GUIDANCE DURING THE CORONAVIRUS:

PROGRESSING CASES AT MCA

the Parole Board
working with others to protect the public

Overview

This guidance has been produced to assist members in progressing cases during the coronavirus pandemic.

Despite the coronavirus pandemic the following principles do not change:

- Protection of the public
- Fairness
- The test for release

However, particularly in light of the coronavirus pandemic, members will be aware of the need to act more flexibly when making decisions in cases allocated to them, particularly when it may not be possible to direct a face to face oral hearing taking place in a prison in the near future.

We are mindful that as well as the principles set out above, we are also under a duty to 'speedily' review the detention of prisoners in cases referred to us. This duty comes from Article 5(4) of the Human Rights Convention.

This guidance is intended to assist members to act flexibly and progress cases during the coronavirus pandemic, bearing in mind all of the principles that apply to these cases.

The Rules

The Parole Board Rules 2019 enable cases to be progressed in a number of ways. They are:

(1) A **panel** at MCA can make different decisions under rule 19. They are:
  (a) A decision to release (or recommend transfer to open conditions in appropriate cases) on the papers.
  (b) A decision to refuse release (or decline to recommend transfer to open conditions in appropriate cases) on the papers. Such a decision may be the subject of a rule 20 request for an oral hearing, which must be evaluated against the principles of fairness detailed below (and not treated as an appeal against the rule 19 decision which requires a judgement of whether that decision was 'correct' or not.)
  (c) A decision to direct a case to an oral hearing.

Further guidance about how members can approach cases at MCA stage, and make decisions on the papers and directions to an oral hearing with *Osborn* in mind, is given below.

However, at this point it may be worth noting that both a decision on the papers and a direction to an oral hearing can take a number of different forms.

- A decision on the papers can be made in appropriate cases, and further guidance is given on this below. It can be made in a concise fashion if the member is able to set out the reasons for decision briefly.
- A direction to an oral hearing can include, as well as a face to face oral hearing taking place at a prison, a hearing taking place over a telephone or video link (referred to below as respectively a 'telephone hearing' and a 'video link hearing'). A panel making such a direction at MCA will want to bear in mind that the starting point for such a direction is a single member panel, and they can add other members (such as specialists) if that is necessary.

A panel at MCA can also be composed of one or more members. In a single member MCA panel, the single member is automatically the panel chair. A member considering the case at the MCA stage has the option to expand the panel to include one or more other members. This might be helpful if a view is required from a specialist member, or the original MCA member thinks that the complexity of a case might benefit from the consideration of another panel member. We anticipate that multi member MCA panels may accordingly support members to conclude the case on the papers at MCA.

A panel at MCA can also seek advice from a mentor, a duty member, a specialist member, or the Legal & Practice queries team if there is any issue they need advice on so that they can progress a case.

If the case progresses to an oral hearing, there are a number of ways in which it can be concluded. Members making such directions at MCA stage may want to bear these in mind.

(2) A **panel chair** or **duty member** can direct that a case which has been directed to an oral hearing at MCA can be decided by a **panel** on the papers under rule 21. There are a number of procedural requirements which have to be fulfilled before this can be done. They are:
  (a) The **panel chair** or **duty member** will need to identify further evidence that has been submitted since MCA.
  (b) The **panel chair** or **duty member** will need to notify the parties of their intention to direct a decision on the papers under rule 21.
  (c) The **parties** will need 14 days to make representations about (i) whether the case should be decided in the papers and (ii) what that decision should be.
  (d) Once those representations are made, the **panel chair** or **duty member** will need to make a decision to decide the papers under rule 21.
  (e) The **panel** will then make a decision on the papers. The panel can be composed of the panel chair or duty member who made the decision at (d) above, appointed as such by the secretariat under rule 5.
  (f) This process cannot normally be used when an oral hearing has been listed within the next 3 weeks. The 3 week rule should only be waived in exceptional circumstances. Members may wish to take advice from Legal & Practice Queries if they are dealing with a case which they think is exceptional or where a hearing has recently been adjourned, deferred, or cancelled.

