the Parole Board
working with others to protect the public

[2020] PBRA 151

Application for Reconsideration by Wright

Application

1. This is an application by Wright (the Applicant) for reconsideration of a decision of decision of an oral hearing dated 10 August 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.

3. I have considered the application on the papers. These are decision letter, the dossier and the application for reconsideration. I have also had the benefit of an audio recording. This captured the first 90 minutes of the hearing, but not the hearing in its entirety. As the application concerns the conduct of the hearing and the recording was incomplete, I also sought further written evidence from the panel and witnesses in response to my particular questions concerning the subject matter of the application for reconsideration. I have also seen various items of email correspondence relating to the management of the case and sought clarification on administrative procedure from the Parole Board Listings team.

Background

4. The Applicant received an extended sentence, comprising a ten-year custodial period with a four-year extension on 25 April 2014 following conviction after trial for manslaughter. His parole eligibility date is reported to be 28 April 2020, his conditional release date is reported to be 28 August 2023 and his sentence expiry date 28 August 2027. The Applicant was 32 years old at the time of sentencing and is now 38 years old.

Request for Reconsideration

5. The application for reconsideration is dated 27 August 2020 and has been submitted by solicitors acting for the Applicant.

6. The primary ground on which reconsideration is sought is that evidence heard during the oral hearing was incomplete due to procedural unfairness; specifically, that the panel was fixated on completing the hearing by a certain time. Following from this, the application also points out a number of purported mistakes and generalisations in the decision letter which it claims supports the view that the panel was distracted by virtue of this procedural unfairness.

7. The application also raises the point that it was procedurally unfair not to have a psychologist specialist member on the panel.

8. It also notes that the decision letter was delayed with little by way of explanation but does not submit that this gave rise to any procedural unfairness, so there is no need for me to consider that point further.

9. No matters of irrationality are raised.

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

Current Parole Review

11. This section intentionally contains more details relating to aspects of the management of the Applicant's case than would normally be expected in an application for reconsideration, as I consider them to be relevant to its determination.

12. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2019 to consider whether or not it would be appropriate to direct his release.

13. On 3 January 2020, a single member case assessment panel ('MCA panel') directed the case to an oral hearing. The MCA panel assessed that the hearing did not require a specialist psychologist or psychiatrist member, having noted there was no suggestion that the Applicant suffered from any form of personality disorder. At the time the MCA panel reviewed the case, there were no psychological reports in the Applicant's dossier. The hearing was directed to be listed for three hours, with a three-member panel. It also noted that the case was unsuitable (at that time) to be conducted by video or teleconference link.

14. On 23 January 2020, the Parole Board was notified that an independent psychological risk assessment had been completed. Permission was sought via a Stakeholder Response Form (SHRF) to add this report to the dossier and to permit the author's attendance to give evidence in relation to their report. The application was considered by a duty member and duly granted. The report (dated 27 November 2019) was added to the dossier and the independent psychologist added to the hearing timetable.

15. On 4 June 2020, Panel Chair Directions (PCDs) were set. These made no variation to the list of witnesses or the panel logistics (including the time allocated for the hearing by the MCA panel) other than confirming that the case could proceed remotely via videoconference (in response to official advice from HM Government concerning the COVID-19 pandemic which suspended face-to-face oral hearings). The Applicant raised no objections to the change to a remote hearing or the panel chair's decision not to increase the time allocated for the hearing notwithstanding the addition of another witness after the MCA panel had considered timings.

16. An oral hearing timetable was issued on 22 June 2020. It gave details of the panel members and their roles, together with a list of witnesses (including the

independent psychologist) and the technical details for accessing the remote hearing. The Applicant's case was scheduled to start at 10:30 am.

17. The panel had a second case listed for the same day which was scheduled to start at 14:00 pm. This fact did not appear on the timetable issued to the Applicant, his legal representative or the witnesses. It would not ordinarily do so.

18. The Applicant's case proceeded to an oral hearing via videoconference on 1 July 2020. The panel consisted of two independent members (including the panel chair) and a judicial member. There was no specialist member. It took evidence from the Applicant's Offender Supervisor (OS) and Offender Manager (OM) together with the independent psychologist.

