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[2020] PBRA 202

Application for Reconsideration by Wallace

Application

1. This is an application by Wallace (the Applicant) for reconsideration of a decision made on the papers dated 11 December 2020 not to direct his release.

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 decision letter, the dossier and the application for reconsideration.

Background

4. The Applicant was sentenced to imprisonment for public protection on 19 September 2006 following conviction after trial for causing grievous bodily harm with intent. A minimum term of seven years was imposed. His tariff expired on 19 September 2013. The Applicant was 48 years old at the time of sentencing and is now 62 years old.

Request for Reconsideration

5. The application for reconsideration is dated 15 December 2020 and has been submitted by solicitors acting for the Applicant.

6. The ground for seeking a reconsideration is that the decision made by a Duty Member not to proceed with an oral hearing (which resulted in a negative decision on the papers) was procedurally unfair. No matters of irrationality are raised.

7. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in December 2019 to consider whether or not it would be appropriate to direct his release and, if release was not directed, to advise the Secretary of State on his continued suitability for open conditions.

9. On 15 June 2020, the case was considered on the papers by a Member Case Assessment panel (the 'MCA panel'). That panel directed the case to an oral hearing. In doing so, it noted that "*release or progression on the papers alone is unlikely to be a viable option and as it had been many years since [the Applicant] last had an oral hearing, it seems inevitable that a hearing will be required…".* In doing so, the MCA had the benefit of legal representation on the Applicant's behalf seeking an oral hearing, noting (amongst other matters) that the Applicant's last oral hearing was almost five years ago.

10. In making directions for the oral hearing, a psychological risk assessment (PRA) was directed with a deadline of 30 November 2020, together with updates from the Prison Offender Manager (POM) and Community Offender Manager (COM) due on 14 December 2020. It also directed that the oral hearing panel required a psychologist specialist member.

11. On 17 August 2020, a Stakeholder Response Form (SHRF1) was submitted on behalf of the Secretary of State, seeking revocation of the directed PRA. It noted that the Applicant was, at that time, engaged in open-ended treatment within a regime to help people recognise and deal with a wide range of problems. It noted that he has outstanding identified treatment needs. It stated that his Prison Offender Manager (POM) and Community Offender Manager (COM) were supportive of the Applicant remaining on that regime to complete therapy. It suggested a PRA be completed following any significant change in the Applicant's progression.

12. In response, his legal representative did not object, understanding the logic behind the request, but sought clarification of a planned therapy end date so a timetable for reports could be formulated.

13. SHRF1 was reviewed by a Duty Member who refused to revoke the direction for a PRA. They noted that the application was vague (in the sense that it contained no professional expectation on when therapy may end) and advised the Secretary of State to provide clarity on when therapy might be likely to end in any renewed application for the PRA to be revoked.

14. On 9 October 2020, a second Stakeholder Response Form (SHRF2) was submitted on behalf of the Secretary of State. It made reference to (and appended) a report dated September 2020 from a prison psychologist detailing the Applicant's progress within the treatment regime. This report stated that the Applicant began core therapy in February 2017. A minimum of 18 months in therapy would be expected. Although in the Applicant's case this period would have passed in August 2018, the report also noted that therapy is open-ended, and it was not certain when the Applicant would be considered ready to end therapy and progress. Therapy had been suspended between March 2020 and September 2020 due to COVID-19 restrictions. It was not clear when the Applicant's next progression review would take place, but it noted that as all identified risk factors remained outstanding, it was not expected that he would be considered to have completed therapy at that review.

15. It reiterated the point from SHRF1 that therapy is open-ended and went on to say that it was unlikely that the Applicant would complete therapy "*within the next 12*

months". It confirmed that the Applicant had seen the report. It again sought revocation of the PRA. No further legal representations were made at this point.

16. SHRF2 was reviewed by a second Duty Member who, noting that the legal representations submitted for SHRF1 implied support for the PRA to be completed post-treatment, revoked the direction for a PRA. This Duty Member also invited the Applicant's legal representative to submit any further representations in respect of the necessity, or otherwise, of the oral hearing that had been directed by the MCA panel.

17. On 30 October 2020, a third Stakeholder Response Form (SHRF3) was submitted by the Applicant's legal representative. It affirmed the Applicant's position that he wanted the oral hearing to proceed. It submitted that all other directions made by the MCA panel should remain active and requested that a member of staff involved with the Applicant's therapy should be directed to attend to give oral evidence regarding his progression to date. The Secretary of State offered no comment.

18. SHRF3 was considered by third Duty Member on 19 November 2020 who considered that a decision could be made under rule 21 of the Parole Board Rules 2019 as "*new information is now available and known to all parties"* and invited representations from the parties to be received no later than 4 December 2020. It stated the case would be reviewed again (by the same Duty Member) during the week commencing 7 December 2020.

