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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GAVIN COYLE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

PAROLE COMMISSIONERS FOR NORTHERN IRELAND

MCCLOSKEY J

The challenge

[1] Gavin Coyle (the "Applicant"), a sentenced prisoner, challenges a decision of the Parole Commissioners for Northern Ireland (the "Commissioners") dated 24 October 2017 whereby they declined to direct his release on licence and determined that a further review of his case should be completed within nine months of that date.

[2] The Applicant contends that the impugned decision of the Commissioners is infected by two errors of law, namely:

(a) "*… by failing to expressly consider the particular nature of the evidence – hearsay – and the difficulties and risks arising from it when deciding what weight to attribute to it …. the Parole Commissioners failed to discharge the common law duty to take into account whether, and to what extent, an individual has been able to properly challenge the evidence when formulating a judgment on disputed facts*".

(b) "*… by permitting the entirety of the evidence relating to the alleged new offences to be given by way of multiple hearsay …. the Parole Commissioners failed to call any*

> *witness for cross examination … resulting in an unfair procedure*".

The foregoing are the formulations in the Order 53 Statement.

The impugned decision

[3] The Applicant, having pleaded guilty to the offences of possessing explosive substances, possessing assault rifles and ammunition and belonging to a proscribed organisation, was given a commensurate sentence of ten years imprisonment divided into five years custody and five years on licence. He was released on licence on 06 April 2016. One of his licence conditions required him not to engage in paramilitary activities.

[4] The Applicant's recall to prison was precipitated by allegations from a male person that the Applicant had blackmailed him, threatened to kill him and had subjected him to a serious assault. He was arrested and, on 16 February 2017, remanded into custody in respect of charges of belonging to a proscribed organisation, blackmail and common assault. The Applicant denies all charges.

[5] On 17 February 2017 the Department of Justice (the "Department") revoked the Applicant's licence, acceding to the recommendation of a single Commissioner to this effect. On 09 June 2017 the Department wrote to the Commissioners in these terms:

> "*The Chair has asked the Department to confirm whether the Commissioners will be provided with the recording referred to at page 61 of the dossier and if not, why not; and further the Department has been asked to produce any additional material and evidence, including any relevant witness statements, that are relied on in this case …*
>
> *It is accepted by the Department that the Commissioners have, as part of their function, to consider all available evidence in order to satisfy themselves that it is no longer necessary for the protection of the public that a prisoner should be confined …*
>
> *However …. there is a live criminal investigation being carried out by the PSNI with regard to the subject offences and files have been lodged with the PPS for consideration. The Department is not the investigating or prosecuting body and therefore is not in a position to provide the requested recording or indeed the disclosure of any other evidence.*"

The "*recording*" mentioned in this passage is understood by reference to the following extract from the police "Outline of Case" compiled for the purpose of their licence recall submission to the Commissioners:

> "*On 14/02/17 police seized a mobile phone from a member of the public who along with one other person approached Gavin Coyle and his co-accused regarding what had happened to the injured party. The conversation/argument that ensued was recorded on a mobile phone (mostly audio with some video) and lasted for 23 minutes. During this Gavin Coyle identified himself by name, stated that he is a member of the IRA, that he had done five years in solitary confinement …* [and] *… made reference to the money demanded from the injured party.*"

The aforementioned letter from the Department also noted that the injured party would not be giving evidence before the Commissioners.

[6] The dossier of evidence compiled for consideration by the Commissioners contained three different incarnations of the police "Outline of Case" report. The most recent – and the most detailed – bears the date 13 March 2017. This contains a more detailed account of the evidence against the Applicant than its predecessor. In common with its predecessor it consists mainly of a hearsay account evidently provided by the alleged injured party to the police. It also, under the rubric of "Additional Evidence", deals with the mobile phone recording evidence against the Applicant. <u>All</u> of the evidence is the author's summary of source materials not disclosed. There is also an indication that two "*witness statements*", of undisclosed sources and authorship, were put to the Applicant in interview. The Applicant was unresponsive throughout the three police interviews. The mobile phone audio/video evidence was put to him during the final interview.

