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[2024] PBRA 39

Application for Reconsideration by Asad

Application

1. This is an application by Mr Asad ('the Applicant') for reconsideration of the decision of a Member Case Assessment member of the Parole Board ('the MCA member') who on 1 January 2024 issued a decision not to direct the Applicant's release on licence and not to send his case for an oral hearing.

2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background

3. The Applicant is aged 45 and was born and grew up in Afghanistan before coming illegally to the UK. He was then granted temporary leave to remain in the UK which expired in November 2019.

4. The Applicant is serving a sentence imposed on 6 May 2016 for the rape of a girl under the age of 13 ('the index offence'). That sentence is a 'Sentence of Particular Concern' and is made up of a custodial term of 16 years and a licence extension period of one year. The Applicant will become eligible for early release on licence in March 2024 (his 'parole eligibility date').

5. The Secretary of State (the Respondent) has referred his case to the Parole Board ('the Board') to decide whether to direct his early release. The test for early release is whether his continued confinement in prison is necessary for the protection of the public. If he is not released on licence by direction of the Board at this stage his case will be reviewed again by the Board in a year's time (his 'annual review'). If he is not released on licence at any stage by direction of the Board, he will be automatically released on licence in March 2032 at his 'conditional release date'.

6. The Applicant received concurrent sentences for other sexual offences against the girl's two siblings. It is unnecessary to recite the facts of his offences save to say that he was in a position of trust which he abused. He is liable to be deported when he is released from prison.

7. He was convicted by a jury after a contested trial. He continues to maintain his innocence of all the offences of which he was convicted but the Board is obliged by law to proceed on the basis of the jury's verdicts: it has neither the authority not the resources to reinvestigate the case.

8. His case was reviewed by the MCA member on 1 January 2024. The MCA member had a choice of 3 options: (1) to make a decision on the papers to direct the Applicant's early release on licence (2) to make a decision on the papers not to direct his early release on licence or (3) to send the case for an oral hearing. The MCA member made a decision on the papers not to direct the Applicant's early release on licence.

9. The Applicant now seeks release a direction for reconsideration of the MCA member's decision.

The Relevant Law

The test for release on licence

10. As indicated above the test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The Parole Board Rules 2019 (as amended)

11. Under Rule 28(1) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

12. Reconsideration will only be directed if one of more of the following three grounds is established:
    (a) It contains an error of law; or
    (b) It is irrational; or
    (c) It is procedurally unfair.

13. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:

    (a) A paper panel, as in this case (Rule 19(1)(a) or (b)) or
    (b) An oral hearing panel after an oral hearing (Rule 25(1)) or
    (c) An oral hearing panel which makes the decision on the papers (Rule 21(7)).

14. It follows that the MCA member's decision in this case not to direct the Applicant's early release on licence is eligible for reconsideration.

15. The application for reconsideration is made on the basis of irrationality. No error of law or procedural unfairness is suggested.

Irrationality

16. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out as follows the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

"the issue is whether the … 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."

17. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.

18. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

The application for reconsideration in this case

19. This application is made by the Applicant's solicitors on his behalf. Two sets of representations have been submitted in support of the application. The original representations accompanied the application. The representations have been expanded in the new ones which read (so far as is relevant) as follows:

> *"The Applicant would seek an oral hearing pursuant to the judgment in Osborn (Appellant) v The Parole Board (Respondent) Booth (Appellant) v The Parole Board (Respondent) In the matter of an application of James Clyde Reilly for Judicial Review (Northern Ireland) [2013] UKSC 61 and R (on the application of Somers) v Parole Board [2023} EWHC 1160 (Admin).*
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> *'This application is made on the basis that the decision to deny [the Applicant] an oral hearing is irrational. The panel has concluded that [the Applicant] cannot be directed to an oral hearing due to a need to complete interventions to reduce risk. However, it is clearly stated that the reason that [the Applicant] has not completed any interventions is due to [the Applicant] not being required to complete a programme needs assessment. This assessment was not carried out specifically due to his low risk in reoffending. It is submitted that this is an irrational basis to deny [the Applicant] an oral hearing.*
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> *'It is fair for [the Applicant] to be granted a Parole Board Oral Hearing so that the requirements for his release can be clearly set out by professionals. An oral hearing is an appropriate setting to better understand [the Applicant's] attitude towards the index offence and his plans for reintegration in the community.*
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> *'An oral hearing should be directed so that [the Applicant] may undergo a Programme Needs Assessment, should the Parole Board Require core risk reduction work to be done.*
>
> *'[The Applicant] should be presented with the fair opportunity to explain what he has accomplished while in custody.*

