

[2023] PBRA 108**Application for Reconsideration by Swallow****Application**

1. This is an application by Swallow (the Applicant) for reconsideration of a decision made by a panel of the Parole Board dated 17 April 2023 to not direct his release.
2. The case was determined on the papers by a Member Case Assessment (MCA) member on that day.
3. I have considered this application on the papers. These are the application for reconsideration, the response from the Secretary of State (the Respondent) and the dossier.

Background

4. On 4 April 2014, the Applicant received an extended determinate sentence comprised 6 years imprisonment and 8 years extended licence period for attempted rape and sexual assault. He was released on 3 April 2020 and recalled in October 2020.
5. The Applicant was 20 years old when sentenced and 29 when his case was reviewed.
6. Since then, he has remained in custody. Prior to the decision at hand, his case had last been considered in January 2022 where it was concluded on the papers with no direction for release. This was his third review since recall.

Request for Reconsideration

7. The application for reconsideration is dated 10 May 2023 and has been drafted by the Applicant personally.
8. These are set out in a narrative format and so are hard to break down into specific instances.
9. They can be summarised in the following way:
 - a) The Parole Board dossier was not up to date.
 - b) A Programme Needs Assessment had been prepared but was not submitted.
 - c) He is currently engaging in (or about to engage in) trauma therapy and is making progress.

10. It is said that the above amounted to procedural impropriety. The essence of his case however is that he would wish to have an oral hearing “so I can show how far I have progressed in my sentence”.

Current Parole Review

11. The Applicant’s case was referred to the Parole Board by the Secretary of State to consider whether it would be appropriate to direct his re-release following the revocation of his licence in 2020.

12. His case was considered by an MCA member on 17 April 2023 where no direction for release was made.

The Relevant Law

Parole Board Rules 2019 (as amended)

13. 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)).

14. 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)).

15. Due to the extended nature of the Applicant’s determinate sentence, it is one amenable to the reconsideration mechanism.

Procedural unfairness

16. 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.

17. 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.

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

The Reply from the Respondent

19. In accordance with the rules, the Respondent was asked if he had any representations to make within 7 days.

20. He has submitted a two-page document (dated 24 May 2023) that responds to the factual allegations made by the Applicant. This does not contain any submissions on the merits.

Discussion

Eligibility

21. Although the decision was a provisional one, it is one that is capable of reconsideration (see r19(1)(b) taken with r28(1)).

22. However, it is unclear to me why the Applicant has applied for reconsideration of the decision at this stage. The obvious application would have been to have applied under rule 20(1) for an oral hearing to be held.

23. That application would be decided by a duty member. That duty member would have different powers (they could only grant or refuse the application), but that makes no real distinction in practice, particularly in a case such as this where it seems that the Applicant's application is for an oral hearing.

24. There would be distinct advantages for an application. Rather than showing an error of law, there is a much broader discretion to take account all the factors. And, even if the application was refused, he would still be able to apply for reconsideration of the original decision.

25. For those reasons, this application may well be misguided and unwise, but it is one which I have jurisdiction to consider.

Merits of the application

26. I then consider the merits of the application and remind myself of the limited jurisdiction that I have.

27. A difficulty that the Applicant has is that his complaints appear to be around material that was not before the Panel (either because it had not been provided or, in the case of the therapy report, it had not yet been written as the therapy had not been completed). The cases of **Boyle [2020] PBRA 127** and **Nightingale [2019] PBRA 40** confirms that the reconsideration mechanism is not a free-standing appeal, but a review of the decision.

28. Specifically, there is no provision in the Rules for there to be fresh evidence submitted. As was said in **Nightingale**:

“In this regard it must be pointed out that the Reconsideration Mechanism is not an opportunity for persons disappointed by a decision of the Parole Board to put fresh evidence before it when seeking to have a decision reviewed. As part of any judicial proceedings, it is incumbent on all parties to ensure that all relevant information is before the tribunal before allowing the case to proceed. Accordingly, if a report is pending, or if relevant information is available to the parties which would assist the fact-finding and/or decision-making tribunal at first instance or, as in this case, on review, it is incumbent on the parties to ensure that the relevant information is lodged. If that is not possible because, as in this case, the final report or assessment is not available, it is incumbent on the party concerned to seek to have the matter adjourned. No such application was made in this case by the Applicant’s legal representatives.”

29. It seems to me that this is a full answer to the Applicant’s complaint. He would have had access to the dossier before it went to the MCA member and could have submitted material on his behalf, or request that it be submitted. In addition, it would have been open to him to have requested that the case be adjourned to allow for more time for this to be done, or for him to complete the trauma work. It is not suggested that the dossier was not compliant with the Parole Board Rules.
30. It may well be that the matters that the Applicant puts forward now would, had they been raised before the MCA member have caused that member to adjourn the case or direct an oral hearing. Further, it may be that had an application for an oral hearing been made, this would have persuaded the duty member to grant one.
31. However, that is not the test that I have to apply. In this case, it seems to me that there is no error of law in the decision made.
32. I have considered whether I could reconstitute myself as a Duty Member and treat this as an application for an oral hearing. However, even though I am accredited as a Duty Member, I have not been appointed at such to deal with this application. Further, this is not the application that the Applicant has made, and it does not seem appropriate to me to act in such a way. It is open to the Applicant to make an application out of time for an oral hearing in the usual way. If he does, then that application can be decided on the merits.

Decision

33. For the reasons I have given, whilst I do have jurisdiction to determine the application, I cannot see any error of law or procedure in the decision made and therefore the application for Reconsideration is refused.

Daniel Bunting
12 June 2023