

[2023] PBRA 119

## Application for Reconsideration by Rattigan

### Application

1. This is an application by Rattigan (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated the 17 May 2023 not to release the Applicant following an oral hearing on 17 October 2022.
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, the response from the Secretary of State and the dossier. In order to give further context, I have also requested and seen the published set aside decision dated 9 March 2023 (**Rattigan, Application to Set Aside [2023] PBSA 13**).

### Background

4. On the 8 December 1999 the Applicant received a life sentence for murder. The offence saw the Applicant and another man break into the home of an elderly woman, in sheltered accommodation, in the early hours intending to steal. The victim disturbed them and was subjected to fatal injuries as a result. He was aged 22 at the time of the index offence and is now 46.
5. His minimum tariff of 18 years, less time served, expired on 25 December 2016.
6. He was released by a panel of the Parole Board on 19 August 2021 and was recalled on 14 September 2021.

### Request for Reconsideration

7. The application for reconsideration is dated 31 May 2023. It was submitted by legal representatives on behalf of the Applicant but is handwritten on the published form CPD2 and appears to have been prepared by the Applicant himself.
8. The grounds for seeking a reconsideration are said to be on the basis of irrationality. The representations state that risk can be managed in the community and submit

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that the Applicant was being punished for the failings of others and that he would have gone to the PIPE Approved Premises as directed. It is pointed out that "everyone agrees I can be managed out in the community".

9. Although the application is said to be made on the basis of irrationality, I have also considered whether there is a valid claim on the basis of procedural unfairness.

### Current parole review

10. The case was referred to the Parole Board by the Secretary of State for Justice on 21 September 2021. The referral was considered by a Member Case Assessment (MCA) panel on 23 November 2021 when a provisional no release decision was made on the papers. The referral was considered again by a Duty Member panel on 22 December 2021 when the case was directed to an oral hearing.
11. The oral hearing took place via video link on 17 October 2022 by a two-member panel. This was the Applicant's first review after his recall to custody on 14 September 2021. Oral evidence was heard from the Prisoner Offender Manager (POM), the Community Offender Manager (COM), and a Prison Psychologist. The Applicant was legally represented during this hearing.
12. On 21 October 2022 the Parole Board directed release. On 9 March 2023 a set aside decision was made, which set aside the release decision under Rule 28A Parole Board Rules and referred the case back to the original panel. On 17 March 2023 Panel Chair Directions were made, directing a further COM report as well as further legal/personal representations. The case was reviewed by the panel on the papers on 3 May 2023 and on 17 May 2023 the Parole Board issued its decision letter.

### The Relevant Law

13. The panel correctly sets out in its decision letter dated 17 May 2023 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.
14. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

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

15. 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).
16. 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)).

### *Irrationality*

17. 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."*

18. 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.

### *Procedural unfairness*

19. 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.
20. 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.
21. The overriding objective is to ensure that the Applicant's case was dealt with justly.

### **The reply on behalf of the Secretary of State (the Respondent)**

22. The Public Protection Casework Section (PPCS) on behalf of the Respondent has stated in an email dated 9 June 2023 that he does not wish to make representations in response to this application for reconsideration.

### **Discussion**

23. By its letter of 21 October 2022, the Parole Board directed the release of the Applicant. This decision was however set aside by the decision of 9 March 2023 (**Rattigan, Application to Set Aside [2023] PBSA 13**). Neither the Applicant nor

his legal representative made any representations that were received during the 7-day period set down by Parole Board Rule 28A(6)(c).

