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[2023] PBRA 133

Application for Reconsideration by Ratcliffe

Application

1. This is an application by Ratcliffe (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 13 June 2023 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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the decision, the dossier, and the application for reconsideration. I have had access to the audio recording of the hearings on 6 December 2022 and 23 May 2023. I have also sought written clarification on various matters from the Applicant's legal representative via the Parole Board Case Manager.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) on 23 April 2010 following conviction for wounding with intent to cause grievous bodily harm. The tariff was set at 39 months (less time spent on remand) and expired in October 2012.

5. The Applicant was 23 years old at the time of sentencing and is now 36 years old. This is his sixth parole review.

Request for Reconsideration

6. The application for reconsideration is dated 3 July 2023 and has been drafted by solicitors acting for the Applicant.

7. It argues that the decision was procedurally unfair. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding irrationality or error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in January 2021 to consider whether or not it would be appropriate to direct his release.

9. On 27 July 2021 (after having been previously adjourned for various reports) the case was directed to oral hearing by a single-member Member Case Assessment (**MCA**) panel. Further updated reports were directed. At that time the MCA panel noted:

> *"[The Applicant] is reported to have some learning needs that can impact on verbal comprehension. To ensure he is able to participate effectively in his hearing it is considered that a face-to-face hearing is required for him, though professionals can attend via video-link."*

10. On 24 November 2021, Panel Chair Directions (**PCDs**) were issued. These noted that the case appeared to be ready for hearing. They also noted that:

> *"The need for a face-to-face hearing with [the Applicant] and video-link provision for other witnesses, as detailed in the MCA Directions, will be reconsidered nearer to the hearing."*

11. The hearing was listed for a face-to-face hearing to be held on 4 January 2022.

12. On 21 December 2021, further PCDs were issued. These called a Directions Hearing to consider various matters including, amongst other things, the "*appropriateness of Face to Face hearing"*.

13. A Directions Hearing was held on 4 January 2022 via video-link. The Applicant and his legal representative were present. The substantive oral hearing was adjourned to the first available date after the beginning of May 2022 to allow an updated psychological risk assessment (**PRA**) to be prepared. The Applicant's legal representative "*confirmed that [the Applicant] would find a video remote hearing acceptable"*.

14. The hearing was listed for a remote hearing to be held on 20 June 2022.

15. This hearing was adjourned as the Applicant's Community Offender Manager **(COM)** was reportedly unwell on the day and unable to attend. No suitable cover was available at short notice.

16. A hearing was re-listed for a remote hearing to be held on 6 December 2022.

17. The hearing on 6 December 2022 took place before a three-member panel, including a judicial member. The Applicant was legally represented throughout the hearing. Oral evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his COM and the HMPPS psychologist author of the previously directed PRA.

18. New evidence had been received on the morning of the hearing. This included information relating to the Applicant having been placed on report following an

intelligence-led search of his cell in which it was alleged that an improvised weapon and a bottle of unknown liquid had been found. Adjudication proceedings had been deferred pending the outcome of the parole hearing. Matters were also raised in the prison psychologist's oral evidence relating to progress issues in a former open establishment and certain case note entries which had not been seen by the panel nor the Applicant or his legal representative. The panel concluded that the newly raised matters had the potential to affect its assessment of the Applicant's risk and were relevant to the making of its decision.

19. The case was adjourned again, and written evidence relating to the new matters was directed. The panel noted that it was hoped that, following disclosure of the documentary evidence, the Applicant's legal representative would be able to make written submissions and the review could be concluded on the papers without the need for further oral evidence. However, the panel also recognised that it may be necessary to reconvene for further oral evidence to be taken.

20. Written submissions dated 9 February 2023 on behalf of the Applicant noted that not all the directed reports had been disclosed (despite the directed deadline of 20 December 2022 having long since passed). The submissions sought conclusion on the papers with a direction for release.

