

[2024] PBRA 57

## Application for Reconsideration by O'Neill

### Application

1. This is an application by O'Neill (the Applicant) for reconsideration of a decision dated 16 January 2024 made by a panel on the papers not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board 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.
3. I have considered the application on the papers. These are the decision, the dossier (consisting of 187 pages), and the application for reconsideration (dated 4 March 2024).

### Background

4. The Applicant received a sentence of life imprisonment on 17 January 2005 following conviction for wounding with intent to do grievous bodily harm to which he pleaded guilty. His tariff was set at three years and expired in January 2008.
5. He was first released on licence in January 2015 following an oral hearing but recalled to custody in May 2015 following allegations of violence against a female. These allegations were disposed of with No Further Action. He was re-released on 3 April 2018 following an oral hearing.
6. His licence was revoked for the second time on 22 May 2023, and he was returned to custody the following day. The Police National Computer (**PNC**) report dated 24 May 2023 records that he had been arrested for alleged threats to kill, assault occasioning actual bodily harm, common assault, and criminal damage.
7. The Recall Report (**Part A**, 23 May 2023) provides more detail about the matters that led to the Applicant's recall. It was alleged that the Applicant:
  - a) grabbed the throat of his partner's 12-year-old son and pushed him;
  - b) spat at his partner;
  - c) hit a doorframe with a meat cleaver and damaged a drawer by slamming it shut; and
  - d) waved three knives around (one meat cleaver and two large chopping knives) whilst saying he was going to stab/kill his partner's ex-partner and other members of her family.



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8. The Applicant was technically bailed until 14 August 2023 (but was recalled in any event).
9. The Applicant was 24 years old at the time of sentencing and is now 44 years old.

### Request for Reconsideration

10. The application for reconsideration is dated 4 March 2024 and has been drafted and submitted by counsel instructed on behalf of the Applicant.
11. It submits that the decision was procedurally unfair as the review ought to have involved an oral hearing in line with binding case law. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made on the grounds of irrationality or error of law.

### Current Parole Review

12. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in June 2023 to consider whether to direct his release. If the Board did not direct release, it was invited to advise the Respondent whether the Applicant should be transferred to open conditions. This is the Applicant's first parole review since his second recall.
13. The Post Recall Risk Management Report (**Part B**, 14 June 2023) notes that the Applicant did not agree with the allegations which led to his recall as set out in the Part A report. He denied spitting at his partner and denied physically touching either complainant. He stated that he wanted to be charged, so that he could prove his innocence and be found not guilty (rather than a disposal of No Further Action).
14. Legal representations of 17 July 2023 affirmed the Applicant's denial in respect of the allegations. They sought an adjournment for an update on the police investigation and (potentially) an updated report from the Applicant's Community Offender Manager (**COM**). If the adjournment application was not granted, then an alternative application for an oral hearing was made to allow the panel to undertake a thorough risk assessment, for the Applicant to give his account of the alleged breaches of his licence and to test the evidence of the COM and the Applicant's Prison Offender Manager (**POM**) in ascertaining whether the Applicant met the test for re-release.
15. On 30 October 2023, the case was considered by a single-member Member Case Assessment (**MCA**) panel. It was adjourned until 15 December 2023 for an update from the Applicant's Community Offender Manager (**COM**), including (amongst other things) updated information on the status of the police matters.
16. The COM duly provided a Release and Risk Management Report (**Part C**, 8 December 2023). This reported that the Applicant had been charged on 21 November 2023 with the following offences:

a) Criminal damage;

- b) Common assault (against his partner);
- c) Assault by beating (two counts, against his partner's son);
- d) Common assault (against his partner's son); and
- e) Affray.

17. It is further noted that the Applicant's first court appearance in relation to the charges was scheduled for 21 December 2023.

18. Further email correspondence within the dossier (dated 11 January 2024) indicated that the Applicant appeared before magistrates on 2 January 2024, had been remanded in custody, and that the case has been sent for trial in the Crown Court. No date had been set for the trial.

19. Supplementary legal representations (by email, undated) sought an oral hearing, and noted that the charges would be fully contested at trial. It was further noted that the charges were less serious than those considered at the time of the Applicant's arrest. While it was acknowledged that it would take some time before the criminal charges were determined, an oral hearing was sought in case the Applicant was found not guilty or the charges withdrawn prior to the case being listed.

20. On 16 January 2024, the MCA panel made no direction for release on the papers.

## The Relevant Law

21. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is automatically set out within the Parole Board's template for oral hearing decisions.

### *Parole Board Rules 2019 (as amended)*

22. 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)).

23. 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)).

24. 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*

25. 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.

26. 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.