[7] In their elaborate written submission to the Commissioners, the Applicant's solicitors said the following of the "recording":

> "*It was said during the course of Mr Coyle's arrest that this was surrendered by an unknown person. The defence have taken issue with this alleged recording as police were not in a position to provide details of who took the recording or comment as to when or how it was recorded. No statement has been proffered by the maker of the recording and the content of the recording, which was played during police interview, was inherently bizarre and highly suspicious. No expert voice analysis has been put to Mr Coyle to suggest that he is one of the males on the recording nor is there any visual identification available ….*"

It was further represented that at a remand hearing police had confirmed to the District Judge concerned that there would probably be no statement from the maker of the recording. On the basis of perceived evidential shortcomings in the prosecution case bail was granted and an ensuing PPS appeal against this decision was dismissed by the High Court on 26 April 2017. It was also represented that written statements of evidence had been made by only two witnesses, namely the injured party and his partner, containing accounts said to be "*at wild variance with each other*".

[8] Much of the background outlined above is recorded in the impugned decision of the Commissioners, which was generated in the wake of a hearing conducted on 18 October 2017. The decision records that both the Applicant and the Department were represented. The Applicant gave evidence. The Commissioners also considered two hand written statements made by him. As the following passage demonstrates, certain other evidence was indirectly brought to the panel's attention:

> "*Submissions on behalf of Mr Coyle were also made about alleged inconsistencies within H's witness statements and discrepancies between them and those of his partner concerning the allegations … the actual witness statements were not submitted to the panel.*"

["H" is the alleged male injured party.]

[9] Having noted the thrust of the representative's submissions on behalf of the Applicant, the decision states:

> "*For the reasons given below, the panel is satisfied on the balance of probabilities that Mr Coyle's behaviour (as outlined in the paragraphs above) after his release from custody is such that the risk of harm to the public has increased significantly (ie more than minimally) since his release.*"

The text continues:

> "*In coming to this conclusion the panel has …. relied upon evidence in addition to the mere fact of charge and prosecution alone. After hearing oral evidence from Mr Coyle and hearing all the submissions, the panel concludes that the information in the dossier from the police outlined above constitutes cogent evidence which establishes on the balance of probabilities that Mr Coyle was involved in the commission of the two counts of blackmail, one count of common assault and one count of professing to be a*

member of a proscribed organisation, for which Mr Coyle awaits trial in the criminal courts."

The decision continues:

> *"The panel saw evidence that H has made clear allegations against Mr Coyle concerning these criminal charges. Mr Coyle denies the charges but admits that H knows him and that there was a violent altercation between them outside the gym as alleged, albeit that Mr Coyle maintains that it was H who instigated the violence. In his hand written statement, Mr Coyle admits that it was he and M who entered the gym to seek out and confront H. Mr Coyle later confirmed that he believed that H worked for the security services prior to the incident in the gym.* ***The panel take the view that even in the absence of a decision to charge Mr Coyle, his undoubted risk taking behaviour in supporting and lending weight to M's confrontation of H at the gym, which led to violence, is sufficient of itself in demonstrating an increased risk of harm.****"*
>
> [Emphasis added.]

[10] The panel expressly noted the submissions relating to the frailties of the prosecution case against the Applicant and the intrinsic implausibility of the conduct alleged against him. It noted that the witness statements of H and his partner had not been provided and observed:

> *"It was of course open to Mr Coyle to seek to introduce witness statements or seek to call witnesses if he so wished. The panel heard from no other witness than Mr Coyle and no prosecution witness statement was relied upon."*

It expressed its omnibus conclusion in the following terms:

> *"The panel concludes that (even though he has not been convicted in a criminal court applying the relevant criminal standard of proof) there is cogent information or evidence referred to above that the panel accepts proves on the balance of probabilities that Mr Coyle was involved in the above offences, which self-evidently involve and increase in harm to the public. The panel is satisfied on the balance of probabilities that this aforementioned behaviour indicates a significant increase in the risk that Mr Coyle poses of causing harm to the public …* [and] ..

> *constitutes a serious breach of Mr Coyle's licence conditions ….*"

It was further noted that since recall the Applicant had not undertaken any appropriate risk reduction steps and that none of the professional witnesses involved had recommended his release.

