

[2020] PBRA 114

Application for Reconsideration by Galley

Application

1. This is an application by Galley (the Applicant) for reconsideration of a decision of an Oral Hearing Panel of the Parole Board (OHP) dated the 14 July 2020 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. This is an eligible case.
3. I have considered the application on the papers. These are the decision letter, the dossier and written submissions prepared by solicitors representing the Applicant. The Secretary of State makes no representations in response to this application.

Background

4. The Applicant is now 54 years of age. He was aged 42 when he committed a sexual assault on an elderly female. He was convicted following a trial and was sentenced in February 2008 to an Indeterminate Sentence of Imprisonment for Public Protection and given a tariff of ten months and four days. That tariff expired in December 2008.
5. The Applicant has previous convictions for sexual offences against children, wounding and arson. The hearing before the OHP was the sixth review of his sentence.
6. Originally, the OHP was due to consider this case at an oral hearing on 27 May 2020. That hearing was adjourned to 10 July 2020 to enable further information to be provided to the panel. On that day the same professional witnesses including a Prison Psychologist were in attendance as they were on the first occasion. The Applicant was represented by his solicitor. Due to the advent of the COVID 19 outbreak, Her Majesty's prisons were not permitting oral hearings to take place within prison establishments. As an alternative it was agreed that the hearing should take place by teleconference.

Request for Reconsideration

7. The application for reconsideration is dated 30 July 2020. It is submitted that the proceedings were procedurally unfair because of the following grounds:

- (i) A power cut at the prison during the hearing meant that the Applicant did not hear the majority of the Psychologist's evidence.
- (ii) The Applicant now wishes to place new information relevant to risk before the Parole Board that was not available to him at the time of the hearing.

The Relevant Law

Parole Board Rules 2019

- 8. 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)).
- 9. 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 a previous reconsideration application in the case of **Barclay [2019] PBRA 6**.

Procedural unfairness

- 10. 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.
- 11. 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.
- 12. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Discussion

- 13. The first ground on which a reconsideration is sought is that a technical difficulty that arose during the hearing resulted in a significant breakdown in communication between the Applicant and the hearing leading to an unfair result. Clearly, if this had been the case and a prisoner was as a result prevented from effectively participating in the proceedings then that would almost certainly amount to procedural unfairness.
- 14. It is submitted that it was not apparent at the time that the Applicant had missed what was described as "*the majority of the psychologist's evidence*". It is further



submitted that the Applicant *"did not have the capacity to interject once his connection had been resumed"*.

15. Since the termination of face to face oral hearings in prisons as a result of the Covid-19 outbreak, I understand that over fourteen hundred telephone hearings have been conducted remotely nationwide. This and other measures have enabled what would otherwise have been unacceptable delays in prisoner's hearings to be avoided. Inevitably difficulties will occur during a hearing conducted remotely. All participants are alive to this and each will play their part in overcoming them appropriately. For example, the panel chair at every hearing is able to monitor whether any participant has even momentarily lost their connection.
16. One of the advantages of the routine recording of oral hearings is that any complaint can be thoroughly investigated. I have instigated such an investigation in this case and what follows represents a summary of the information that has been helpfully provided by the participants. The hearing began at 10.30 am and ended at 4.30 pm during which there were at least two short breaks. It appears that there was a power failure at the prison which occurred sometime between 1.30pm and 2.30 pm brought about, as I understand it, by a test at the prison of the emergency electricity supply. It lasted a matter of a few seconds. Another witness and the Applicant were both disconnected from the hearing while the psychologist witness was giving evidence. As soon as the disconnection occurred the witness who was in the room next door to the Applicant, went into the room occupied by him. The Applicant was dialled back into the hearing there and then, having been disconnected from it for no more than thirty seconds. The witness who had assisted the Applicant also dialled back into the hearing; she estimated that she was disconnected for no more than sixty seconds. The Panel Chair was not made aware at any stage that the Applicant lost contact with the hearing for any extended period. At the end of the evidence the Applicant was asked by the Panel Chair if there was anything further he wished to say. The Applicant responded but said nothing at all about having been disconnected. It would appear from his solicitor's submissions that the Applicant did not raise the matter with his legal representative at the time or in the immediate aftermath of the hearing.
17. There is in my judgment no evidence to support the dramatic suggestion made by the Applicant that he missed the majority of the evidence from the Psychologist. The information which I have summarised in paragraph 16 indicates that contact was lost by the Applicant for less than one minute. It is clear from the decision letter that the Applicant's representative was fully instructed throughout and was able to and did challenge aspects of the evidence given by the Psychologist. There is no evidence to suggest that the Applicant was in any way disadvantaged by the very brief break in communications. Indeed, all the indications are that he effectively participated in the hearing throughout. It is the experience of those who have participated in audio hearings that all concerned are positively encouraged to make it known if they have failed to hear or have any difficulty in hearing what was being said. That was the position in this case. I am confident that if the Applicant had failed to hear as much as is claimed on his behalf, then that crucial fact would have been raised by him at some point during the course of this long hearing or very soon thereafter.
18. I turn to deal with the second ground. It is submitted on the Applicant's behalf that since the hearing his former wife has sadly died. It is further submitted that he made



a promise to her not to mention certain matters (unspecified) but now he feels able to do so. It is submitted that "*this information directly links to one of the victims of his index offence*". I note that there was only one victim in the index offence although it is right to say that the Applicant has offended in the past against more than one victim in the same case. No further information is provided by way of clarification or explanation in support of this ground.

19. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in a decision on a previous reconsideration application in the case of **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision in this case it is clear that the panel carefully considered all the evidence that was before them.
20. The submission in support of ground (ii), if I have understood it correctly, is to the effect that the Applicant has been withholding information known to him during the lifetime of his former wife which he now suggests, if disclosed, might be relevant to his future risk. The position is that there is nothing before me other than this unsupported assertion made on the Applicant's behalf to indicate that further evidence was ever even available let alone necessary. Therefore, in my judgment, there is nothing whatsoever to indicate that there was any procedural unfairness in the conduct of the proceedings before the OHP.
21. I am entirely satisfied that the Applicant's hearing was conducted with consummate care and fairness. Prolonged audio hearings are not easy to conduct nor to participate in. All the information gathered from other participants at this hearing demonstrates beyond any doubt that a technical difficulty did arise and was dealt with very swiftly indeed thereby avoiding any possible prejudice to the Applicant and his case. It is obvious from a careful reading of the decision letter that runs to sixteen pages that everything that could and should have been placed before the OHP was indeed before them. The decision letter itself is in my judgment impressively detailed, comprehensive, balanced and fair.
22. I have reached the clear conclusion, for the reasons set out above, that there are no grounds for interfering with the OHP's conclusions in this case.

Decision

23. The application for reconsideration is dismissed.

Michael Topolski QC
26 August 2020



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