

[2021] PBRA 83

Application for Reconsideration by Hawthorn

Application

1. This is an application by Hawthorn (the Applicant) for reconsideration of a decision by a Parole Board Panel to conclude his case on the papers by way of a decision letter, dated 2 March 2021, refusing to direct his release.
2. I have considered this application on the papers. These comprise of the dossier containing 188 pages, the application for reconsideration contained in handwritten documents dated 13 April 2021 and 20 April 2021 consisting, in total, of 5 pages of submissions, and the decision of the Panel dated 2 March 2021.

Background

3. On 6 June 2014, the Applicant, having pleaded guilty to five counts of breaches of a 2021 Sexual Offences Prevention Order, one count of controlling prostitution and one of controlling a child prostitute, was sentenced, for rape, to an Extended Prison Sentence totalling 15 years consisting of a 10-year custodial term and an extended period of 5 years. The Parole Eligibility date was 16 July 2020, Conditional Release date in November 2023 and Sentence Expiry date in November 2027.
4. The offences followed his release from a nine-year prison sentence imposed in September 2004 for conspiracy to commit indecent assault, conspiracy to live off the immoral earnings of a male prostitute, indecency with a child and living off the immoral earnings of both a male and a female prostitute. He was fully aware of the Court Order against him, having in Court, ripped up an order.
5. Full details of the offences are unnecessary but, in brief terms, they related to running a purported escort agency operating throughout the country but employing and controlling vulnerable young people, mostly men, frequently drug addicts, who were marketed, on the website, as providing sexual services.
6. The Applicant had a substantial criminal record for a large variety of offences.
7. The Applicant was twice released into the community but re-called for what a Panel following an oral hearing, in May 2020, described as "*offence paralleling and concerning behaviour*".

Request for Reconsideration

8. It is not necessary to reproduce the application for reconsideration in full, but the Applicant's documents have been carefully considered.
9. The application comprises a five-page document, written by the Applicant, and submits that the decision is "*irrational and unfair*". It is not easy to extract formal grounds of application from the letters submitted by the Applicant but, in concise form, he claims to have written to the Parole Board on a number of occasions seeking an oral hearing and enclosing documents which he considers relevant to matters of risk, documents which do not appear in the dossier and, therefore, do not appear to have been seen or considered by the Panel. He specifically quotes extracts from judgment in **Osborn and Booth v Parole Board [2013] UKSC 61** in support of his application.
10. I asked for further particulars of the Applicant's grounds as the original application did not provide the details I considered necessary to properly judge their merits. As a result, the Parole Board received an e-mail dated 21 May 2021 from a Probation Officer working at his current prison, as follows:

"[the Applicant] has provided 4 numbers from recorded deliveries to yourselves as he is not sure which two are from the bundles of paperwork.

*He said the **first one was received** by yourselves **around 17/12/2020** and the **second one was received on 22/12/2020**. He said these were **signed for by a [xxx]**. They were actually both sent on the same day from [the prison at which the Applicant was located]*

The numbers he has provided are

NL[redacted]

NL[redacted]

NL[redacted]

KX[redacted]

[The Applicant] was at [previous prison] when these were sent, so I don't know if they can provide any further information?

I hope this is enough for the folders to be located.

[The Applicant] does not have a solicitor".

11. Further enquiries have been made inside the Parole Board organisation, but nothing has been found save that it has been suggested that the documents might have been sent to the Board's previous address and not redirected to its current address.
12. Although the Applicant does not specifically seek reconsideration on the basis of procedural unfairness, the Reconsideration Assessment Panel (RAP) considers that the issues raised by him relate primarily to procedural unfairness and, accordingly, has considered both statutory grounds for reconsideration, irrationality and procedural unfairness.

Response on behalf of the Secretary of State



13. The Secretary of State (SoS) by e-mail dated 11 May 2021 indicated that no representations were offered in response to the application.

