

2024 PBRA 200**Application for Reconsideration by Khan****Application**

1. This is an application by Khan (the Applicant) for reconsideration of a decision of a Member Case Assessment panel (the panel) of 25 June 2024 not to direct release and not to send the case to an oral hearing.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the application for reconsideration; the decision of the panel and the dossier seen by the panel.

Request for Reconsideration

4. The application for reconsideration is dated 27 September 2024.
5. The grounds for seeking a reconsideration are as follows:
 - The decision is flawed due to procedural unfairness.

Background

6. The Applicant was sentenced in 2006 to a sentence of imprisonment for public protection (IPP). He was 22 years old at the time of sentence. The index offence was of robbery. He was given a minimum term (tariff) of one year and 245 days, this expired in August 2007. He has been released following a Parole Board hearing on 6 occasions and recalled on each occasion.

Current parole review

7. The Secretary of State's referral to the Parole Board is dated December 2023. This is the second review of his sixth recall, the first review was in January 2023 at an oral hearing. The panel of January 2023 did not direct release or recommend transfer to open conditions. The Applicant was 41 years of age at the time of the decision under reconsideration.

8. Following the referral by the Secretary of State, the case was sent to the panel who considered the case on the papers. It is important to my decision to note that there were no personal or legal representations within those papers. The dossier provided mandatory reports including updated reports from the Applicant's Prison Offender Manager, Community Offender Manager and security intelligence from the prison. The panel made no direction for release and no recommendation for transfer to open conditions.
9. Following the panel's decision, the Applicant's legal representatives provided representations that the case should be sent to an oral hearing. This is provided for under Rule 20 (1). The case and the representations were duly considered by a Duty Member under Rule 20 (5). The Duty Member concluded that the case should not be determined at an oral hearing. The panel's decision remained provisional as it was eligible for reconsideration. The Rule 20 decision is not the subject of this application as it is out of scope. It is the panel's decision that is the subject of the reconsideration.

The Relevant Law

10. The panel correctly sets out in its decision letter dated 25 June 2024 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 (as amended)

11. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
12. 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)).
13. 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**.

Procedural unfairness

14. 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.



15. 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;
- (e) the panel did not properly record the reasons for any findings or conclusion; and/or
- (f) the panel was not impartial.

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

Other

17. In the cases 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.

Reconsideration as a discretionary remedy

18. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

The reply on behalf of the Secretary of State

19. On 3 October 2024 the Respondent informed the Parole Board that they had no representations to make on the application.

Discussion



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20. Any representations submitting that the Applicant wished for an oral hearing should have been made by the Applicant or their legal representatives at the time of the referral of the Secretary of State where the case relates to release following recall of a prisoner (Rule 18 (b)). In this case, the referral was on 1 December 2023. The panel considered the case in June 2024 and the dossier contained no representations either from the Applicant or his legal representatives. It is the prisoner's responsibility to instruct representatives and for personal or legal representations to be submitted in a timely manner. If a prisoner has had the opportunity to provide representations and fails to do so that does not establish a procedural unfairness.
21. A decision to refuse an application for an oral hearing under Rule 20, following an earlier decision not to direct release under Rule 19, is not eligible for reconsideration under Rule 28. *However, the original decision not to direct release under rule 19 can properly be the subject of an application for reconsideration, (my emphasis)* and such an application can properly argue that the lack of an oral hearing amounts to a procedural unfairness.
22. I have therefore considered the panel's decision. The relevant paragraph in the decision letter is in its conclusion, and says the following: "*When making a decision to conclude on the papers, the panel took into consideration the principles set out in the case of Osborn, Booth and Reilly (2013) UKSC 6 concerning oral hearings but determined there are no reasons to direct one, and (the Applicant) has not asked for one. Taking all the information into account the panel could not be satisfied that it is no longer necessary for him to be confined for the protection of the public and, accordingly, made no direction for his release or a recommendation for open conditions.*"
23. The panel did not have before it any representations for an oral hearing as I have indicated above. The application for reconsideration indicates that the principles of the case of *Osborn et al* as well as the case of *R (on the application of Somers) v The Parole Board of England and Wales [2023] EWHC 1160 (admin)* were not followed. I note that the case of *Somers* followed the principles of the case of *Osborn et al*.
24. The application cites a number of paragraphs from the case of *Somers* and further argues that the panel did not fully engage with the principles in both cases, was "*relatively terse*" in nature and also that the panel did not engage with the case, which was complex.
25. In my judgement, the argument that the panel may not have fully explored the complexity of the case cannot be said to be procedurally unfair. The panel could not have considered representations that were not before it on any issues regarding complexity.
26. It is clear in the panel's decision letter that the panel took into account the principles in the case of *Osborn* when making its decision and I have quoted this above.



27. At paragraph 17 of this decision there is a cogent summary of the principles in the case of *Osborn* and I will take each one and explore it in relation to the panel's decision:

a) 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 prisoner made no representations at the time of referral of his case to the Parole Board in December 2023, and there continued to be no representations until June 2024 when the panel considered the dossier and made its decision. The panel therefore had to make its own assessment, which it did. There could be no procedural impropriety on this point.

b) The Supreme Court indicated that an oral hearing is likely to be necessary where the Board is in any doubt whether to direct one:

The panel decision is clear and there is no suggestion of doubt regarding the evidence before it or questions in the mind of the panel as indicated in the decision letter.

c) An oral hearing should be ordered where there is a dispute on the facts:

The Applicant's case is well recorded in the dossier. He has been released on a number of occasions and issues relating to the last recall were fully explored in the oral hearing dated January 2023, which is in the dossier. As the panel had no personal or legal representations before them at the time of the hearing (for which I find no procedural impropriety), any disputes of fact that could have been raised were not before the panel.

d) 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:

I accept that in some cases this would be a persuasive argument for directing an oral hearing. However in this case, the Applicant's risks have been considered a number of times before the Parole Board and are known, these include those leading to the circumstances of his most recent recall. This recall had been explored and recorded at an earlier hearing by the Parole Board, resulting in a decision not to release or recommend open conditions. I consider that the panel took into account his risks as known as well as whether it would be necessary in this particular case for the Applicant to be able to put his case at an oral hearing. I note that since the last hearing very little had changed. While the fact that little has changed does not in itself negate the necessity for an oral hearing, I consider that in this particular case the panel's decision, taking all the evidence before it, was reasonable.



e) 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:

The Applicant made no representations suggesting that he wished to participate. The decision letter is clear that there had been no relevant changes since the last review. The panel could reasonably conclude that there was no *legitimate interest* that it needed to take into account. It is accepted that all decisions of the Parole Board have important implications for any prisoner.

f) It is not necessary that there should be a realistic prospect of progression for an oral hearing to be directed:

If the panel had only relied on a realistic prospect of progression in its decision, there may have been some scope for consideration of this principle. However in my view the panel has made a thorough assessment of where the Applicant is at this time in his sentence taking into account the recommendations of the professional witnesses in the dossier, the evidence of his behaviour and engagement as reported in the dossier, and has come to a reasoned and reasonable conclusion. The panel goes further to note that there is a psychological risk assessment underway that might provide some further insights into the Applicant's treatment pathway in the future, should he choose to engage with them.

Even had the panel been explicit in indicating the only reason they were concluding on the papers was because there was no realistic prospect of progression, taking this particular case into account, I would not have been minded to grant reconsideration. A grant of reconsideration is a discretionary remedy even if any findings of procedural impropriety were to be made.

Decision

28. Refusal – For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
15 October 2024