21. Further PCDs dated 3 March 2023 directed a reconvened oral hearing.

22. The case proceeded to a reconvened oral hearing on 23 May 2023 at which further evidence was heard from the Applicant, his new POM, his new COM and the HMPPS psychologist. The hearing was further adjourned for clarification on the wording of a proposed additional licence condition sought in the event of a release direction. Closing submissions (dated 5 June 2023) seeking release were subsequently provided on behalf of the Applicant.

23. The panel did not direct the Applicant's release.

The Relevant Law

24. 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. The decision in this case did not use the current Parole Board template, but it does state the test correctly in its **Introduction** section. Although not raised in the application for reconsideration, the failure to use to correct template does not, of itself, make the decision procedurally unfair. The substance of the decision remains the same, even if the form is somewhat historic.

Parole Board Rules 2019 (as amended)

25. 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)).

26. 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)).

27. 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

28. 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.

29. 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.

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

Official record of proceedings

31. The published Member Guidance '*Digital Recording of Proceedings'* (version 1.4, May 2023) is clear that, although the Parole Board is required to ensure that a proper record is made of formal proceedings (following **R (McIntyre) v Parole Board [2013] EWHC 1969 (Admin)**), digital recordings enable the Board to have an official record of proceedings, in a way that is easier than asking panel chairs to keep a full handwritten record of the proceedings. Where there is a digital recording, it will stand as the official note of record. Handwritten notes do not need to be taken in addition to recording. Guidance suggests it is advisable for panel chairs to make at least some very brief notes of the evidence as a contingency to technology failing, or the recording not being

reactivated following a pause. Therefore, in a hearing where there is a full digital audio recording (as is the case in both hearings in this particular case) there is no requirement for a panel chair to take a full note of oral evidence. Of course, it is open to panel chairs to take a full note if they wish, but they do not have to do so.

32. As a general principle of fairness, it seems to me that if a panel chair chooses to take full written notes in addition to an audio recording, then their notetaking must be done in a way that does not adversely impact upon the ability of any witness to give their oral evidence to the extent that their natural response to questions becomes unfairly hindered.

The reply on behalf of the Secretary of State (the Respondent)

33. The Respondent has offered no representations in response to this application.

Discussion

34. The sole ground on which the application for reconsideration is based is that the Applicant was prevented from putting his case properly and, in consequence, was not given a fair hearing.

35. It is said that:

> *"[The Applicant] feels that the quality of his evidence and his understanding of the proceedings were significantly hampered by the constant interruptions from the Panel Chair. He believes consistently being stopped when he was mid-way through giving his evidence disadvantaged him and he would lose track of what he was saying to the point he was unable to give his best evidence. He kept losing his flow and concentration and got very lost in the process. He found it very difficult to follow the proceedings and due to the way in which the hearings were conducted, he was losing his trail of thought…He also feels that he was being pushed to answer questions despite indicating over again and stating that he wasn't able to proffer an explanation."*

36. It is also argued that it is clear from the dossier that the Applicant requires additional support with communication.

37. Having reviewed the dossier, I note the following:

(a) An adult intelligence assessment (dated 27 January 2017) rates the Applicant's general intelligence and processing speed as borderline, and his verbal comprehension, perceptual reasoning and working memory as low average. The report notes that *"[The Applicant's] processing speed was the least developed of the four abilities and is the area where he will require the most support. This means that he may need extra time to complete tasks and answer questions."*

(b) A note from the Applicant's then COM of 26 May 2021 noted that "*[a] face to face hearing is likely to be the easiest scenario for [the Applicant] to engage fully and understand an oral hearing".*

(c) The original MCA directions of 27 July 2021 acknowledged the Applicant's difficulties and consequently directed a face-to-face hearing.

38. I agree that it is clear from the dossier that the Applicant requires additional support with communication.

39. I also note that, at the Directions Hearing on 4 January 2022, the Applicant's legal representative "*confirmed that [the Applicant] would find a video remote hearing acceptable*". It therefore appears that the Applicant's need for support was not so great that his legal representative insisted on the face-to-face hearing that had been directed at MCA.