<u>Consideration and conclusions</u>

[11] The thrust of the Applicant's case is encapsulated in the following passage in the skeleton argument of Mr Toal (of counsel):

> "*.. the panel failed to acknowledge, let alone grapple with, the fact that the evidence relating to the new offences was presented by way of hearsay. Worse still, the panel then held the Applicant's failure to call witnesses against him, in that his opponent did not call any witnesses and relied entirely upon hearsay evidence whilst the Applicant is undermined by not calling witnesses to rebut the very same hearsay evidence called by his opponent.*"

Mr Toal further characterised the police "Outline of Case" document, which contained the only evidence before the panel of the Applicant's alleged reoffending (apart from the Applicant's written and oral evidence), as multiple hearsay, being a police officer's summary account of what other witnesses were alleging. Mr Toal acknowledged that the adduction of hearsay evidence did not *per se* render the hearing or its outcome unfair. He drew attention to the following passage in <u>Judicial Review</u> (Auburn *et al*):

> "*There is no general rule that it will be a breach of the requirements of fairness, or otherwise unlawful, for a decision maker to take into account evidence falling within a problematic category when deciding whether a particular fact is established, even if such evidence is the only or main evidence in relation to that fact. However, it is important that the decision maker grapples with the dangers that these problematic categories of evidence pose …* [and] *…. must take into account the particular nature of the evidence and the difficulties and risks arising from it when deciding what weight to attribute to it. In particular, the decision maker must take into account whether and to what extent an individual has been able to properly challenge the evidence, such as by questioning the witness who gave the evidence … Where evidence falling within a problematic category is adduced against an individual, he or she must be afforded a fair opportunity to challenge it and make submissions on it.*

In some cases, the evidence will be so fundamental to the matter to be decided that fairness will require that an individual be afforded the opportunity to cross examine the witness giving the hearsay evidence, before it is taken into account at all."

[At paragraphs 6.137, 6.138 and 6.141.]

[12] Mr Toal also prayed in aid the following passage from the judgment of Latham LJ in R (DPP) v Havering Magistrates' Court [2001] 1 WLR 805, at [41]:

"What undoubtedly is necessary is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on and answer that material. If that material includes evidence from a witness who gives oral testimony clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to. The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion."

This issue was further addressed in R (Sim) v Parole Board [2003] EWCA Civ 1845, at [57]:

"That passage seems to me to be generally applicable to proceedings before the Parole Board when it is assessing risks, especially bearing in mind that recall decisions are not criminal proceedings within the meaning of article 6 : R (West) v Parole Board [2003] 1 WLR 705 . Merely because some factual matter is in dispute does not render hearsay evidence about it in principle inadmissible or prevent the Parole Board taking such evidence into account. It should normally be sufficient for the board to bear in mind that that evidence is hearsay and to reflect that factor in the weight which is attached to it. However, like the judge below, I can envisage the possibility of

> *circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination before it is taken into account at all. As so often, what is or is not fair will depend on the circumstances of the individual case."*

The "*passage*" to which Keene LJ is referring is that of Latham LJ reproduced above. Mr Toal, in summary, submits that the decision of the panel is vitiated by the inter-related failures of failing to properly direct themselves on the inherent dangers of hearsay evidence and failing to properly test such evidence.

[13] The argument of Mr Sayers (of counsel) on behalf of the Commissioners draws attention to rule 23 of the Parole Commissioners Rules (NI) 2009, which provides at paragraph (6):

> *"The panel may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a Court of law …"*

Mr Sayers submitted that the principle formulated by Keene LJ in Sim (*supra*) was not satisfied. Furthermore, referring to the decisions in R (Brooks) v Parole Board [2004] EWCA Civ 80 and Re CD's Application [2008] UKHL 33, Mr Sayers highlighted that the Applicant's legal representatives had not availed of the facility of seeking to secure the attendance of the witness or witnesses in question by subpoena for the purpose of being questioned at the hearing.

[14] In my estimation, the first flaw in the case made on behalf of the Commissioners is over-reliance on the passage in the judgment of Keene LJ in Sim to the extent of impermissibly elevating what was said there to the level of an inflexible principle or rule, a rigid test which the Applicant must satisfy in order to succeed. This neglects what I consider to be the correct juridical approach, namely that where issues of procedural fairness arise every case is unavoidably fact sensitive and contextually special. In my view the most important sentence in the relevant passage in Sim is the final one:

> *"As so often, what is or is not fair will depend on the circumstances of the individual case."*

I consider that in [57] of Sim Keene LJ did not formulate an exhaustive threshold test, either by intention or effect.

[15] Giving effect to the overarching principle which I have emphasised above I derive little assistance from first instance decisions such as R (Weska) v Parole Board [2012] EWHC 827 (Admin) on which Mr Sayers placed much reliance. This decision is a mere illustration of the High Court's evaluation of the requirements of

procedural fairness in the specific factual context of that case. While Mr Sayers drew attention to the principles formulated by the learned deputy judge in [21] – [24], none of these is contentious.