'It is requested that [the Applicant] is directed to an Oral hearing so that intervention in the community can be discussed as a prospect.

'There are also inaccuracies in the dossier that need to be addressed before a fair assessment of risk can be made of [the Applicant]".

The Respondent's position

20. The Respondent (the Secretary of State) is a party to all parole proceedings (the other party in each case being the prisoner). As such he is the Respondent to any reconsideration application made by or on behalf of a prisoner, and is therefore entitled to submit his own representations in response to those submitted by or on behalf of the prisoner.

21. By e-mail dated 8 February 2024 the Public Protection Casework Section of the Ministry of Justice ('PPCS') stated on behalf of the Respondent that he offers no representations in response to the Applicant's application for reconsideration in this case.

Documents considered

22. I have considered the following documents for the purpose of this application:

(a) The dossier provided by the Secretary of State for the review of the Applicant's case, which now runs to 173 numbered pages and includes a copy of the MCA member's decision;
(b) The two sets of representations submitted by the Applicant's solicitors in support of his application for reconsideration; and
(c) PPCS' e-mail of 8 February 2024.

Discussion

23. It is convenient to discuss in turn each of the submissions made by the Applicant's solicitors in support of this application.

Submission 1: *The Applicant would seek an oral hearing pursuant to the judgment in Osborn (Appellant) v The Parole Board (Respondent) Booth (Appellant) v The Parole Board (Respondent) In the matter of an application of James Clyde Reilly for Judicial Review (Northern Ireland) [2013] UKSC 61 and R (on the application of Somers) v Parole Board [2023} EWHC 1160 (Admin).*

24. These cases establish that, even when there is no realistic prospect of an oral hearing resulting in a direction for release on licence, fairness to the offender may require an oral hearing to be directed. There are a variety of reasons why that may be the case.

25. The MCA member clearly had that principle in mind. He wrote at the start of his decision: "*At the current time, although [the Applicant's] prison conduct is good, there does not seem to be any genuine reason, in terms of fairness to him, as to why an oral hearing is needed, and the review is being concluded with a paper decision."* At the end of this decision I will discuss the question whether that view was rational or irrational.

Submission 2: *This application is made on the basis that the decision to deny [the Applicant] an oral hearing is irrational. The panel has concluded that [the Applicant] cannot be directed to an oral hearing due to a need to complete interventions to reduce risk. However, it is clearly stated that the reason that [the Applicant] has not completed any interventions is due to [the Applicant] not being required to complete a programme needs assessment. This assessment was not carried out specifically due to his low risk in reoffending. It is submitted that this is an irrational basis to deny [the Applicant] an oral hearing.*

26. I am afraid that the solicitors' analysis of the position is not an accurate one and is based on a misunderstanding.

27. The index offence and the associated sexual offences were exceptionally serious ones (as reflected by the lengthy sentence imposed) and on any sensible view of the case the Applicant at the start of his sentence presented a high risk of serious harm to children: it will remain high until his conditional release date unless before then he is able to demonstrate that he has reduced it to a level which would be safely manageable on licence in the community.

28. The initial approach adopted by prison psychology (based on a statistical risk assessment which placed his risk of re-offending at the low level) was that the Applicant did not qualify for any of the programmes offered to sex offenders with a view to reducing their risks to the public.

