

[2020] PBRA 79

## Application for Reconsideration by McFadden

### Application

1. This is an application by McFadden (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 29 May 2020. This decision was undertaken by the panel on the papers. The outcome of the decision was not to direct release and not to recommend transfer to open conditions.
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. Initially the documents were:
  - The Decision Letter (the Decision);
  - The dossier; and
  - The Application for reconsideration dated 3 June 2020.
4. I asked for further information which was provided in the following format:
  - Cover Email dated 21 May 2020 (at 9.14am) sent by the Applicant's legal representatives and received by the Parole Board Secretariat the same day;
  - An attachment in the above email of a Stakeholder Request Form dated 21 May 2020, containing legal representations; and
  - A note sent by Secretariat staff confirming that the email with the attachment had been received but had in error not been added to the dossier considered by the panel.

### Background

5. The Applicant is serving a sentence of Imprisonment for Public Protection (IPP) imposed following a conviction for sexual assault on a minor. The tariff expired in July 2014.

### Request for Reconsideration

6. The application for reconsideration is dated 3 June 2020.
7. The grounds for seeking a reconsideration are as follows:



- (a) That the decision was procedurally unfair; and
- (b) That in making the decision, the panel did not take into consideration the legal submissions made on the 21 May and referred to above.

8. A number of supporting or additional submissions are made in the application. Since the application was not made on the published reconsideration form CPD 2, which contains guidance notes to help prospective applicants ensure their reasons for challenging the decision of the panel are well-grounded and focused, it would have taken me some time to glean the relevant information for the grounds of reconsideration. However, the approach that I have taken has not rendered that necessary, and therefore the additional matters have not been addressed here.

### **Current parole review**

9. The date of the current referral is February 2019 and the case was directed for an oral hearing by a single member panel in August 2019. It was listed in January 2020, deferred for further information in December 2019 and re-listed for hearing on 26 May 2020. Before the oral hearing could take place, the COVID-19 outbreak happened and the prison service ceased all face to face parole hearings. Because there was likely to be a substantial delay before face to face parole hearings would recommence, the Parole Board issued guidance as to how members should address this new situation. The Parole Board requested all panel chairs to review any outstanding cases directed to an oral hearing to consider whether an alternative method of disposal could be adopted. The possible alternatives were a decision on the papers; a hearing held by telephone conference or by video link. It was made clear that alternative methods should only be adopted if there could be a fair hearing.
10. On 1 May 2020, the panel chair reviewed the Applicant's case as per the above new guidance and issued adjournment directions. These indicated that following a neutral case assessment, the panel chair had assessed that on the basis of the information currently available in the dossier, and pending receipt of the further reports directed, it was considered that sufficient information would be available within the dossier to enable this current review to be concluded by way of a paper review. It should be further noted that the panel chair considered that any future hearing should be held face to face, which would inevitably add to the delay of listing the hearing.
11. The panel chair directed the further reports giving a deadline of 21 May 2020, and also welcomed any further legal or personal representations by the same date.
12. On 29 May 2020, a Decision Letter (by remote assessment by the panel) indicated that the further information directed had been added to the dossier and considered; and that no further representations having been received, the panel chair considered that the case should be concluded on the papers by intensive paper review. Release was not directed, and no recommendation was made for open conditions.

13. It is known now that on 9.14am on 21 May 2020 the Applicant's legal representatives did send further representations; these were received by the Parole Board but in error they were not added to the dossier considered by the panel.

## The Relevant Law

### *Parole Board Rules 2019*

14. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).
15. Rule 21 sets out procedures that must be followed before a decision can be made on the papers after a direction for an oral hearing. Rule 21(1) provides the panel chair with a power to direct that the case be determined on the papers. That power can only be used after new evidence has been received. Provision is made under Rule 21(3) to allow the parties to make representations as to whether the case should or should not be considered on the papers before any direction to do so has been made. Rule 21(6) provides that a direction cannot be made where there is less than 3 weeks to the oral hearing.

### *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.
19. In the case of **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

20. The Secretary of State stated that he wished to make no reply to the application.

### Discussion

21. The approach taken by me to this application does not hinge on the consideration or decision of the panel or the panel chair. In my opinion, having invited representations and apparently receiving none, they correctly took the view that they could decide to conclude on the papers.

22. The problem however is that the panel chair did not have the written legal representations before them prior to deciding to conclude on the papers. Whether or not, in light of the further representations they *might* have continued to conclude on the papers is speculation. The written representations were clear that the Applicant was content for a paper conclusion if the panel was minded to recommend a transfer to open conditions, however if that were not to be the case the Applicant would prefer to wait until an oral hearing. This indicates that they had taken into consideration what could be a considerable delay till a face to face hearing could be held.

23. Furthermore, there is some additional information in the representations that the panel chair might have taken into consideration before deciding to conclude on the papers. The Decision Letter refers to the Applicant's stated reluctance (as reported in the report of a professional witness) to be transferred to open conditions. This may or may not have played a part in the panel's paper decision. The representations however indicate that on further reflection, the Applicant was prepared to go to open conditions in order to be able to progress, if that was the decision of the Parole Board.

24. It seems to me that the principles of fairness as outlined in the case of **Osborn et al** are highly relevant in any decision that I make, as is the procedure outlined in Rule 21(3). There was a procedure set down to be followed, it was not followed correctly through no fault of the Applicant. It was an administrative error, and this should be rectified.

### Decision

25. Accordingly, I find there to have been a procedural irregularity that has rendered the process that led to the decision to be 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 the original panel following the correct process.



## Directions

26. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.
27. I have no doubt that the original panel is fully capable of approaching the matter conscientiously and fairly. There is no comment or criticism made on its consideration and their decision. I cannot see therefore why there would be even a suspicion that there might be any further prejudice or unfairness to the Applicant should the same panel consider the case afresh from the point of having to make a decision whether to conclude on the papers or grant an oral hearing. In my view this provides the Applicant with an appropriate remedy, in that it puts the Applicant in the same position as they would have been if the representations had been received and considered by the panel before it made its decision to conclude on the papers.
28. It should of course be recognised that having considered the representations, the panel might still make the decision to conclude on the papers, taking into consideration the information provided in the written representations. There is no guarantee that an oral hearing will be directed.
29. The following further directions are now made:
  - (a) The original panel chair must be sent the dossier and written representations as soon as is practicable, and the other panel members should be copied in to alert them to the issue;
  - (b) The original decision should be removed from the dossier; and
  - (c) The panel should be provided with this decision as it should not affect its reasoning in any way.

**Chitra Karve**  
**24 June 2020**