19. On 30 November 2020, further written legal representations were submitted, reiterating the request for an oral hearing. These representations specifically questioned what further progress the Applicant could make in therapy and that taking oral evidence would enable a panel to make a "*thorough, informed and independent decision on risk and comment on where risk is best managed at the material time"*. While the therapy report was acknowledged to be "*noteworthy",* it was submitted that its content should be "*explored and tested*". It was further submitted that it would be unfair to conclude the review on the papers and that, had it been known that not objecting to the revocation of the PRA would have led to consideration under rule 21, then the Applicant would have objected at that point.

20. On 11 December 2020, the Duty Member who considered SHRF3 concluded the review the papers under rule 21. The decision was issued as an 'Oral Hearing Decision Letter'. The Duty Member did not consider that an oral hearing was necessary. The decision noted:

> *"The panel recognises the benefits of being able to test evidence and make representations at an oral hearing but does not consider that there is any great likelihood that doing so would change the facts or the assessment of risks that have been drawn from them. Representations submitted on your behalf have been considered, as has the evidence of those responsible for your therapy and sentence planning. No other factors suggest that fairness requires an oral hearing to be directed."*

21. There was no direction for release and no recommendation for a move to open conditions.

22. On 14 December 2020, after the decision not to release had been made, the Applicant's POM submitted the report that had been directed by the MCA panel. This did not support release but would support a recommendation for a move to open prison conditions.

The Relevant Law

23. The panel correctly sets out in its decision letter dated 11 December 2020 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.

Parole Board Rules 2019

24. 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)). This is an eligible decision.

25. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

26. Rule 21(1) of the Parole Board Rules 2019 allows a panel chair or duty member to direct, if further evidence is received after a case has been previously to an oral hearing (under rule 19(1)(c) or 20(5)), that the case should be decided on the papers if an oral hearing is no longer necessary.

27. The power conferred by rule 21(1) is subject to procedural rules. The Parole Board must notify parties of receipt of the further evidence as soon as practicable (rule 21(2)); the parties may make further representations within 14 days of this notification (rule 21(3)). The panel chair or duty member may then direct that the case will be decided on the papers (rule 21(4)). The decision may either be release/no release (rule 21(7)) and is provisional for 21 days if eligible for reconsideration under rule 28 (rule 21(8)) or final otherwise (rule 21(9)).

Procedural unfairness

28. 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.

29. 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.

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

Other

30. 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. Its 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; 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

31. The Secretary of State has submitted no representations in response to this application.

Discussion

32. In this review, the Duty Member made three separate and distinct decisions:

(a) The case should be concluded on the papers without an oral hearing (**Decision 1**);
(b) Having decided to conclude on the papers, to determine the case themselves (**Decision 2**); and
(c) Having decided to determine the case themselves, to make no direction for release (**Decision 3**).

33. It is only Decision 3 that is open to reconsideration under rule 28.

34. However, once the decision to conclude on the papers in this particular case was made, it followed that the decision not to direct release was essentially a *fait accompli*. The new evidence supporting the decision to conclude without an oral hearing was sufficiently unfavourable to the Applicant's case that the Duty Member was satisfied that no hearing was necessary. In the light of this negative evidence, the Duty Member must therefore, at that stage, have formed the view (even if it was only a provisional view) that release was unlikely. Having formed any such provisional view, they went on finally to make the decision not to release themselves.

35. The three decisions are thus (although distinct) inextricably linked. I am therefore considering the fairness of both Decision 1 and Decision 2 as steps in the overall procedural process that resulted in the final decision not to release the Applicant (which falls squarely within the ambit of rule 28).

36. It is therefore first necessary to consider the statutory process mandated by rule 21, before moving on to common law standards of procedural fairness under **Osborn**.

Rule 21

37. While rule 21 is undoubtedly procedurally complex, its requirements have been met. Specifically:

    (i) The update regarding therapy constituted new evidence (rule 21(1))
    (ii) this was notified to both parties via SHRF2 (rule 21(2))
    (iii) representations were made within 14 days of notification (rule 21(3))
    (iv) the Duty Member considered the evidence and the representations and decided the case should be concluded on the papers (rule 21(4)(a)) by themselves (rule 21(5))
    (v) the decision was for no release (rule 21(7)(a)) and was provisional (rule 21(8)) by virtue of its eligibility for reconsideration (rule 28)
    (vi) the decision was issued within 14 days (rule 21(12)).

38. In particular, Decision 2 is permitted by rule 21(5).

Osborn

39. Having found no basis on which to find procedural unfairness insofar as the express procedural rules laid down by law are concerned, it is next necessary to consider the common law standards of procedural unfairness.