40. However, the fact that the Applicant agreed to a video remote hearing does not relieve the panel of its duty to ensure that he is able to present his case properly, particularly when it has been put on notice that the Applicant has confirmed and significant verbal processing challenges. Indeed, it could be argued that the panel would need to take additional care to ensure the Applicant was able to participate fully in the more artificial environment of a video hearing.

41. The Applicant was legally represented in both hearings. In cases where a prisoner has the benefit of legal representation, it would ordinarily be expected that any perceived deficiencies with the conduct of the hearing would be raised at the time, rather than via the reconsideration mechanism after the event.

42. However, in this case, it is submitted that the Applicant's legal representative and "*another professional witness"* raised difficulties with the panel chair interrupting witnesses in an attempt to make a verbatim note of evidence despite proceedings being recorded.

43. It was impossible for me to determine whether the Applicant was, in fact, unfairly prevented from putting his case properly without listening to the audio recording of the hearings. I have therefore listened carefully to the full audio recordings of both hearings and make the following observations.

44. In relation to the first hearing:

(a) The panel chair regularly and frequently interrupted all witnesses (including the Applicant) to ask them to slow down and/or clarify or repeat what they had just said, regardless of who was leading the questioning. Throughout the first hearing, there were around 60 such interruptions in total.

(b) On one occasion, the POM said, "*I'm sorry, I've lost my train of thought"* and later, "*Sorry, I keep getting interrupted"*.

(c) The Applicant's legal representative commented, while questioning the POM, "*It is very distracting midway through to be disrupted".*

(d) The Applicant was interrupted 26 times during his evidence (which lasted around 48 minutes in total).
(e) Other than the comment made during her questioning of the POM, the Applicant's legal representative raised no other objections to the conduct of the hearing and did not express anything that would have indicated concerns for the Applicant's ability to give evidence.

45. In relation to the second hearing:

(a) Again, the panel chair regularly and frequently interrupted all witnesses (including the Applicant) to ask them to slow down and/or clarify or repeat what they had just said.
(b) At one point (following the third interruption in four minutes) the POM said "*It's very difficult to speak slowly when you're trying to recount information…"*
(c) The panel chair said, "*That may be so, but I am required to make accurate notes"*.
(d) The Applicant was interrupted 14 times during the course of giving his evidence (which lasted around 40 minutes in total).
(e) There were several points during the hearing at which the giving of oral evidence slowed to dictation pace.
(f) The panel chair spoke over the Applicant.
(g) There was a point at which the panel chair asked the Applicant to answer a question about how long a certain event might have taken. The Applicant replied, "*You're asking me to guess, when I don't know".* The panel chair encouraged the Applicant to make a guess. The Applicant said, "*I can have a guess if you want me to have a guess…but it won't be the truth – about a minute?".* The panel chair said, "*So you say it was a very short time"* to which the Applicant responded, "*That's what I guess, yeah".*
(h) At the end of the hearing, the Applicant's legal representative said she would "*benefit from a chat with [her] client after the hearing"* before making closing submissions in writing. The panel chair told that Applicant that "*If [your legal representative] has concerns, or you have concerns when you're chatting afterwards, then she can incorporate them in her submissions"*.
(i) When the Applicant's legal representative was asked at the end of the hearing if she had anything to add before the hearing was closed, she replied, "*no".*

46. Closing written submissions dated 5 June 2023 make no reference to the conduct of the second hearing. The Applicant's legal representative did not raise any concerns about the conduct of the hearing while it was taking place. Therefore, I accept that a professional witness raised a difficulty at the time, but I find no evidence to support the assertion within the application that the legal representative also raised difficulties, whether during the hearing, or afterwards in writing, despite having sought (and availed herself of) the opportunity to speak to the Applicant immediately after the hearing.