[16] Equally there is no real assistance to be derived from R (Headley) v The Parole Board [2009] EWHC 663 (Admin), as the learned deputy judge's formulation of the framework of legal principle at [21] confirms. Furthermore, I consider any suggestion that the principle to be distilled from Headley is that the opportunity for a prisoner to confront his accuser will arise only in a rare or unique case fallacious, for at least two reasons. First it fails to respect the fundamental legal doctrine which I have highlighted above. Second it is a distortion of the judgment of Deputy Judge Pelling QC.

[17] R (Brooks) v The Parole Board [2004] EWCA Civ 80 is another fact sensitive decision. There the majority decision to uphold the dismissal of the prisoner's application for judicial review at first instance turned mainly on what Kennedy LJ (the first member of the majority) stated at [37]:

> "… *The requirements of fairness depend on the circumstances of the individual case and in my judgment there was nothing unfair about the decision of the panel to proceed as it did.* ***As I have made clear, neither the Parole Board nor the Secretary of State did anything to inhibit the claimant's opportunity to test by cross examination the allegations of SL before those allegations were taken into account, but in the particular circumstances of this case that opportunity was not worth much and the claimant's solicitor was entitled to decide not to pursue it more than she did.***"

[Emphasis added.]

SL's allegation was that the claimant had raped her. Wall LJ concurred. Notably he highlighted the Board's careful critique of the written evidence of Ms L: see [80] especially (I shall return to this theme). The Lord Justice also emphasised the significant element of conjecture in the claimant's complaint of procedural unfairness: see [79] and compare Kennedy LJ at [36].

[18] That the Commissioners were empowered to take steps to secure the attendance of the Applicant's accusers is not in dispute. That is the effect of the decisions in Re CK's Application [2017] NIQB 34 and Re Toal's Application [2017] NIQB 124. Equally there is no suggestion of any error of law in the Department's approach to this issue, reproduced at [5] above. It seems likely that, as in Brooks, the Commissioners simply did not turn their minds to the possibility of proactively taking steps designed to secure the attendance of either or both of the Applicant's accusers. However, in my judgement, this did not render the Commissioner's

decision making process unfair, for four main reasons. First, in circumstances where it would have been clear to all concerned that no steps were being taken by the Commissioners to secure the attendance of any witness at the oral hearing, nothing was proactively done on behalf of the Applicant to this end. The analysis in Brooks at [37] that neither the panel nor the Secretary of State did anything to inhibit the Applicant's opportunity to test by cross examination the allegations of his accusers seems to apply fully. Second, the Applicant's legal representatives were sufficiently informed and equipped to compile an admirably elaborate written submission to the panel. Third, it is common case that by the stage of the panel's hearing the Applicant's representatives were in possession of certain written "victim" statements emanating from the PPS. Fourth, it was at no stage argued by the Applicant's legal representatives at the hearing that the panel should defer its final decision until efforts had been made to secure the attendance of either or both of the accusers.

[19] This conclusion does not, however, dispose of the Applicant's case. As the formulation in [2] above makes clear, the Applicant's primary ground of challenge is, in terms, that the panel did not sufficiently appreciate the nature, attributes and risks of the hearsay evidence upon which the case against him was based, failed to treat it with caution and circumspection and failed to subject it to the requisite rigorous scrutiny.

[20] As *per* the texts on which the Applicant relies – see [11] *supra* – the main duty imposed on the adjudicator or decision maker is to "grapple with" the nature of the controversial evidence and its intrinsic shortcomings and limitations. Caution and alertness are required. In Re CD's Application [2008] UKHL 33, Lord Carswell adverted to the requirement that a court or tribunal examine the evidence "*more critically or more anxiously*" in certain contexts: see [28]. In that case the prisoner had his licence revoked in consequence of an allegation by his niece of buggery, indecent assault and gross indecency. Lord Carswell stated at [29]:

> "*… before being satisfied that* [the perpetrator] *was the respondent, the panel had to devote the necessary critical attention to the evidence adduced in support of such a serious charge. It is quite apparent that they did devote very careful and anxious attention to the question. They examined the possibility that it could have been one of three other persons, which they rejected. They considered the case put forward by the respondent and the quality of his evidence and expressed themselves satisfied after 'most careful scrutiny' that he was the perpetrator, saying that they were clear in their minds that he had committed the grave sexual assaults. In my opinion they went about their task in the proper manner and the criticism made of their approach was not justified. The evidence against the respondent was clear and cogent and pointed very strongly to the conclusion reached by the panel.*"

By the stage of the panel hearing in CD there were two complainant sisters, and neither gave evidence. The panel considered video recorded evidence of their interviews by social workers. The possibility of evidence by live video link was considered and rejected. While the panel was amenable to an application to adjourn to enable the prisoner's solicitor to subpoena one of the complainants, no application to this effect was made. The other evidence against the prisoner was provided by police officers, social workers, a forensic scientist, psychologists, a Probation Service Resettlement Manager and a prisoner governor.