19. The panel adjourned the case after the hearing. Adjournment PCDs dated 2 July 2020 noted that there were significant time constraints, but the panel was of the view that it had enough evidence to conclude the review. However, the Applicant's legal representative was offered the opportunity to put any further questions to witnesses (either in writing or orally). If they did not feel the need to do so, they were invited to make written closing submissions.

20. A deadline of 16 July 2020 was set for written closing submissions *"if no further questions are to be put to witnesses"*.

21. On 4 July 2020, the Parole Board Case Manager issued these PCDs by email. The covering email also repeats the points made by the panel chair thus:

> ***Legal Rep*** *– The panel wanted to check with you that you had asked all that you needed to at the hearing given the time constraints on the day. However, if you don't have any further questions, you are invited to submit closing submissions by 16/07/2020.*

22. On 7 July 2020, the Applicant's legal representative responded to the Parole Board Case Manager to say:

> *Could you please thank the Panel and advise that I have no further questions for witnesses, and that I will be submitting closing submissions as soon as possible and certainly before the deadline date.*

23. Extensive closing submissions (comprising eight pages) dated 15 July 2020 were made in writing. These invited the panel to direct the Applicant's release. They did not make any reference to concerns about the time allotted to the hearing, the conduct of proceedings, the composition of the panel, the adequacy or sufficiency of the evidence or any other matter concerning potential procedural unfairness.

24. The decision letter was dated 10 August 2020. It noted that the Applicant's OS and OM were supporting release and that the independent psychologist considered that the Applicant's risks were manageable with a robust risk management plan which included psychological work.

25. Nonetheless, having considered the totality of the evidence, the panel was not satisfied that the Applicant's risks could be safely managed in the community over the three-year risk period until the conditional release date. It concluded that the Applicant needed to remain confined for the protection of the public and made no direction for release.

The Relevant Law

26. The panel correctly sets out in its decision letter dated 10 August 2020 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

27. 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)). This is an eligible decision.

28. 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

29. 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.

30. 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.

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

Other

31. In **Oyston [2000] PLR 45**, Lord Bingham said at para. 47:

> *It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a*

continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.

The reply on behalf of the Secretary of State

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

Discussion

33. I will deal with the two areas set out in the Application separately. The issue relating to panel composition is more straightforward so I will deal with that first.

Panel composition

34. It is submitted that the failure to add a psychologist member to the panel was "*wholly unfair*" to the Applicant. It is also noted in the Application that his legal representative has "*only now been able to confirm that the members sat on the panel do not have psychological experience"*. The Application for reconsideration is made by the same legal representative present at the hearing and the wording suggests that it was only after the hearing that they became aware that the panel did not include a psychologist member.

35. The MCA panel specifically did not add a psychologist to the panel and, at the time of making its directions, there was nothing to indicate that one was required. These MCA directions would have been available in the dossier when the application was made to disclose the independent psychological report and add its author to the timetable. When seeking this permission, it was open to the Applicant to request the addition (or substitution) of a psychologist specialist member knowing that the need for one had not been indicated by the MCA panel.

36. Moreover, in the normal course of events, specialist members are identified as such on the issued timetable. The timetable for this hearing did not indicate a psychologist. While the Applicant himself may not have realised this, he was legally represented, and if the attendance of a psychologist specialist member was fundamental to a fair hearing, it is reasonable to expect a query to have been made at that stage since none was indicated on the timetable.

37. In any event, the panel introduced themselves at the start of the hearing. It would have been entirely clear at that point that the panel comprised two independent members and a judicial member. If the Applicant or his legal representative had concerns about fairness stemming from the composition of the panel, there was a further opportunity to object before the panel proceeded to hear oral evidence.

38. No objection to the panel composition was raised later in the hearing or in the closing written submissions.

39. It is clear to me that the Applicant had multiple opportunities before and at the hearing to ascertain the panel's composition. At any of these points, it was open to the Applicant to raise an objection and the Applicant did not do so.