Current Parole Review

14. The case had been referred to the Parole Board in October 2020, the Board being asked to consider whether to direct release.
15. The Panel decision followed a referral in October 2020 and was the second review during his current sentence, the first being an oral hearing in May 2020.
16. The Panel decision adopted, by way of quotation, much of the decision of the 2020 Panel, outlining the circumstances of a recall from release from the 2004 sentence, the Applicant's evidence in relation to the recalls and an acceptance by him that, in 2020, he had breached his licence conditions through failure to disclose contact with a woman who lived with her two teenage children, and that the recall had been justified. The earlier panel had formally found that the recall was appropriate. It examined the risk reduction work carried out by him, the circumstances of each recall and his custodial behaviour since recalls including the Applicant's explanations for his breaches and his concessions as to failures to meet licence requirements fully. It acknowledged that there had been no recent concerns about his custodial behaviour and examined his evidence as to future plans should he be released. It considered the evidence of the professional witnesses who recommended release and the extra conditions proposed for his Risk Management Plan. It found, however, that the Prison Psychologist had accepted that there remained a strong likelihood that he would revert to behaviour involving lack of openness and non-compliance with Licence Conditions and, notwithstanding her previous recommendation for release, identified that there could be benefits in a period of testing in open conditions provided that psychologically informed support was available. It also found that this option had not been discussed by the Prison Offender Manager (POM) or her stand-in but accepted that the Community Offender Manager (COM) had not identified therapeutic benefit from a Category D placement. It concluded that given his past behaviour on licence and his "*demeanour in the hearing*" the Panel was not confident that he could be safely managed in the community.
17. Having adopted much of what had been found by the 2020 Panel, the current Panel dealt briefly with the up-dated situation noting that both the POM and COM did not support release considering there were outstanding treatment needs, that they did not consider the Applicant's risks could safely be managed in the community and that the risk management plans would still need extensive development prior to any future release decision.
18. Notification of the provisional decision (2 March 2021) was said to have been issued on 6 March 2021, the Applicant being notified, as per standard format, that in the absence of response, it would become effective after 28 days (6 April 2021) subject to the further 21 days (27 April 2021) granted for a reconsideration application. Nothing, it had seemed, had been heard from the Applicant at the end of the initial period, a "*no response letter*" being sent on 6 April 2021. The application for reconsideration was said not to have been received until 27 April 2021. The Board has, however, indicated that although the application was served incorrectly an exception would be made in this case.



The Relevant Law

19. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.
20. Under Rule 28 (1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision as to whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether made by a paper panel (Rule (Rule 19(a)(a) or (b))), by an oral panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).
21. In **R (on the application of 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".

22. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.
23. The application of this test has been confirmed in recent decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.
24. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.
25. Under the principles expressed in **Osborn**, the key test is whether the fairness to a prisoner requires an oral hearing, bearing in mind the facts of the case and the importance of the issue at stake. Factors to be considered include:
 - Whether the evidence can be considered without the need for it to be tested orally or in person;
 - Despite the duty of the Parole Board to provide a swift review, the test is not the likelihood (or otherwise) of release or the need to save time, expense or trouble;
 - All evidence must be given the appropriate scrutiny with particular care in relation to issues of fact which may be disputed or open to explanation or mitigation;



- Whether the prisoner wishes to have an oral hearing and the legitimate interest in being able to participate in a decision which has important implications for him;
- The evidential effect of the conclusion of pending criminal proceedings;
- Whether there are psychological issues which need to be tested; and
- The decision is not confined to a determination of whether or not to direct release (or recommend a transfer to open conditions) but includes other aspects, such as comments or advice in relation to the prisoner's treatment or offending behaviour work which may be required, which will, in practice, have a significant effect on his management in prison or on future reviews.

26. The common law duty to act fairly, as applied in this context, is influenced by the requirements of **Article 5(4) as interpreted by the European Court of Human Rights**. Compliance with the common law duty should result also in compliance with the requirements of **Article 5(4)** in relation to procedural fairness. **Article 6** is relevant to criminal trials but does not impinge on this duty.

Discussion

27. The Panel correctly sets out in its decision letter dated 18 April 2021 the test for release and the issues to be addressed in making a recommendation to the SoS for a progressive move to open conditions.

Irrationality

28. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel has clearly set out details of evidence considered by it and clearly explained the basis for its decision.
29. Although the Applicant makes reference to the overriding duties of a Panel to act within its duties under Human Rights legislation, no suggestion is made that the Panel did not do so in this case.

Procedural Unfairness

30. I am concerned, however, at the fact that this decision was finalised on the papers, without the Applicant having the opportunity to amplify, in person, issues such as those outlined in detail in his application. The Panel was clearly unaware of them, reference being made, in the decision, to the dossier containing only *"brief representations from [the Applicant] but no legal representations"* and *"The Panel did not find that there are any compelling reasons for an oral hearing at this time and [the Applicant has] not submitted any reasons for an oral hearing."* I preface my findings, however, by expressing complete sympathy for the Panel which was clearly entitled to see any relevant documentation and whose decision, in the absence of such information, was taken entirely properly.
31. In the absence of any evidence to gainsay the Applicant's assertions and, particularly in light of detailed information as to Postal Recorded Delivery references, I take the view that that information is, on the balance of probabilities broadly accurate and that any defect in retention or production of documents should



not prejudice the Applicant's case. Adopting the principles outlined in **Osborn**, I rule that an oral hearing was and remains appropriate.

Decision

32. For the reasons I have given, I do not find that the Panel's decision was irrational but do find that there was procedural unfairness in the operation of the system and accordingly have granted the application on that basis. Although the decision makes formal reference to having taken into account the principles of **Osborn**, the Panel would, in my view, almost certainly have given him the opportunity to make his case at an oral hearing.

Edward Slinger
23 June 2021

