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[2021] PBRA 167

Application for Reconsideration by Collinge

Application

1. This is an application by Collinge (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 18 October 2021 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have also had access to a video recording of the hearing.

Background

4. The Applicant is serving three separate sentences of imprisonment for public protection all of which were imposed on 2 February 2009 after conviction for robbery (with a minimum term of 52 months), false imprisonment (with a minimum term of 60 months) and sexual assault with intentional touching of a female with no penetration (with a minimum term of 18 months). At the same time, he was also convicted on three counts of exposure for which no separate penalty was imposed, and failing to surrender to custody, for which he received 28 days imprisonment, not served. His tariff expired on 28 July 2013. This is his fourth parole review.

5. The Applicant was aged 42 at the time of sentencing. He is now 55 years old.

Request for Reconsideration

6. The application for reconsideration is undated but was received by the Parole Board on 3 November 2021. It has been submitted by solicitors acting on behalf of the Applicant.

7. The application advances four alternate grounds for reconsideration based on procedural unfairness as follows:

   a) Failure to allocate sufficient time for the hearing;

   b) The panel chair did not afford sufficient time for witnesses to be fully questioned;

   c) The panel chair made prejudicial comments during the hearing; and

d) The panel indicated that it would make its decision before closing submissions had been received.

8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

9. The introduction to the application submits that the decision was irrational and procedurally unfair. However, nothing else in the application appears to be founded on irrationality and so I will deal with the points raised based on procedural unfairness alone.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in July 2020 to consider whether or not it would be appropriate to direct his release.

11. The case was directed to oral hearing by a Member Case Assessment (MCA) panel on 2 December 2020. Various updated reports were directed. Panel logistics were set for a three-member panel (with no specialist member) and a time allocation of three and a half hours. The case was considered to be suitable to be held via video link. The Applicant was in open prison conditions at the time.

12. Panel Chair Directions (PCDs) were issued on 15 April 2021, directing that the case should proceed to oral hearing on 17 May 2021. No further directions were set, and no changes were made to the panel logistics. By this time, the Applicant had been returned to closed prison conditions as there were concerns regarding inappropriate behaviour towards female staff.

13. The case was adjourned on 7 May 2021 at the request of the Applicant's legal representative for the completion of an independent psychological report. Further PCDs were issued, adding the independent psychologist author to the timetable. Panel logistics were set for a three-member panel (including a psychologist and a psychiatrist specialist member, who by that time had already been allocated to the panel). The time allocation was reduced to three hours.

14. A timetable for the hearing was issued on 2 July 2021. This listed four witnesses, including the independent psychologist, the Applicant, and a four-member panel. The panel member's designations were stated as 'Chair', 'Psychiatrist Panel Member', 'Psychologist Panel Member' and 'Panel Member'. The timetable was silent as to the allotted time and the fact that the panel had a second hearing that day.

15. The oral hearing took place on 14 October 2021. The Applicant's case was listed for a 10:00 start. The panel were also listed to hear a second case that day which was listed for a 14:00 start. The hearing took place via video link due to COVID-19 restrictions. The panel consisted of four members, including both psychologist and psychiatrist specialist members. Oral evidence was taken from the Applicant's Community Offender Manager (COM) and Prison Offender Managers (POMs) from his current and previous establishments (as listed in the MCA directions of 2 December 2020) and an independent psychologist. The Applicant was legally represented throughout. His COM did not support release, but the independent psychologist did.

Closing submissions were made in writing after the hearing on the Applicant's behalf inviting the panel to direct his release. The panel did not direct release but recommended a return to open conditions.

16. Given the detail of some of the procedural matters raised in the Application, I have made enquiries concerning the precise chronology of events after the hearing. While this is unusual (and generally unnecessary) it is essential in the circumstances of this case.

17. The key events are as follows:

a) 14 October 2021, 14:02: Oral hearing proceedings concluded;
b) 14 October 2021, 17:39: Written legal representations email received;
c) 15 October 2021, 10:40: Legal representations sent to panel members;
d) 18 October 2021, 17:22: Decision sent to case manager by panel chair; and
e) 19 October 2021, 16:13: Decision issued to all parties.