40. Even if they had done so, it does not follow that the request for a psychologist specialist member would have been granted. None was considered necessary by the MCA panel. The case was reviewed again by the panel chair at initial PCD stage and after the disclosure of the independent psychological report. If the panel chair, in reviewing the entirely of the dossier (including the independent psychological report) and directing it to proceed to an oral hearing, considered that the psychological issues before the panel had become so complex that a psychologist specialist member was necessary then they would have directed one. If the psychological issues were particularly complex, the panel also had the opportunity to direct a prison psychological report. It did not do so, suggesting that the panel felt perfectly capable of dealing with the psychological evidence without specialist assistance.

41. While it is true that the panel members were not qualified psychologists, it is not true that they lack psychological experience. All members of the Parole Board are very familiar with reading and understanding complex psychological evidence. They are able to ask questions of expert witnesses, do so routinely, and are able to do so fairly. To suggest otherwise would mandate the presence of a psychologist specialist member at any hearing involving a psychologist witness. This would constitute an unnecessary and unsustainable state of affairs. It would also introduce an inevitable and unacceptable impediment to the Parole Board's obligation to conclude reviews expeditiously as well as undermining the capability of independent and judicial members.

42. It follows, then, that not only did the Applicant not avail himself of the opportunity to seek a psychologist specialist member, but also that if he had, the issues before the panel were not so complex that an application for a specialist could be guaranteed to succeed.

43. With the benefit of hindsight, no member of the panel considered that the psychological issues in the Applicant's case were such that the inclusion of a specialist colleague would have been necessary to resolve or interpret them. As such, it is clear to me that the panel members understood the evidence and its relevance to the risk assessment and the statutory test for release.

44. In any event, any lingering doubt about the panel's competence to question the independent psychologist fairly is entirely dispelled by her response to me that "*It is my opinion that I was given appropriate time for a wide range of questions to be asked and for me to answer these questions.*"

45. Not only was the independent psychologist subject to a wide range of questions, but she raised no concerns that gave rise to any hint of suspicion that the panel members asking those questions did not understand either their relevance or the answers she gave in response to them.

46. Overall, there is no basis on which I can rightly find that the lack of a psychologist specialist member on the panel introduced any procedural unfairness and this ground therefore fails.

Insufficient time

47. The second area raised in the application concerns the impact of the limited time available for the hearing on the panel's ability to elicit sufficient evidence and complete a robust risk assessment.

48. The application states that, before evidence was taken, all parties were advised that there was an afternoon hearing and that it was imperative for that hearing to begin on time given the complexity of the afternoon case. It is further stated that the panel advised all parties that the Applicant's hearing may need to be adjourned if it ran out of time.

49. It is submitted that this "*set the tone for evidence*" given by professional witnesses and that witnesses were obligated to provide short answers due to time constraints. It is also submitted that the independent psychologist was "*rushed*" to provide answers to questions asked.

50. In consequence of the time constraints, various "*mistakes and generalisations*" in the decision letter are highlighted, which, it is submitted, would not have been made if the panel had sufficient time to elicit full evidence from witnesses and accurately assess the Applicant's risks in the light of that more fulsome evidence. As such, the hearing was procedurally unfair.

51. It is common ground that the time available for the hearing was limited. The panel chair outlined the timing at the start of the hearing and made it clear that the aim would be to complete the hearing in the time allotted by the MCA panel. The panel chair also set out that, if all oral evidence had been taken within the allotted time (but there was not enough time left for oral closing submissions) then closing submissions could be made in writing, but if further evidence was necessary then the hearing may have to be adjourned to preserve the timetable for the afternoon case.

52. It could be argued that the hearing should have been allotted more time when the independent psychological report was disclosed, and the additional witness added to the timetable. However, neither the duty member nor the panel chair chose to do so. Neither should they have done if they were satisfied that the issues were such that they could still be dealt with in the time allotted by the MCA panel. This is another indication of the straightforward nature of the psychological issues in this case that, as already discussed, went against the addition of a specialist member.

53. As it was otherwise impossible for me to determine whether the witnesses did, in fact, feel rushed, I sought their views on their experience in giving evidence and, more broadly, on their perceptions of fairness at the hearing. It transpired that, by the time of asking, the OM had left the National Probation Service. The OS recalled that the hearing was conducted "*briskly*" and although he had recommended a different course of action than that taken by the panel, his view was that "*the hearing was fair to [the Applicant]*".