24. The set aside decision considered whether a further oral hearing was necessary considering the principles in **Osborn**. It considered that *"in all the circumstances the current panel would have sufficient information to decide the case on the papers and make directions accordingly. It is open to that panel to direct an oral hearing if it wishes to do so."*
25. Having been notified that the set aside application had been made, the Applicant made two sets of written representations, one dated 9 March 2023 and one which bears a solicitors office date stamp of 10 March 2023. These were provided to the Parole Board panel before it made its decision of 17 May 2023.
26. As with the application for reconsideration, both representations are handwritten (it appears by the Applicant), with no representations prepared on his behalf by his legal representative who has essentially acted as a post-box intermediary between his client and the Parole Board. This is unfortunate as it means the representations lack the focus that a lawyer would bring to them.
27. The representations dated 9 March 2023 question the 7-day time limit the Applicant had to respond to the set aside decision, observing that he had only been notified the process was under way on 7 March 2023. As is clear from the set aside decision, regrettably the set aside panel did not consider those representations as they had not received them. The panel chair however did have sight of them, and directions were given on 17 March 2023 by the chair for an updated COM report and following that, any further representations from the Applicant or his legal representative.
28. An updated COM report was provided dated 13 April 2023. The report made no recommendations as to whether the Applicant was suitable for release, nor did it consider his suitability for open conditions.
29. Despite him apparently continuing to be legally represented, no further representations were provided by or on behalf of the Applicant in response to the evidence of the COM as had been directed. What the panel did apparently then receive were the representations date stamped 10 March 2023, which it seems to have considered to be in response to the directions. Plainly they were not as they pre-dated the directions themselves. In my view the decision letter therefore wrongly records that *"Following the setting aside of its decision, the Panel sought updates from [the Applicant]/his legal representatives and from the Community Offender Manager which have now been received."*
30. On 17 May 2023 the panel of the Parole Board then made its decision on the papers not to release the Applicant. The decision letter is essentially identical to that from October 2022 with details added of *"events following release decision in October 2022"* and a partially updated conclusion. This provides:
  - 4.9. *"The Panel has seen nothing in the events since its decision in October 2022 or in [the Applicant's] representations to change its risk assessment and conclusion. It remains the Panel's view that an initial period in a PIPE AP is an essential part of the plan to manage [the Applicant's] risk for all the reasons set out above. [The Applicant]*

*continues to say that he has never agreed to go to a PIPE AP and felt that he was being bullied into it. Full engagement with the regime of a PIPE AP is essential in order to benefit from the regime and to enable staff to provide him with the necessary support he needs.*

- 4.10. *"The Panel does not consider that [the Applicant's] risk is manageable in the community without the support and controls which would be provided by a PIPE AP. Given [the Applicant's] ongoing attitude of refusal and/or non-engagement, release to a PIPE AP is not possible. The Panel was further concerned that there does not appear to have been any improvement in his relationship with [his COM] and that he appears to have shown some instability in engaging in a hunger strike and his concerns about his personal safety. Having taken all of the above into consideration, the Panel concluded that [it] remains necessary for the protection of the public that [the Applicant] remain confined and does not direct his release."*

The decision not to direct an oral hearing.

31. The leading authority on procedural unfairness in relation to Parole Board hearings is **R (Osborn and Booth) v Parole Board [2013] UKSC 61; [2014] AC 1115**. The principal issue in that case was the circumstances in which an oral hearing would be necessary.
32. In **Grinham, R (On the Application Of) v Parole Board [2020] EWHC Civ 2140 (Admin)** the following propositions were identified from **Osborn** which I consider are also pertinent to the issues in this reconsideration:
- (i) The court must determine for itself whether a fair procedure was followed. The court's function is not merely to review the reasonableness of the decision maker's judgment of what fairness required [65].
  - (ii) An oral hearing was likely to guarantee better decision making in terms of the uncovering of facts, the resolution of issues and the concerns of the decision-maker, due consideration being given to the interests at stake: [66].
  - (iii) One of the virtues of procedurally fair decision-making is that it is liable to result in better decisions by ensuring that the decision-maker receives all relevant information and that it is properly tested. The purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged: [67].
  - (iv) The first is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel: [68].
  - (v) Research has revealed the frustration, anger and despair felt by prisoners who perceive the Parole Board's procedure as unfair, and the impact of those feelings on their motivation and respect for authority: [70].
  - (vi) The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: [71].
  - (vii) The Parole Board should also bear in mind that the purpose of holding an

oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him: [82].