(3) A **panel** can make a decision on the papers following notification under rule 23(1) and (2)(a) that a prisoner does not want an oral hearing/does not want to attend an oral hearing.

(4) A **panel** can make a decision on the papers following a rule 23(2)(b) compliant hearing at which the representative is present but the prisoner is not.

(5) In extreme cases, a **panel** can make a decision on the papers in the absence of both the prisoner and his representative, using a combination of rules 6 and 23(2)(c). Panels should take advice from Legal & Practice Queries before doing so.

(6) A **panel** can make a decision following an oral hearing under rule 24. That oral hearing can take place:

(a) at a face to face oral hearing held at a prison;
(b) over a video link; or
(c) over a telephone link.

Panels will need to be as flexible as possible to enable them to carry out hearings during the coronavirus pandemic, when a face to face oral hearing may not be possible. We recommend that if a telephone or video link hearing is considered, panel chairs seek the view of the parties beforehand. The parties should ordinarily have been given up to 14 days to respond, but we recognise that a shorter notice period might be appropriate in some circumstances (for example, if a listed hearing slot can be saved by giving a shorter notice period of a telephone or video link hearing.)

(7) A **panel chair** or **duty member**, sitting alone, can also hold a directions hearing under rule 7 to progress a case. A directions hearing requires 14 days notice to the parties (although this timescale can be varied under rule 9 if appropriate). If members wish to vary this timescale then they should do so on notice to the parties so that they can put in any objections before the directions hearing. A directions hearing will enable the panel chair or duty member to review the progress of a case, check compliance with directions, identify material that is needed to progress a case and direct its productions, discuss the attendance of witnesses and direct their attendance at an oral hearing. The parties should be in attendance – the prisoner and his representative, the Secretary of State's officials such as the OM and OS, and potentially a Secretary of State representative – and it might be useful for other witnesses to also attend to talk about directions. However, a directions hearing does not enable the panel chair or duty member to take evidence or make substantive decisions about release or open conditions. If evidence is to be taken this should be done by the panel at a telephone, video link, or face to face oral hearing.

Osborn and oral hearings

The principles set out by the Supreme Court in the case of *Osborn* [2013] UKSC 61 will apply to all of these situations. The Court's summary of those principles is annexed to this guidance for your reference. It should be referenced in your decisions, and you should give reasons why you have or have not directed an oral hearing (and if so, in what form).

However, it is important to remember that *Osborn* does not require an oral hearing to take place in all cases. The key test is whether fairness to the prisoner requires an oral hearing, bearing in mind (1) the facts of the case and (2) the importance of the issue at stake.

To ensure that reviews are as speedy as possible, members (at or after MCA) should continue to only send cases to oral hearings when an oral hearing is required to reach a decision to conclude the review.

For example, *Osborn* does not require a hearing:

- just because the parties have asked for one;
- where evidence can be considered without the need to be tested orally or in person;
- where the prisoner's legitimate interest in taking part can be discharged by written submissions.

Members should also bear in mind that the test set out by *Osborn* is not the likelihood of release, or the need to save time, expense, or trouble. This is different from the Parole Board's a duty to provide a speedy review under Article 5(4). Accordingly, unless an oral hearing is required for fairness, the speediness of the prisoner's review in itself is likely to require a swift conclusion on the papers. That is particularly so when, due to the coronavirus pandemic, it may not be possible to hold an oral hearing (in any given format) in the near to mid future. Of course, if a telephone or video link hearing can be held, that may be a good way to resolve the tension between the requirements of fairness and speedy review. Members may wish to contact case managers to see whether one can be facilitated, where, and when.

Osborn also reminds us that we should not be predisposed to believe the official account given by representatives of the State, but must test all evidence with appropriate scrutiny. The Parole Board is now much more independent than it was when *Osborn* was decided (for example, it is no longer required to follow the Secretary of State's directions when considering release) so we are confident that members will test the evidence without fear or favour.