47. As I have already said, cases in which a party to proceedings has been represented by a lawyer are highly unlikely to succeed in an application for reconsideration if there had been no challenge made to the alleged irregularity. On the face of it, that is the situation in this case. The Applicant's legal representative did not quibble with the way in which the hearing took place at the time and did not do so afterwards. As a general principle, it is not open to a party to cry foul after missing an opportunity to object at the time of an alleged irregularity.

48. The Applicant's legal representative has subsequently pointed out that the Applicant was not able to provide his feedback on the draft submissions following the second hearing prior to their submission. She then went on leave. While she was away, the Applicant contacted a colleague and explained the difficulties he had experienced in the hearing. By the time his legal representative had returned from leave, the decision had already been issued.

49. Putting the issue of whether submissions should have been made without the Applicant's input to one side, this account, which I accept, does at least show that the Applicant raised his concerns prior to the decision being made and explains why these concerns were not reflected in the closing written submissions.

50. That said, it does not account for a failure to challenge the alleged unfairness in either hearing. The Applicant's legal representative would have known of his learning and processing difficulties. She indicated that she had worked with the Applicant for some time. She heard the way in which he was questioned. If she considered that proceedings were manifestly unfair, she should have intervened at the time.

51. I have carefully considered whether to dismiss the application. First, there is no evidence to support the statement in the application that the Applicant's legal representative raised difficulties at either hearing (save for her comment when questioning a witness at the first hearing). Second, that the Applicant's legal representative did not, in fact, raise difficulties either at the time or afterwards that suggested any concern relating to the Applicant's ability to give his best evidence.

52. Having listened to both hearings, I am astonished that the Applicant's legal representative did not intervene promptly, forcefully, and repeatedly in the face of a disproportionate level of interruption.

53. Having not raised an issue at the time of either hearing, the Applicant's legal representative had another opportunity to object in closing submissions. However, I note that the Applicant has difficulties with general intelligence, processing speed, verbal comprehension, perceptual reasoning and working memory. It may well be that he did not feel as though he had been disadvantaged at the time of the hearing, or immediately afterwards when he spoke to his legal representative prior to written submissions being made. This could account for his feelings of having been unfairly treated taking some time to

develop, and, unfortunately for him, not raised in time to be reflected in written submissions.

54. During the second hearing, the panel chair told the Applicant that it was important for him to tell his story in his own words and then never let him do so. Constant interruptions led to fragmented evidence from all witnesses, but particularly from the Applicant. As a general principle, it is virtually impossible to assess the veracity of any oral evidence if the witness is not allowed to speak freely and naturally.

55. Notwithstanding the silence of the Applicant's legal representative (which would ordinarily be sufficient for the application to be dismissed), I find, in the particular circumstances of this case and bearing in mind the Applicant's cognitive deficiencies, that the constant interruptions were such that witnesses (and particularly the Applicant) were unfairly precluded from giving their oral evidence in a way that allowed reasoned and sustainable conclusions to be drawn from that evidence. Moreover, I find that the Applicant would have struggled to follow the oral evidence given by others about him. I find that the Applicant was prevented from putting his case properly and therefore was not given a fair hearing. The extent of this unfairness is sufficient, in my opinion, to override the legal representative's failure to intervene at the time. I have already made it clear that I consider she should have done so.

56. I am certain that the panel chair's intentions in ensuring he had a full comprehensive written note of evidence in addition to the audio recording demonstrates a desire for fairness, even though such a note is not mandated nor necessary when the audio recording system is operational as it was here. I am also certain that the panel chair did not intend to disadvantage the Applicant and was motivated by the sound principles of fairness and thoroughness. He went to some lengths to explain to the Applicant that he must be given a fair hearing. The panel chair will most likely be mortified by the outcome of this application, and that is a matter of some regret. But having carefully considered all the evidence, and considered the effect on the Applicant of the manner in which the hearing was conducted, I cannot fail to make a finding of procedural unfairness on the evidence before me.

Decision

57. For the reasons set out above, the panel's decision was procedurally unfair and the application for reconsideration is granted.

Stefan Fafinski
21 July 2023