below.

Background

4. On 5 May 2016 the Applicant was sentenced to an extended sentence for robbery and attempted robbery comprising a custodial term of 5 years and an extended licence period of 3 years. He was released on 20 June 2020, initially to residential drug rehabilitation. He served a further two-week sentence imposed on 15 November 2021 for attempted theft. His licence was revoked on 26 November 2021.

5. The Applicant has a long history of offending associated with addiction to class A drugs and his need to finance that habit. That is why he was released to residential drug rehabilitation. It appears that following this rehabilitation he relapsed. He was not recalled by reason of the two-week sentence; but rather because he failed to attend appointments and was out of touch following his release from that sentence.

Request for Reconsideration

6. The application for reconsideration is dated 30 September 2022 and runs to some 43 paragraphs setting out a good deal of background. The background is helpful; but it is also always helpful if the application sets out precise numbered grounds by virtue of which it is argued that the case should be reconsidered. This application does not do so; I believe, however, that I can summarise the grounds as follows.

(a) The case should not have been decided on the papers; an oral hearing had been directed, the date for that hearing still lay in the future, and it was procedurally unfair and inappropriate to decide the case on the papers.

(b) Applying the decision of the Supreme Court in **Osborn v Parole Board [2013] UKSC 61**, common law principles of fairness required an oral hearing and it was irrational to decide otherwise; in any event, article 5(4) of the European Convention on Human Rights required an oral hearing.

Current parole review

7. The Applicant's case was referred to the Parole Board following his recall to prison. It was considered by a single member at the MCA stage. On 25 March 2022 the single member directed that the case should go to an oral hearing pursuant to rule 19(1)(c) of the Parole Board Rules. In due course the hearing was listed for 11 October 2022 and the panel chair was allocated.

8. The Applicant, however, expressed himself unwilling to engage with the Parole Board. In a letter sent in April 2022 he said that he "*would not be attending any Parole Board hearings*" and that he had "*no interest in getting released on any form of licence*". On 13 July 2022 the Applicant signed a form stating that he did not wish to attend an oral hearing and was content for the case to be dealt with on the papers.

9. On 11 August 2022 the Applicant's legal representative wrote to the Board. The letter acknowledged that the Applicant had expressed reluctance to proceed with the hearing, but pointed out that it was not unusual for clients to change their mind closer to the hearing after receiving legal advice. The letter concluded with a request for the Parole Board to leave the door open to legal representations closer to the hearing date.

10. It appears that the panel chair did indeed wait for more than a month before taking any action. Eventually, however, the panel chair decided to conclude the case on the papers. No further notification was given to the Applicant or his legal representatives before doing so. The panel gave the following reasons.

    "*The panel awaited any further representations. Nothing further was received from [the Applicant's] legal representative. The panel noted [the Applicant's] clear intention from his earlier representations and it considered that it could and should conclude the present review on the papers, pursuant to the Parole Board Rules 2019 (as amended). The panel concluded the review on the papers on 23 September 2022.*"

11. The panel concluded that the concerns about the Applicant's substance misuse meant that there was a real risk that he would commit a further serious offence and that any risk management plan would be ineffective. It was satisfied that it remained necessary for the protection of the public that he be confined; and accordingly made no direction for his release.

12. On receipt of the decision the Applicant's representative immediately wrote to the Board seeking reconsideration. According to the representations the Applicant had been encouraged by his Prison Offender Manager to engage with the parole process and had contacted his representative shortly before the decision was issued.

The relevant law

13. In the closing paragraph of its decision letter the panel correctly applied the test for release in a case where, as here, the prisoner is recalled in the extended licence period of an extended sentence: the Parole Board will direct release unless it is positively satisfied that it is necessary for the protection of the public that the prisoner be confined. See **Sim v Parole Board [2004] QB 1288**.

14. The Applicant was serving an extended determinate sentence. The panel's decision as to release is eligible for the reconsideration procedure: see rule 28 (2)(b) of the Parole Board Rules 2019. As I will explain below, once an oral hearing has been directed the power to decide on the papers to decline release is found in rule 21(7). A decision under rule 21(7) is amenable to reconsideration: see rule 28(1).

15. The Parole Board has a duty to take decisions which are lawful. A panel must therefore (1) take decisions which are within its legal powers, (2) apply the law correctly when taking its decisions, (3) fulfil legal duties which are placed upon it in taking its decisions, (4) exercise its discretionary powers for proper purposes, (5) take into account considerations which the law requires it to take into account, and (6) leave out of account considerations which are irrelevant in law.

16. The concept of irrationality is derived from public law. The test is whether the 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".* See **CCSU v Minister for the Civil Service [1985] AC 374**, applied to Parole Board decisions by **R (DSD and others) v the Parole Board** [**2018] EWCH 694 (Admin)**. This is the standard I have applied when considering this application for reconsideration.

17. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair or the panel lacked impartiality. The concept applies only if a procedural error results in unfairness. If an error did not result in unfairness (for example, if it was corrected or not of any real importance) then the concept does not apply.

18. In **Osborn 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.

The reply on behalf of the Secretary of State

19. The Secretary of State has informed the Parole Board that it is not intended to make any representations in respect of this application.

Discussion

20. It is important to keep in mind that pursuant to rule 19(1)(c) of the Parole Board Rules an oral hearing of the Applicant's case had been directed. Once an oral hearing has been directed, there is a set procedure within the Parole Board Rules if the case is to be decided on the papers.

21. The procedure will be found within rule 21. It applies if the panel chair or a duty member considers that an oral hearing may no longer be necessary for one or more of the reasons set out in rule 21(1). The first stage is to notify the parties that the Board is considering whether to decide the case on the papers and to set out the reasons: see rule 21(2). The second stage is to allow 14 days for the parties to make representations: see rule 21(3). The third stage is for the panel chair or duty member to consider the representations and decide whether the case should be considered on the papers or whether it should continue to the oral hearing: see rule 21(4). Only after those three stages have been completed should the case be decided on the papers either by the existing panel chair or by another panel: see rule 21(5) and (7).

22. The rule 21 procedure may, of course, be applied if a prisoner has expressed the view that he does not wish to take part in an oral hearing. Such an expression may well lead a panel chair or duty member to conclude that it is no longer necessary for an oral hearing to take place. But rule 21 provides necessary safeguards: a prisoner and his representative will know that this decision is under consideration and the deadline by which representations must be made.

23. In this case the panel chair decided the case on the papers after an oral hearing had been directed. The panel chair did not follow the procedure set out in rule 21. It was a procedural irregularity to decide the case on the papers without first going through the stages which I have identified above. In my view this procedural error did result in unfairness. It meant that the Applicant and his representative were unaware that the decision was about to be taken and did not have an opportunity to make representations about it. Especially where, as here, his solicitors had asked for an opportunity to make representations closer to the time of the oral hearing, the procedural safeguards in rule 21 should not have been omitted. It was premature to decide the case on the papers. I therefore accept that there is merit in the first ground which I have identified above. I do not think any useful purpose would be served by addressing the second ground separately.

Decision

24.For these reasons I uphold the application for reconsideration.

David Richardson
7 November 2022