54. The independent psychologist was of the view that, as previously stated, she was "*given appropriate time for a wide range of questions to be asked and for [her] to answer these questions"*. This is clearly fatal to the Applicant's submission that the independent psychologist was "*rushed*".

55. However, the independent psychologist also stated that, in her view, the other witnesses (the OS, the OM and the Applicant) "*did not have sufficient time or questions allocated to them within the hearing"* and, as such, "*did not feel the hearing was fair to [the Applicant]"*.

56. When conducting a parole hearing, there is no set time or number of questions allotted to any witness. Members of the panel use their judgement and extensive experience in questioning witnesses and, once they are satisfied that they have sufficient evidence from any witness, they may move on. This may involve them going to far as to actively curtail discussion.

57. The OS did not agree that he felt rushed or inadequately questioned, or that the hearing was unfair. Clearly, I cannot speculate on what the OM would have said about her own experience.

58. The Applicant's legal representative did not consider it necessary to raise any concerns about the adequacy, quality or sufficiency of evidence on the day of the hearing. In any event, they had the opportunity to ask their own questions of all witnesses at the hearing, which would have given them the opportunity to fill in any unaddressed gaps in the evidence that they considered to be favourable to the Applicant's case for release.

59. The panel chair has reviewed their notes from the hearing and has told me that the Applicant's legal representative asked three questions of the independent psychologist, one of the Applicant, none of the OS and none of the OM. Of course, it may be the case that the Applicant's legal representative only asked limited questions because they felt under time pressure to do so. However, they did not make any representations to that effect at the time and neither did they do so in this Application.

60. Moreover, after the hearing, the Applicant's legal representative was given a very clear and obviously signposted opportunity to put any further questions in writing if they wished to do so. In response to this, they passed on thanks to the panel, confirmed they had no further questions and, in time, provided their closing submissions in writing. These contained no comment about the quality of evidence, the timing of the hearing or their inability to ask sufficient questions; neither did they seek a reconvened hearing for them to address any perceived procedural unfairness.

61. In summary: the application claims the independent psychologist was rushed. She says she was not, but other witnesses were. The OS (who was the only professional witness available to comment) says he was not. The application contends that professional witnesses were curtailed in their ability to give evidence; the views of those I have been able to ascertain say they were not. The application makes no

comment about whether the Applicant was rushed. The Applicant's legal representative also had sufficient opportunity to question witnesses as fully as they wished.

62. With all the above points in mind, and having been able to listen to a recording of at least part of the hearing, I am left with the impression of that the hearing was conducted brisky, but one which allowed the panel and the legal representative to ask all they wanted and for the panel to elicit sufficient evidence on which to base its decision.

Decision letter

63. The application also cites a number of points of disagreement with the accuracy of the decision letter or the panel's weighting of evidence, which, it submits, show that the panel must have been distracted by its "*fixation*" in completing the hearing on schedule. In her response to my enquiry, the independent psychologist also made observations to me about the decision letter, which, although not part of the application for reconsideration, raised similar issues.

64. In essence, these points question the accuracy with which the panel has recorded evidence, the weight given to aspects of the evidence in reaching its decision, and areas that went unexplored.

65. In respect of the recording of evidence, the panel had the advantage of seeing and hearing the witnesses. It would not be appropriate for me to direct a reconsideration unless it is manifestly obvious that the panel has made egregious errors in its recitation of the evidence which undermined its assessment of risk and its conclusion.

66. While certain facts are in dispute, I do not find the discrepancies of fact, whether taken individually or collectively, constitute a compelling reason for me to interfere with the panel's decision.

67. The weight given to aspects of the evidence is a matter for the panel in undertaking its risk assessment. No points of irrationality are raised by the Applicant and neither do I find any evidence of irrationality in weighing evidence on the papers before me.

68. As previously stated, I find that the panel elicited sufficient evidence on which to base its decision and that it had explored those areas of evidence that it felt material to making its decision.

69. Overall, I do not find that the content of the decision letter formed any sustainable basis to support a finding of procedural unfairness by the panel.

Grinham

70. Since this application concerns (amongst other things) issues of insufficient time at a hearing, I am bound to consider the recent High Court decision in **R (Grinham) v Parole Board [2020] EWHC 2140**.

