the Parole Board
working with others to protect the public

[2021] PBRA 188

Application for Reconsideration by Greene

Application

1. This is an application by Greene (the Applicant) for reconsideration of a decision of a Parole Board panel on the papers dated 28 October 2021 not to direct his release on licence.

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. These are the 180-page dossier provided by the Secretary of State including the written reasons for the decision, the decision of the panel who completed the earlier review of this case dated 9 February 2021, the application for reconsideration and an email on behalf of the Secretary of State.

Background and current parole review

4. The Applicant is now aged 46. On 2 July 2015, when he was aged 40, he received an extended sentence comprising 7 years custodial element and 3 years extended licence, following conviction for three offences of Robbery. The offences involved three different victims including an 82-year-old man and an 86-year-old woman. At the same time, he received a determinate concurrent sentence of 3 years' imprisonment for burglary.

5. Unless found suitable for release by the Parole Board, the Applicant would automatically be released at his conditional release date in August 2022. He became eligible for release in April 2020. He had a review at that point with an oral hearing held in January 2021 (after an earlier deferral and then adjournment) and a decision issued in February 2021. That panel did not direct release.

6. Therefore, this was his second review. The referral from the Secretary of State is dated 13 May 2021. A single member reviewed the case as part of the member case assessment (MCA) process and concluded the matter on the papers. At that stage the Applicant had not submitted any personal or legal representations.

7. In order to make the decision, the MCA panel had a dossier prepared by the Secretary of State which included a report from the Applicant's community offender manager (COM) and a psychological risk assessment prepared by a prison

psychologist in 2020. At the previous review, the prisoner had commissioned his own psychological risk assessment but that was not in the dossier.

Request for Reconsideration

8. The application for reconsideration, dated 3 December 2021, was submitted by the Applicant's legal representative. It runs to over six pages, submitting that the decision was both irrational and procedurally unfair. It is not necessary to reproduce the application for reconsideration in full, but all points have been carefully considered.

9. From the application, I have extracted the following grounds;

   a. It was both irrational and procedurally unfair for the panel not to apply the principles laid down in the case of **Osborn and others v Parole Board [2013] UKSC 61** and grant a hearing, particularly given the matters the Applicant would have been able to raise and the short risk period, giving him a reasonable chance of being released.
   b. The decision was irrational as it gave little or no weight to key aspects namely the 1:1 anger management work completed by the Applicant and the significant period he has remained substance free.

The Relevant Law

10. The panel correctly sets out in its decision letter the test for release.

Parole Board Rules 2019

11. 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)).

12. Under Rule 20 of the Parole Board Rules 2019 an application for an oral hearing can be made within 28 days of the written decision at MCA stage. However, a decision not to release which is eligible for reconsideration under Rule 28 remains provisional for a further 21 days. Under Rule 20 there is no limitation on the discretion of the Parole Board member considering whether to direct an oral hearing despite the earlier decision. Such a discretion must, as a matter of general principle, be exercised judicially, i.e., in the interests of justice. The limitations on the discretion of the Parole Board member considering an application under Rule 28 are set out above at paragraph 2.

Irrationality

13. 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."

14. 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.

15. 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

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 and others 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 confirmed by way of email dated 15 December 2021 from PPCS on his behalf that he did not wish to make any representations in response to the application.

Discussion

Ground 1

21. The reality of this case is that there should have been an application for a direction for an oral hearing pursuant to Rule 20 of the Parole Board Rules 2019. No such application was made. However, this application for reconsideration was received in time to be considered under Rule 28. Reconsideration can only be granted if the decision under discussion was irrational or procedurally unfair. If the decision properly falls within one of those categories then reconsideration can be directed, notwithstanding that the more direct route to rectification under Rule 20 has not been taken.

22. The Applicant submits that the panel member simply used a "*standard paragraph*" referencing the case of **Osborn** but failing to engage with the principles established in the case. **Osborn** sets out helpful guidance as well as illustrative examples of situations where fairness to the prisoner does require an oral hearing. The Applicant quotes some of the key points in his application.

23. **Osborn** is clear that fairness does not require an oral hearing on every occasion, and it is also clear that a mere assertion on behalf of a prisoner that he should have an oral hearing will not entitle a prisoner to one, providing fairness can be achieved on the papers. Of course, I remind myself that it is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed.

24. In essence the Applicant argues procedural unfairness, as a mere mention of **Osborn** does not establish the application of it and also that the decision was irrational not to direct release given the Applicant would have had an opportunity to argue for release against a backdrop of a shorter risk period than both the previous review and at MCA (a hearing taking some months to list), the testing of the risk management plan to manage risk for the period including a confirmed place in designated accommodation and other developments since the last review (including his sustained good behaviour).

25. Firstly, I have to consider whether the MCA panel member did fairly consider the principles laid down in **Osborn**. The only way to establish this is by looking at the written reasons for the decision. Whilst I accept the submission that a mere mention of the relevant case law is not sufficient, I do not accept that a short paragraph may not suffice in many cases. Here the MCA member specifically states that they have not found any reasons to grant a hearing but does not elaborate on that. I need to consider this carefully and whether in these particular circumstances the member should have addressed some of the principles directly.

26. I remind myself that the Applicant had made an application for release at his first review less than a year ago and actively engaged with the process including two

psychological risk assessments and the oral hearing. It flows that, in the absence of evidence to the contrary, he would likely want to do the same on this occasion particularly as it would be his final review before his conditional release date. It is likely that he would experience feelings of resentment if he was not given an opportunity to put his version across, a scenario predicted in **Osborn**. It is important to highlight that, in this case he had not taken the opportunity to put anything in writing (I do not know the reasons why) and so, aside from the decision of the last panel which described some of his evidence, the MCA member did not have anything directly from him.

27. There are a number of issues raised in the decision reasons which would have benefited from the Applicant putting forward his evidence or questioning the evidence of others. These include: the security report which the MCA member said they found to be "*of some concern*"; the effectiveness of the anger management work which had been accepted to some extent by the previous panel; the risk management plan including work and support available which was not detailed in the decision and also the designated accommodation (there had not yet been a referral or answer to the referral to designated accommodation at the point this decision was made and this would also likely have an effect on the length of the risk period once a bed is available); and the "*nuanced*" recommendation of the COM. Lord Reed in **Osborn** identified the benefits of a prisoner's involvement: to illuminate situations, raise issues and give evidence on their own behalf including answering questions.

28. Overall, I am not persuaded that there is sufficient evidence that the principles laid down in **Osborn** were applied. I find that the decision not to direct an oral hearing in this case was flawed by the apparent failure of the panel to consider Osborn fully. As established in the reconsideration decision of **Uddin [2021] PBRA 58**, "*it may very well be that the panel did consider the principles established in that case - it is second nature for a panel to do so – but, in the absence of reference to, or more importantly any discussion of, those principles it is impossible to be satisfied that the panel turned its mind to the relevant issues*". Whilst it was referenced here, there was no specific discussion and in the particular circumstances of this case, I find that there ought to have been.

Ground 2

29. Given my finding above, I do not consider it necessary to address this ground. The Applicant may well wish to repeat much of what he has said in his application when he submits representations as to why he ought to be granted a hearing.

Decision

30. Accordingly, for the reasons I have given, the application for reconsideration is granted and the case should be reviewed by a fresh MCA panel.

Cassie Williams
23 December 2021