We suggest that when members are considering whether an oral hearing is required (and what form that oral hearing should take) they ask themselves the following questions:

- Is the decision clear and obvious from the fact before you? For example, there may be no support for release or evidence indicating it is a possibility, or a prisoner may have recently arrived in open conditions (or have just started risk management work) and requires time to adjust (or

complete the work). If so, then it may be appropriate to decide the case on the papers.

- Does the prisoner want an oral hearing? If they do not, then it may be appropriate to decide the case on the papers. But care should be taken here to also consider the other questions, particularly if the prisoner is unrepresented.
- Has a further sentence been imposed which makes it impossible to release the prisoner? If so, then it may be appropriate to decide the case on the papers. There may be exceptional cases where this approach is not appropriate, and if you think that is the case you should set out what they are.
- Is the prisoner approaching his sentence expiry date? If a prisoner is 26 weeks or less from their sentence expiry date, then it may be appropriate to decide the case on the papers, as it is unlikely that an oral hearing can be organised in that time. In such a case a prisoner is unlikely to have his detention reviewed at all, so a paper decision at least gives him the opportunity to have that review. There may be exceptional cases where this approach is not appropriate, and if you think that is the case you should set out what they are.
- Are there ongoing criminal investigations or proceedings that are unlikely to be resolved in the next 8 weeks? If so, then it may be appropriate to decide the case on the papers, as it is unlikely that the criminal investigations or proceedings will be concluded in that time. In such a case waiting for extended adjournments or deferrals will not give the prisoner a speedy review of his detention, and so we should try and conclude their review speedily and on the basis of the information that we do have (as further information is unlikely to be forthcoming soon). The Secretary of State can always make a further referral if necessary when investigations or proceedings have concluded. There may be exceptional cases where this approach is not appropriate, and if you think that is the case you should set out what they are.
- Is there sufficient information before you to make the decision? If not, it may be appropriate to make directions for further evidence or hold a directions hearing, before you make any substantive decisions about the case.
- Does the prisoner fall within one of the following categories:
    - they are a life sentence prisoner approaching first release;
    - they were under the age of 21 at the point of referral;
    - they have mental health issues;
    - they do not have mental capacity to make decisions;
    - they are unrepresented;
    - they are otherwise vulnerable;
    - the case involves TACT issues; or
    - the case is high profile.

  If so then it may not be appropriate to make a decision on the papers, but having considered all of the evidence you may feel that you can do so.
- Are the central facts of the case in dispute? If not, it may be appropriate to decide the case on the papers.
- If facts of the case are in dispute and need to be tested, can this be done in writing? If so, it may be appropriate to require written submissions and then decide the case on the papers.

- If facts of the case are in dispute and need to be tested, does the panel need to see the visual reaction of the prisoner or witness to test those facts? If so, it may be appropriate to consider a video link hearing. If not, it might be appropriate to direct a telephone hearing.
- Is there a psychological risk assessment which needs to be taken into account? If not, then it may be appropriate to decide the case on the papers.
- If there is, then are the opinions in the psychological risk assessment in dispute? If not, it may be appropriate to decide the case on the papers.
- If the opinions in the psychological risk assessment are in dispute and need to be tested, can this be done in writing? If so, it may be appropriate to require written submissions and then decide the case on the papers.
- If the opinions in the psychological risk assessment are in dispute and need to be tested, does the panel need to see the visual reaction of the prisoner or witness to test those opinions? If so, it may be appropriate to consider a video link hearing. If not, it might be appropriate to direct a telephone hearing.
- Has the prisoner offered a significant explanation or mitigation of any facts or matters? This also includes questions about evidence in the dossier which might significantly impact the prisoner's management in prison or future reviews. If not, it may be appropriate to decide the case on the papers.
- Is the significant explanation or mitigation in dispute? If not, it may be appropriate to decide the case on the papers.
- If the significant explanation or mitigation is in dispute and need to be tested, can this be done in writing? If so, it may be appropriate to require written submissions and then decide the case on the papers.
- If the significant explanation or mitigation is in dispute and needs to be tested, does the panel need to see the visual reaction of the prisoner or witness to test those facts? If so, it may be appropriate to consider a video link hearing. If not, it might be appropriate to direct a telephone hearing.
- Does the panel need to hear oral evidence to fairly test the facts, matters, and issues? If not, it may be appropriate to decide the case on the papers.
- If the panel considers that it does need to hear oral evidence, does the panel need to see the visual reaction of the prisoner or witness to properly hear that evidence? If so, it may be appropriate to consider a video link hearing. If not, it might be appropriate to direct a telephone hearing.