40. In **Osborn**, the Supreme Court set out a non-exhaustive list of circumstances in which an oral hearing will be necessary in order to comply with those common law standards. These include:

> *Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.* (para. 2(ii)(b))
>
> *Where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a "paper" decision made by a single member panel of the board to become final without allowing an oral hearing: for example, if the*

representations raise issues which place in serious question anything in the paper decision which may in practice have a significant impact on the prisoner's future management in prison or on future reviews. (para. 2(ii)(d))

The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner. (para. 2(vii))

The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood (para. 2(v))

The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews. (para. 2(ix))

41. These considerations are pertinent to Decision 1.

42. Turning first to para. 2(ii)(b): in this case, the Applicant has spent many years in custody, being over seven years post-tariff on a sentence of imprisonment for public protection. In addition, some five years had passed since the last oral hearing; a fact that was mentioned when then original MCA panel considered that an oral hearing would be "*inevitable*". Moreover, the Applicant's legal representative sought to challenge the report concerning the Applicant's progress in therapy (albeit an update report, rather than a full Ministry of Justice assessment), requesting its content be tested and its author directed to attend to give evidence. A panel at an oral hearing (particularly one with the benefit of a specialist member as directed by the MCA panel) may well have been assisted by hearing oral evidence from the specialist who had provided the update report and consider the Applicant's case for release in the light of such evidence.

43. As far as para. 2(ii)(d) is concerned, the decision not to grant an oral hearing is, in effect, a "paper" decision made by a single member of the Parole Board (albeit in this instance by a Duty Member under rule 21, rather than an MCA panel appointed under rule 5(1)). The representations raise issues regarding aspects of the Applicant's progress which would have a significant impact on his future management or future reviews: in particular, the need and rationale for continued therapy in the form supported by professionals (which would result in a further minimum of 12 months in custody) is questioned.

44. With respect to para. 2(vii), the decision is heavily reliant on the content of the update report, which is both short and lacking in detail. Despite this relative brevity, the report appears to have been given priority over the submissions advanced on the Applicant's behalf and, on the face of it, the panel was predisposed to favour its recommendations without permitting challenge via questioning that was sought on behalf of the Applicant.

45. On the matter of questioning witnesses, the decision concludes that testing evidence at an oral hearing would not have any great likelihood of changing "*the facts or the assessment of risks that have been drawn from them".* This implies that a negative decision has, at least in part, been made on the conclusion that the Applicant has no realistic prospect of success, contradicting para 2(v). Even if the Applicant had no prospect of success, this should not be a bar to an oral hearing, particularly not one in which the appropriateness of the proposed treatment pathway is under challenge.

46. The decision also notes that representations have been considered but does not explicitly deal with the submissions advanced on the Applicant's behalf including matters relating to the Applicant's future treatment needs, the necessity of continuing therapy, or progression pathways which fall within the broader ambit of the oral hearing's purpose as expressed in para. 2(ix). In failing to do so, not only is it at odds with **Osborn**, but it is also at risk of falling short of the common law duty to give reasons (**R (Wells) v Parole Board [2019] EWHC 2710**.

47. Overall, I find that the decision not to grant an oral hearing did not adequately reflect the standards of procedural fairness mandated by **Osborn**. Any of the separate matters explored in paragraphs 39-43 would have been sufficient in and of themselves for me to have reached this conclusion. Taking them, all together leads to the inexorable conclusion that the decision not to direct an oral hearing was procedurally unfair and, in consequence of this, the concomitant decision not to direct release cannot be anything other than procedurally unfair. Had the first decision been made fairly (and the oral hearing directed), then it would not have fallen for the decision not to direct release to be made, either by the Duty Member who made it, or anyone else considering the case on the papers under rule 21.

48. While this finding is sufficient for the application to be granted, for completeness, I will deal with two other points raised in the application.

49. The application first correctly notes that a negative decision by an MCA panel would permit a request for an oral hearing within 28 days (Rule 20(2)). The current situation is analogous in that this case was also considered on the papers by a single member. However, in this case the negative decision was made by a Duty Member under Rule 21 and not by an MCA panel under Rule 19. The 28-day window provided by Rule 20 does not apply to cases concluded under Rule 21 and therefore there is no error of procedure on this point, nor error of form in the presentation of the decision (as an "Oral Hearing Decision Letter"),

50. The application also notes that the Duty Member, in coming to their decision, did not explicitly revoke the directions for POM and COM reports and submits that the case should therefore have been considered in the light of these directed reports.

51. In making a decision under Rule 21, the Duty Member must have been satisfied that they had sufficient evidence on which to do so at that time, notwithstanding the content of any previously directed, but not yet disclosed, reports. Making this decision made the production of such reports unnecessary and issuing the decision letter impliedly revoked the outstanding directions.

Decision

52. Applying the tests as defined in case law, I find the decision not to release the Applicant 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 a fresh panel by way of an oral hearing.

Stefan Fafinski
8 January 2021