[21] Mr Sayers is correct to point out that the impugned decision of the Commissioners was not based exclusively on the hearsay evidence adduced via the "Outline of Case" police report. It is clear from their decision that the Commissioners also based their assessment on the written and oral testimony of the Applicant. However, in my view there is no escaping the conclusion that the Commissioners were influenced by the hearsay evidence and took it into account in making their assessment. While Mr Sayers initially sought to circumvent this difficulty by emphasising [37] of the Commissioners' decision, he was obliged to acknowledge – correctly – that this passage must be considered in the context of all that surrounds it, both preceding and following. Within these passages, which contain the critical reasoning of the Commissioners, there are several references to the hearsay evidence: "*… the information in the dossier from the police outlined above …. H has made clear allegations against Mr Coyle concerning these criminal charges …. In assessing the strength of the evidence relied upon by the PPB …. the arguments put forward as to why the PSNI outline of case was allegedly incorrect or unreliable …. the above information taken as a whole ….*". Moreover the panel twice described the hearsay evidence against the Applicant as "*cogent*"; a classic conclusionary statement lacking in analysis or elaboration.

[22] The question to be addressed is whether the panel of Commissioners approached this evidence with the necessary degree of scrutiny and caution, alert to its inherent character (untested hearsay) and the other features which I have highlighted. The answer to this question can only be found in the text of the Commissioners' written decision. There is no other source to be consulted. The Commissioners would have been aware from a combination of the "Outline of Case" and the lengthy written representations of the Applicant's solicitors that the evidence against him was provided by the male complainant (in the main), his female partner (possibly- though unsatisfactorily unclear) and the mobile phone materials. It would have been apparent that the solicitor's representations were compiled by reference to (*inter alia*) written accounts of these two witnesses. Neither of the aforementioned accounts was adduced in evidence by any party. The panel was clearly alert to this (per paragraph 28) and also took express note of the submission that the witness statements of the complainant and his partner suffered from inconsistencies and discrepancies.

[23] The decision of the panel discloses no alertness to the fact that the case against the Applicant (leaving aside his own evidence to the panel) was based exclusively on hearsay evidence. Neither the word "hearsay" nor any synonym appears anywhere in the panel's decision. There is no mention of the consequences of the panel having access to neither the written evidence of the witness or witnesses concerned nor their oral testimony. Nor is there any recognition that this evidence was entirely untested. Given that the evidence was (a) presented to the panel in pure hearsay form and (b) the only evidence adduced against the Applicant (not overlooking his evidence to the panel), I consider that in the particular fact sensitive context of this case the panel was obliged to clearly demonstrate its alertness to these factors, its awareness of the limitations and risks associated with the evidence and its appreciation of the need to subject the evidence to cautious scrutiny. Had these requirements been satisfied, the fundamental duty of "grappling with" the limitations of and risks associated with the evidence would have been acquitted.

[24] Even the broadest and most generous reading of the panel's decision impels ineluctably to the conclusion that the foregoing requirements and duties were not observed. There is nothing in the text even remotely approaching the kind of self-direction required of the panel in this particular context. Finally, there is no hint of how the panel reached the conclusion, self-evidently important, that the hearsay evidence against the Applicant was "cogent". I consider that this assessment could only have been legitimately made via the path which, in my judgement, the panel clearly failed to follow. Giving effect to the governing principles the diagnosis that the panel's decision is vitiated by error of law must follow.

[25] Had it been necessary to do so, and subject to the *caveat* expressed in [14] above, as the foregoing analysis and conclusions demonstrate I would further hold that the Sim formulation is clearly satisfied.

Remedy

[26] I consider the grant of the primary remedy pursued, namely certiorari, appropriate. The impugned decision of the Commissioners is hereby quashed, with the consequence that a new decision by a differently constituted panel will have to be made as soon as reasonably practicable. The Respondent will pay the Applicant's costs, to be taxed in default of agreement. I further order taxation of the Applicant's costs as an assisted person.