The Relevant Law

18. The panel correctly sets out the test for release in its decision letter dated 10 June 2021.

Parole Board Rules 2019

19. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

20. 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

21. 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.

22. 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.

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

Other

24. The matter of time allocation and timekeeping in a parole hearing was considered in **R (Grinham) v Parole Board [2020] EWHC 2140** (and applied in **Wright [2020] PBRA 151**).

25. Mr Grinham was a recalled determinate sentence prisoner and therefore the decision of the panel not to re-release him did not fall within the reconsideration mechanism afforded by rule 28. The challenge to the Parole Board's decision not to re-release him therefore had to be made directly to the High Court.

26. In short, Mr Grinham was recalled to custody. He was then diagnosed with cancer. He was granted an expedited oral hearing at which his re-release was not directed. His case was that insufficient time had been allowed for the hearing. The (single member) panel chair made it clear there was an immoveable time constraint and that they had only agreed to chair the expedited case on the express basis that the hearing would need to be completed by a certain time. It did not appear that the panel chair had another hearing to complete that day. A late report was only served on the day of the hearing and Mr Grinham's solicitor needed time to consider it and take instructions. Other pertinent information was not available at the hearing. The hearing was concluded without oral submissions on Mr Grinham's behalf so that the missing information could be supplied. Closing submissions were made in writing. The High Court found the panel's decision to be unfair, quashed it, and directed a further expedited oral hearing.

27. In doing so, Spencer J considered various matters in the round which led him to conclude that there was procedural unfairness. The ones most pertinent to the present case are:

    1. A failure to comply with directions which led to the late disclosure of a report and missing documentary evidence on the day of the hearing, which gave Mr Grinham's solicitor inadequate time to consider the evidence properly and take his instructions upon it (para. 64);

    2. Insufficient time being available for the hearing to be conducted in an unhurried and seemly manner (para. 65);

    3. Mr Grinham's solicitor was unable to cross-examine witnesses fully for lack of time (para. 66); and

    4. The fact that Mr Grinham was visibly upset when told about the time pressure and said he said it was unfair he would be rushed (para. 66).

The reply on behalf of the Secretary of State

28. The Secretary of State has submitted no representations in response to this application.

Discussion

Ground (a): Failure to allocate sufficient time for the hearing

29. It is first submitted that inadequate time was allowed for the hearing, and this amounted to procedural unfairness. In doing so, reliance is placed on **Grinham**.

30. When the case was first directed to oral hearing, the MCA panel envisaged three witnesses before a three-member panel with an allocation of three and a half hours. By the time of the oral hearing, this had grown to four witnesses before a four-member panel with a three-hour time allocation.

31. It is very unusual for a hearing to take place before a four-member panel. It appears that one of the specialists was a new member of the Parole Board attending the hearing as a 'supported co-panellist' as part of their initial professional development. It is expected that members who attend hearings as a supported co-panellist will take part in asking questions and deliberations regarding the decision. This distinguishes them from 'observers' who, as the title suggests, are members of the Parole Board who observe proceedings but take no part in the hearing, or the decision-making process.

32. This was known to the panel chair prior to the hearing. I note that the adjournment PCDs of 7 May 2021 recorded that the hearing required a three-member panel. Unfortunately, the template used for PCDs does not permit a four-member panel to be shown (such is its rarity). While it would have been helpful for clarity at this stage to have noted the presence of a fourth member in the narrative, this omission is not in itself a matter of procedural unfairness.

33. It is submitted that it was not clear if one panel member was an observer, or all four members would be questioning the Applicant. I disagree. Observers on panels are clearly designated as such, so I find the composition – albeit unusual – was known to the Applicant and his legal representative when the timetable was issued on 2 July 2021.

34. It is submitted that more time should have been allocated to the hearing.

35. I have consulted Annex F of the Parole Board Oral Hearing Guide: 'Guidance on setting directions for oral hearings'. This covers, amongst other matters, best practice on time estimates. While it is rightly acknowledged that an MCA panel will have estimated the time allowance when sending the case to oral hearing, good practice dictates that panel chairs should review the allocation in the light of any changed circumstances as a case may take significantly longer (or shorter) than anticipated at MCA. Guidance also suggests that each witness should be allowed between 10 and 60 minutes depending on the nature of their likely contribution and that a psychologist's evidence will likely require more time than, say, a Personal Officer's character reference.