29. Statistical risk assessments (which are based on the number of convictions which a prisoner has had) can be useful in assessing an offender's risk to the public. However, in a case where the prisoner has only one conviction but it is for an exceptionally serious offence or offences, they can produce a frankly absurd (and certainly unfair) result: professional witnesses will say that he cannot be released unless he has completed appropriate risk reduction work but he cannot do that because prison psychology say that his risk is too low to qualify for it.

30. Happily, in this case that situation was remedied when the Applicant was assessed by probation as presenting a medium risk of future sexual offending and a high risk of serious harm to children. On the basis of those assessments the Applicant than qualified for a Programme Needs Assessment ('PNA') to determine what interventions he might need.

31. A PNA was recommended in May 2023 and the process had commenced by July 2023. The Applicant has been willing to engage in the PNA and in any programmes recommended as a result of it, but his continuing insistence on his innocence makes the process difficult: he himself has said that he does not think that any programme would make much difference.

32. That is not, however, necessarily the case. There are programmes suitable for 'deniers' and one of the professionals has suggested that the Applicant would benefit from motivational work to encourage him to accept responsibility and to engage with completion of offence-focused work aimed at challenging his attitudes and beliefs around sexual offending.

33. It is reported that the PNA has yet to be completed. That is probably because of the above difficulty. However, if I uphold the MCA member's decision it will be important for the PNA to be completed as soon as possible so that by the time of the Board's next review of the Applicant's case he will have had the opportunity to engage in whatever intervention(s) have been recommended in the PNA.

    Submission 3: *It is fair for [the Applicant] to be granted a Parole Board Oral Hearing so that the requirements for his release can be clearly set out by professionals. An oral hearing is an appropriate setting to better understand [the Applicant's] attitude towards the index offence and his plans for reintegration in the community.*

34. The requirements for the Applicant's release on licence will be clear from the PNA when it is completed. The Applicant's current attitude to the index offences is perfectly clear: he denies them all. Since he is likely to be deported on his release from prison it is unlikely that he will be re-integrated into the community in the UK, so his plans are necessarily limited.

    Submission 4: *An oral hearing should be directed so that [the Applicant] may undergo a Programme Needs Assessment, should the Parole Board Require core risk reduction work to be done.*

35. As explained above the PNA is in progress and will need to be completed, with the Applicant's participation, as soon as possible.

    Submission 5: *[The Applicant] should be presented with the fair opportunity to explain what he has accomplished while in custody.*

36. There is already clear evidence that the Applicant has conducted himself well in custody, and he has established a good work record and has engaged in education. These matters are to his credit but in a serious sex offender's case good behaviour in prison (where there is no opportunity for further sex offending of the kind committed by him) is not sufficient on its own to demonstrate a reduction in his risk of further such offending when he is at liberty in the community.

    Submission 6: *It is requested that [the Applicant] is directed to an Oral hearing so that intervention in the community can be discussed as a prospect.*

37. There is really no prospect of the Applicant being released into the community at this stage.

    Submission 7: *There are also inaccuracies in the dossier that need to be addressed before a fair assessment of risk can be made of [the Applicant].*

38. It is not uncommon for there to be inaccuracies in an offender's dossier but they are usually of little if any relevance to the offender's risk of serious harm to the public. The evidence in this case is such that it is perfectly clear that the Applicant's risk to children would not, at this stage, be safely manageable in the community. No attention has been drawn by the solicitors to anything which might realistically change that position.

Decision

39. For the reasons which I have explained above, I am satisfied that none of the grounds advanced by the Applicant's solicitors justify reconsideration of the MCA member's decision.

40. The Applicant's current risk of serious harm to the public is clearly far too high to be safely manageable on licence in the community, and a direction on the papers for his release would have been out of the question. Furthermore there is no realistic prospect that an oral hearing, if directed, could have resulted in a direction for release on licence.

41. That leaves the question whether, even though no direction for release on licence could have been appropriate at this stage, there might have been some other reason why fairness would require an oral hearing. The MCA member did not think there was, and I cannot find any reason for regarding his view as irrational: I am in complete agreement with it.

42. It follows that I am bound to dismiss this application.

Jeremy Roberts
21 February 2023