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

### **The reply on behalf of the Respondent**

28. The Respondent has submitted no representations in response to this application.

### **Discussion**

29. If a panel decides on the papers that a prisoner is unsuitable for release (rule 19(1)(b)), the decision remains provisional for 28 days to allow the prisoner to apply in writing for a panel at an oral hearing to determine the case (rule 20(1), 20(2)).

30. The application notes that the Applicant's solicitors intended to submit a rule 20 application but were unable to do so in time as they had been impacted by a cyber-attack. The reasons for non-submission are not material. The simple fact is that no rule 20 application was made in time.

31. As no rule 20 application had been made, the provisional decision under rule 19(1)(b) became final. At this point, the reconsideration mechanism afforded under rule 28 became available.

32. The application is made on the ground of procedural unfairness due to the lack of an oral hearing.

33. A decision not to direct an oral hearing is not, in and of itself, amenable to reconsideration under rule 28. However, if the decision not to direct release is unfair for want of an oral hearing, then the no-release decision may be reconsidered.

34. Each case will turn on its particular circumstances. There is no general principle that a decision not to direct an oral hearing prior to conclusion on the papers with a negative decision is automatically procedurally unfair.

35. In the Applicant's case, he had been recalled following allegations of further offending, and subsequently charged. The charges brought were of less seriousness than those contemplated at the time of his arrest. The allegations of threats to kill

and assault occasioning actual bodily harm appear to have been dropped in favour of affray and common assault. He denies the allegations and is awaiting trial.

36. The Applicant is also a twice-recalled life sentenced prisoner who is significantly post-tariff.

37. The application makes reference to the well-known fairness principles concerning an oral hearing set out in *Osborn v Parole Board*; *Booth v Parole Board*; *In re Reilly* [2013] UKSC 61 (*Osborn*).

38. In *R (Somers) v Parole Board* [2023] EWHC 1160 (Admin) [23], Foster J reaffirmed that the *Osborn* principles "should form the backbone of any consideration as to affording an oral hearing where release or transfer to open conditions is in issue". Moreover, at [54] Her Ladyship noted that "The need for a hearing to satisfy the entitlement of a prisoner to a fair consideration of his position is the stronger in the case of a post-tariff lifer".

39. In *R (Stubbs) v Parole Board* [2021] EWHC 605 (Admin) [27], Upper Tribunal Judge Markus QC (as she then was) noted that the lack of an oral hearing denied a prisoner an effective opportunity to make a challenge to the contents of the dossier that were in dispute.

40. With that said, parole reviews cannot simply be allowed to drift. Directing an oral hearing would introduce inevitable delay, particularly in the Applicant's case where there is no set timetable for the determination of the criminal charges. The Applicant has a right to a speedy review of his detention under Article 5(4) of the European Convention on Human Rights.

41. *Somers* deals with this matter at [55]:

*"The reasoning in Osborn which adverts particularly to the position of the post-tariff lifer, is tantamount to articulating a presumption in favour of a hearing in such cases. Put otherwise, a good reason for not holding a hearing should be present when a refusal is made in the case of a post-tariff lifer, for whom the issues of insight, behaviour and risk (at least) are central to progress, and are almost certainly best examined and understood in the open forum of an oral hearing. The obligation to consider the prisoner's position falls upon the Board, it is not dependent upon the prisoner, and it does, as the court in Osborn recognised, engage Article 5(4)."*

42. In the Applicant's case, an oral hearing was refused on the basis that the charges were of "considerable concern", that the Probation Service were not able to support release and there was no informed risk-assessment or risk management plan.

43. I do not find that these reasons are sufficient in the light of *Somers* to rebut the quasi-presumption of an oral hearing for a post-tariff life sentenced prisoner. The Applicant's behaviour (and the allegations made about his behaviour) and his risk are central to his prospects of re-release.

44. It is, however, unlikely, that any oral hearing panel would attempt to make findings of fact on the civil standard of proof in relation to matters awaiting criminal trial.

This difficulty can be overcome, as the application notes, by careful and pro-active case management.

45. In conclusion, I find that the decision not to direct the Applicant's release to have been procedurally unfair on the basis that any such decision ought properly to have been informed by an oral hearing, held at such time as is appropriate for the effective conclusion of the parole review. The quasi-presumption in favour of an oral hearing where aspects of *Osborn* are engaged (as they self-evidently are in the Applicant's case) as set out in *Somers* has not been rebutted.

46. The application also makes comments about errors in the Parole Board's own guidance. Any such errors are not mine to determine within the scope of the reconsideration mechanism.

## Decision

47. For the reasons set out above, the application for reconsideration is granted on the basis of procedural unfairness.

**Stefan Fafinski**  
**14 March 2024**