36. Rather than getting into specific detail, I have taken a very rough broad-brush approach to this issue as follows:

a) MCA: three panellists questioning three witnesses plus the Applicant in 3.5 hours amounts to 12 interactions averaging 17.5 minutes each; and

b) Hearing: four panellists questioning four witnesses plus Applicant in 3 hours amounts to 20 interactions averaging 9 minutes each.

37. While this simple arithmetic approach is clearly basic and limited, it at least illustrates that the panel chair should have considered increasing the time for this hearing. Of course, it may have been that the panel chair did consider this much more carefully and meticulously than I have done, being in full possession of all the nuances of the case, and decided that the MCA panel's estimate was excessive and that three hours was appropriate. The panel chair also extended the hearing by half an hour during proceedings, pushing the afternoon case back to a 14:30 start and thereby re-establishing the original 3.5-hour allocation.

38. While I agree that the hearing was set up to be tight for time from the outset, this of itself can only amount to procedural unfairness if the limitation gave rise to circumstances or consequences that resulted in an unfair hearing: matters which are raised in the next ground for reconsideration. Therefore, the first ground (which is only concerned with the setup of the hearing itself) fails.

Ground (b): The panel chair did not afford sufficient time for witnesses to be fully questioned

39. The second ground moves on to discuss the impact of the allotted time on the hearing.

40. It first submits that it became clear that during the legal representative's questioning of the first witness that the panel chair was concerned with the time allotted to the hearing. Moreover, it submits that as soon as the legal representative finished asking questions of the witness, the panel chair stated that "*if lots of questions were to be asked of all witnesses then the matter would have to be deferred as it would not be completed by the start of the next hearing*". It also submits that the panel chair made it clear that he would not let the second hearing be impacted if this one overran.

41. I have watched the video of the hearing carefully. When the legal representative finished asking questions of the first witness, the panel chair, in fact, simply moved on to the next witness. There is no evidence to support the assertions made in this part of the Application. The statement attributed to the panel chair was not made then, nor at any point during the hearing. Of course, I have the benefit of the video recording, which was not available to the Applicant's legal representative, but the application paints a very different picture to what I saw take place.

42. It is also submitted that the panel chair made it clear that he would not allow the second hearing to be impacted if this hearing overran and it would need to be deferred.

43. The first time the matter of timing was raised by the panel chair was after the second witness had given evidence. The panel chair noted that more than half the allotted

time had passed. He said, "*the last thing I want, on [the Applicant]'s behalf is to find we have to adjourn"* and reminded everyone that they would need to be 'focussed' in their questioning from the point of view that the panel could conclude the hearing without having to adjourn. This set a positive and pragmatic tone and illustrated the panel's desire to conclude effectively if possible; it certainly did not amount to procedural unfairness.

44. The Applicant's legal representative says this was the first occasion on which she realised the case was not listed for a full day. This may be true, there being nothing on the timetable to indicate otherwise. It is submitted that this put her in a position in which she was not able to question witnesses fully, to put the Applicant's case properly, or fully test evidence. Of the four points discussed in **Grinham**, there are only two which are relevant here, namely:

    a) insufficient time being available for the hearing to be conducted in an unhurried and seemly manner; and/or

    b) the Applicant's legal representative was unable to cross-examine witnesses fully for lack of time.

    Since there is nothing to suggest there was any failure of compliance with directions, late disclosure or that the Applicant was distressed by the time constraint.

45. Dealing with the first point, I have watched the video of the hearing in its entirety and found no evidence to suggest the hearing was conducted in a hurried or unseemly manner. I did not see anything that created an impression of unnecessary haste. All questions were asked in a calm and measured fashion. No witness was prompted on time, asked to hurry, or curtail their answers unnecessarily.