These questions should be considered together rather than in isolation. It may be that one factor is sufficient for fairness to require an oral hearing even if others are not present.

Members should be aware that the indications set out above are not blanket policies or inflexible requirements, and members are free to take a different approach to those suggested. However, if they do so, they should record their reasons for doing so in the decision letter.

Panels should also bear in mind:

- in recall cases, that liberty has been deprived;
- in cases where a prisoner is significantly post-tariff, that you will need to apply a higher level of 'anxious scrutiny' to the facts and issues of their case; and
- in cases where release is a realistic prospect, panels will need to make sure they have enough information to properly address the issues.

None of these of themselves require an oral hearing but they will be relevant to your consideration of the questions set out above.

The Parole Board's decision is, of course, not confined to its determination of questions of release and suitability for open conditions, but may include other aspects which will have a significant impact on his/her management in prison or on future reviews, such as comments or advice in relation to the prisoner's treatment needs, outstanding areas of risk or offending behaviour work needed (bearing in mind we are not responsible for sentence planning). That may also be a relevant factor to consider.

Members can also indicate in the decision letter that the case could usefully be re-referred to the Parole Board when any outstanding matters (such as an ongoing course or intervention, or a criminal investigation) have been concluded. That may make it easier for a panel to properly conclude a matter either on the papers or at a telephone or video link hearing.

If, having considered all of these questions, a member is still in doubt whether an oral hearing is required, then Osborn indicates that it would be prudent to direct an oral hearing. If that is the case, members will need to consider whether a telephone or video link hearing would be appropriate. Their decision should explain whether a telephone or video link hearing is needed and explain the reasons why.

Members can still direct a face to face oral hearing if they consider it to be absolutely necessary. However, when doing so, they should bear in mind the likelihood that it may be some considerable time before such a hearing can be arranged, and the consequent delay to the prisoner's case. They should also give their reasons why a face to face oral hearing is necessary when making that direction.

Annex – Supreme Court's summary of the *Osborn* principles

i) In order to comply with common law standards of procedural fairness, the board should hold an oral hearing before determining an application for release, or for a transfer to open conditions, whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake. By doing so the board will also fulfil its duty under section 6(1) of the Human Rights Act 1998 to act compatibly with article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in circumstances where that article is engaged.

ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following:

> a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.
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> b) 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.
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> c) Where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.
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> d) 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.

iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.

iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.

v) 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.

vi) When dealing with cases concerning recalled prisoners, the board should bear in mind that the prisoner has been deprived of his freedom, albeit conditional. When dealing with cases concerning post-tariff indeterminate sentence prisoners, it should scrutinise ever more anxiously whether the level of risk is unacceptable, the longer the time the prisoner has spent in prison following the expiry of his tariff.

vii) 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.

viii) The board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense.

ix) 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.

x) "Paper" decisions made by single member panels of the board are provisional. The right of the prisoner to request an oral hearing is not correctly characterised as a right of appeal. In order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong: what he has to persuade the board is that an oral hearing is appropriate.

xi) In applying this guidance, it will be prudent for the board to allow an oral hearing if it is in doubt whether to do so or not.

xii) The common law duty to act fairly, as it applies 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 in compliance also with the requirements of article 5(4) in relation to procedural fairness.

xiii) A breach of the requirements of procedural fairness under article 5(4) will not normally result in an award of damages under section 8 of the Human Rights Act unless the prisoner has suffered a consequent deprivation of liberty.

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