33. Clearly the Applicant had a legitimate interest in being able to participate in the decision, which was recognised by the direction for him to make written submissions. This was the start of a potentially fair procedure, which for reasons which are not clear, the Applicant and his legal representative did not follow.
34. I have considered whether that direction was fair in the circumstances, having regard to the judgment of Carnwarth LJ in **Osborn and Booth** in the Court of Appeal, [2010] EWCA Civ 1409, where in referring at [37] to American authority, he highlighted the fundamental limitations of written submissions:

*"...[written] submissions do not afford the flexibility of oral representations; they do not permit the recipient to mould his arguments to the issues the decision-maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for a decision..."*

35. In the submissions stamped 10 March 2023, the Applicant asked the panel for a public oral hearing. He denied the version of events set out in the set aside application (he had not at this stage seen the COM report of 13 April 2023) and set out his concerns about the risk management plan that had formed part of the October 2022 release decision.
36. The panel state in their decision letter that before concluding the case on the papers they considered it against the principles set out in Osborn "and did not find that there were any reasons for an oral hearing". It may well be that the panel did consider the principles established in that case, but in the absence of any reference to the Applicant's request for an oral hearing nor identification of the principles they thought relevant I find that the decision not to direct an oral hearing in this case was flawed by an apparent failure of the panel to consider Osborn.

#### Failure of duty to enquire.

37. It is of concern that the Applicant's voice was not heard on the set aside application, but that is not the issue before me today. In this reconsideration application it is clear that his voice was not heard in response to the COM's evidence. Decision makers should listen to those who have something relevant to say.
38. Lord Bingham in **R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350**, at [35] when looking at the common law duty of procedural fairness and the holding of an oral hearing observed:

*"Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."*

39. In addition to the absence of the Applicant's voice, the panel did not seek the updated views of all of the professionals following the events which ultimately led to the set aside decision. Both the Prison Psychologist and the POM had given their views to the panel at the oral hearing in October 2022 that he was manageable in the community and that a PIPE AP would be beneficial, but not essential. Their current views were not known when the decision of 17 May 2023 was taken.
40. Additionally, no updated views were sought from any of the professionals as to the Applicant's suitability for open conditions, which was to be considered as part of the referral.
41. A Parole Board panel is subject to the 'duty of enquiry', a duty which has been explained in various decisions of the courts and of reconsideration panels including, for example, **Samuel [2021] PBRA 100** : *"One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary), for that purpose"*.
42. In my view in making its paper decision of 17 May 2023, the panel has done so in the absence of several important pieces of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain. The panel had no updated evidence from the psychologist and POM who had supported release at the October 2022 oral hearing. The panel had no recommendation from the COM nor their view on open conditions.
43. Additionally, although the panel directed representations from the Applicant or his legal representative, sequential to the COM report, it did not receive any, and wrongly considered that it had those representations when in fact the ones it had pre-dated the direction. I consider the panel may have taken different steps if it had not misdirected itself that it had those representations.
44. It is clear that, once procedural unfairness has been established, it is enough to show that but for that procedural fairness the outcome might have been different. It is not necessary that the outcome would necessarily have been different: see **R (Clegg) v Secretary of State for Trade and Industry [2002] EWCA Civ 519**, at [30]. In **R (Gopikrishna) Office of the Independent Adjudicator for Higher Education [2015] EWHC 207** (Admin) at [209] it was held that *"it is not necessary for the claimant to show that the decision would inevitably have been different."* Quoting from the judgment of Elias J in **R v Chelsea College of Art and Design, ex p.Nash [2000] ELR 686** , where a breach of the principles of fairness was found:

*"...It has been urged on me that even if there were defects in the procedure, they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and only in such cases, where one can say that the breach could have made no difference..."*

45. I consider that the process which led to the panel making its decision of 17 May 2023, by misdirecting itself about the evidence it did have and in the absence of these important pieces of evidence is procedurally unfair and this has produced an unjust result. The effect of the absence of this evidence is reflected in the decision letter of 17 May 2023 itself, which is largely identical to that of 21 October 2022, as there is no updated evidence from those whose evidence the panel had considered in October.

## **Decision**

46. Accordingly, I have found there to have been a procedural irregularity, and I do consider that the decision of 17 May 2023 is procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**Angharad Davies**  
**29 June 2023**