46. Moving on to the second point concerning cross-examination, the Applicant's legal representative questioned the first witness for 13 minutes and the second witness for 12 minutes. Both these periods of questioning took place prior to any discussion about time constraints, so it is impossible for me to conclude that the Applicant's legal representative felt under any time pressure or was unable to ask all she wanted because she did not know that time was an issue at that stage.

47. The Applicant's legal representative had no questions for the Applicant (who had, by this stage been questioned for 45 minutes by the panel). She questioned the independent psychologist for six minutes and the final witness for 14 minutes. She was not interrupted or hurried through either period of questioning. I do not find any evidence to suggest the Applicant's legal representative was unable to cross-examine witnesses fully for lack of time. Although she was, by this stage, aware of the need for timeliness, I saw nothing to suggest she felt hurried in questioning and no representations regarding this were made at the time or in the closing written submissions.

48. It is also submitted that panel members and the Applicant's legal representative were prevented from asking questions of witnesses by the panel chair "*on a number of occasions*".

49. In fact, the panel chair interrupted questioning on only two occasions. On the first, he reminded a co-panellist that they should not stray into sentence planning. This was an entirely appropriate intervention which ensured the panel's questioning remained focussed on risk. On the second, he interrupted the Applicant's legal representative, whose line of questioning appeared to be unnecessarily speculative. Again, this was an appropriate intervention to ensure focus on risk. Both interruptions were made to maximise the use of the limited time available to ensure the panel had the best chance of concluding the hearing on the day. I do not find that the panel chair prevented a full exploration of the relevant evidence. There is nothing to suggest that either intervention was to curtail discussion rather than ensuring an appropriate and effective focus.

50. Therefore, applying **Grinham** (as I am bound to do), I do not find any consequential procedural unfairness arising from the allocated time.

51. Finally, it is submitted that closing written submissions were necessary as time was short at the end of the hearing and these were not as effective as oral submissions. Reliance is placed on a passage from the Court of Appeal judgment in **Osborn and Booth v Parole Board [2010] EWCA Civ 1409** in which (at para. 37) Carnwarth LJ quotes American authority (**Goldberg v Kelly 397 US 254, 269 (1970)**) as follows:

> *"… written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision-maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision …"*

52. First, **Osborn and Booth v Parole Board [2010] EWCA Civ 1409** was successfully appealed in **Osborn and Booth v Parole Board [2013] UKSC 61** and is therefore no longer good law; at best it remains persuasive, as does the American authority. **Goldberg v Kelly** held that procedural due process requires a full hearing before welfare benefits were terminated, since the individual interest in these benefits greatly exceeds the interest of the government in efficient adjudication, just as **Osborn and Booth** concerned the requirement of a full oral hearing in matters of parole. Both **Goldberg** and **Osborn** then were predominantly concerned with potential unfairness from proceedings held entirely on paper and can therefore be distinguished from the current case in which oral evidence was heard by the panel, but not the closing submissions. I accept that (as Carnwarth LJ stated) written submissions do not afford the flexibility of oral presentations. However, they are much more likely to do so, and to be effective, if they are compiled following a full hearing of oral evidence rather than simply 'on the papers'.

53. Indeed, Carnwarth LJ went on to say (at para. 38):

> *"… the emphasis is on the utility of the oral procedure in assisting in the resolution of the issues before the decision-maker"*

54. While I accept it may not have been ideal for the Applicant's legal representative to make written submissions, I see they comprise nine pages and set out, with some

clarity, a summary of the evidence and the Applicant's case for release. I do not consider that oral closing submissions would have assisted the panel much further in its decision making. The panel did give the Applicant an opportunity to address the panel directly at the end of the hearing. I do not find that the written closing submissions disadvantaged the Applicant sufficiently to render the decision procedurally unfair.

55. This ground therefore fails.

Ground (c): The panel chair made prejudicial comments during the hearing

56. The next ground submits that the panel chair made comments during the hearing that were prejudicial and based on media reporting of another case. This raises questions concerning the panel's impartiality which could therefore amount to procedural unfairness.