71. Mr Grinham was a recalled determinate sentence prisoner and therefore the decision of the panel not to re-release him was not amenable to 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.

72. 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. I have seen nothing to suggest 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.

73. 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:

    a. 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);

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

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

    d. 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).

74. While there are some superficial similarities to the present case, in my view there are four corresponding matters of fact which distinguish it from **Grinham**.

75. First, much of the allotted hearing time in **Grinham** had been lost to the disclosure of a late report. Not only did that increase the time pressure on the substantive hearing, but it meant that Mr Grinham's legal representative was not able to take full instructions from him on the new evidence. By contrast, all allotted time was available in the Applicant's case, there was no unexpected documentary evidence served on the day, all other directions had been met, and there is nothing to suggest that the Applicant had been deprived of the opportunity to give adequate instructions to his legal representative.

76. Second, in respect of the time constraints, Mr Grinham's case involved an expedited hearing. A further adjournment would, in his case, have defeated the purpose of such an expedited hearing. The Applicant's case had not been directed to an expedited hearing and, although the Parole Board is duty-bound to undertake a speedy review of detention, an adjournment (although unfortunate) would not necessarily have precluded it from doing so.

77. Moreover, the time constraint in Mr Grinham's case resulted from the panel chair's own 'hard stop'. This appears not to have been related to any Parole Board matters. Therefore, if Mr Grinham's case had overrun, although it would have interfered with the panel chair's reason for needing to be elsewhere, no other prisoner's hearing would have been put at risk. By contrast, in the present case, the panel was balancing the need for fairness to the Applicant and fairness to the prisoner whose hearing was listed later that day.

78. Third, Mr Grinham's legal representative was unable to question witnesses as fully as she wished and unable to put her client's case fully. In this case, there is no suggestion that the Applicant's legal representative was deprived of the opportunity to question witnesses; neither do they raise that as an issue in their application.

79. Fourth, Mr Grinham himself said he felt his hearing would not be fair in the hearing when there was limited time available. The Applicant here was equally aware that there was limited time but did not (either directly or through his legal representative) raise any concerns about the fairness of proceedings at the time.

80. I am therefore of the view that there are sufficient distinguishing features between this case and **Grinham** that I am not bound to follow the latter.

Closing remarks

81. Panels of the Parole Board who are listed with two cases on the same day have an obligation to ensure that both prisoners are treated fairly. If a morning hearing is likely to overrun to the extent that the afternoon case becomes untenable, then continuing with it until it reaches a conclusion at the expense of the afternoon case would seem harsh on the afternoon prisoner who will have been fruitlessly waiting for and preparing for their own hearing.

82. In the normal course of events panel chairs will ensure that enough time is allotted to cases prior to the hearing day itself to maximise the likelihood of both cases completing successfully. That said, panel chairs cannot foresee all delaying evidential or procedural complications that might arise during a hearing and wreck their best-laid timekeeping plans.

83. From time to time it will be necessary for a panel to proceed at pace. Doing so does not render the hearing procedurally unfair in itself. A brisk hearing may well (and usually does) allow a panel to gather sufficient evidence on which to base its decision while offering the prisoner a fair opportunity to state their own case, assisted by (if they so wish) a properly instructed legal representative. By contrast, the panel's haste in a hearing such as **Grinham** (compounded by issues such as late or missing evidence that had nonetheless been directed in good time) may preclude proper legal representation or proper examination of that evidence.

84. In essence, then, a time constraint is not, in and of itself, a determinative characteristic of procedural unfairness. However, a time constraint can create unfairness if the panel is consequently unable to elicit and test full evidence or if the prisoner cannot fairly state their case or cross-examine witnesses.

85. In the Applicant's case, I do not find any basis on which to conclude there was procedural unfairness stemming from the limited time available for the hearing. I am satisfied that the panel gathered and tested enough evidence in the time available on which to base its conclusion and the Applicant had ample opportunity to cross-examine or respond. Consequently, this ground also fails.

Decision

86. For the reasons I have given, I do not consider that the decision was procedurally unfair and accordingly the application for reconsideration is refused.

Stefan Fafinski
14 October 2020