57. The comments arose during the panel chair's questioning of the independent psychologist. When asked about the Applicant's propensity to reoffend, she said that if he were to reoffend, it would likely be a non-contact exposure offence and the risk of serious harm to the public would be low.

58. The following exchange took place:

Panel chair: "*I don't understand why you think an offence of indecent exposure could not have a high risk of serious harm*."

Independent psychologist: "*Because he's not putting hands on.*"

Panel chair: "*Yes, but if he engages in that kind of behaviour towards a woman could it not escalate? There was a very well-publicised case recently where a murderer who abducted and raped a woman had only committed previous indecent exposures; they are a precursor to serious offences. I don't understand.*"

Independent psychologist*: "Not necessarily; but I think that I would say in this case that he gets much more gratification, much more satisfaction and benefit, from his indecent exposures than he has for assault. So he has escalated on two occasions, as you say, to assault. Neither one has brought him the pleasure, the gratification that the indecent exposures do."*

59. Following this line of questioning the Applicant's legal representative asked the independent psychologist to clarify the distinction between physical and psychological harm. She said that non-contact offences would cause no physical harm but could cause moderate psychological harm. If the Applicant moved on to contact offences in which violence was used to secure compliance, then the chance of deliberate or non-deliberate physical harm increases. The independent psychologist reaffirmed her view that the Applicant met the statutory test for release.

60. The Applicant's legal representative did not invite the independent psychologist to offer a view on the panel chair's statement that exposure offences are a precursor

to offences causing serious offences at the time, or in the written closing submissions.

61. The application relies on **R v Ealing Magistrates Court, ex p Fanneran (1996) JP 409** (quoted in **Grinham** at para. 53) which reminded any decision-making body that a comment could still be prejudicial even if its decision would inevitably have been the same without that prejudicial comment having been made.

62. This is a matter of natural justice. Paraphrasing **De Smith's Judicial Review, 8th ed, 8-070**, public confidence in the fairness of a hearing may be undermined if a reasonable observer regarded that hearing to be inadequate. Procedural unfairness is not solely founded in a breach of procedural rules. Therefore, the question becomes whether a reasonable observer would consider that the panel chair's comments undermined the fairness of proceedings.

63. There is a strong argument that the panel chair's comment (taken as a whole) was simply an unwise and clumsy means of challenging the evidence of the independent psychologist and, as such would not have been procedurally unfair.

64. Yet the fact remains that it was said that offences of exposure are (not 'could be') a precursor to serious offences: a comment that was made by comparison to media reports of an extreme case in which sexual murder took place after previous allegations of indecent exposure.

65. As the panel chair said that exposure offences lead to more serious offences using an example in which the escalation involved abduction, rape and murder, the reasonable observer may well conclude that the panel chair believed the Applicant's risk of serious harm was far higher than his previous offending behaviour or the expert evidence might suggest. The same reasonable observer might think that the panel chair closed his mind to all the evidence in favour of his own belief about the link between exposure and escalation to potentially fatal levels of sexual violence.

66. This is a situation in which the proposition put forward in **ex p Fanneran** must be applied: even if the comments made no difference to the decision, and the panel chair did not mean to convey anything more malign than a robust challenge to the evidence of the only witness supporting release, the impression left to the reasonable observer was one in which it appeared that a potentially damaging assumption could have undermined the panel's assessment of risk. As such, this is contrary to the ordinary principles of natural justice and the application for reconsideration must be granted.

Ground (d): The panel indicated that it would make its decision before closing submissions had been received

67. Having made a finding of procedural unfairness, I do not have to consider the final ground in depth, suffice it to say that the panel became *functus officio* (following **Dickins v Parole Board [2021] EWHC 1166 (Admin)** at the point it agreed the final written decision (18 October 2021, 17:22) which was after closing written representations had been received and forwarded to the panel (15 October 2021, 10:40). While the panel chair indicated the panel would discuss the case and make a decision after the hearing, I do not find that this implied any such decision would

be made while ignoring any legal representations. It is not unreasonable to imply 'provisional' into the panel chair's words in closing.

Decision

68. Applying the tests as defined in case law, I find the decision not to release the Applicant to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Stefan Fafinski
29 November 2021