

[2024] PBRA 12

## Application for Reconsideration by Collins

### Application

1. This is an application by Collins (the Applicant) for reconsideration of the decision dated 6 November 2023 made by a panel following an oral hearing. The panel made no direction for 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 (consisting of 523 pages), and the application for reconsideration. I have also had access to the audio recording of the substantive hearing and a copy of the additional documents presented by the Applicant at the oral hearing.

### Background

4. The Applicant was born male.
5. On 7 February 2002, the Applicant was convicted after trial on 11 counts of rape and received 11 concurrent sentences of life imprisonment. The tariff was set at seven years less time spent on remand and expired in March 2008.
6. On the same occasion, the Applicant received four concurrent determinate sentences of 12 years on each of four counts of attempting to choke, suffocate or strangle with intent to commit an indictable offence. These sentences are now served.
7. The victim of the index offences was the Applicant's wife. The Applicant is maintaining innocence.
8. The Applicant was 37 years old at the time of sentencing and is now 59 years old. The pro-forma case summary within the dossier prepared on behalf of the Secretary of State (the Respondent) indicates that this was the Applicant's seventh parole review.
9. The Applicant has previous convictions for sexual offences. The first, in 1987, was for intercourse with a girl under 16 and attracted a sentence of imprisonment for 30



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days wholly suspended for two years. The second, in 1991, was for rape, in respect of which the Applicant was sentenced to imprisonment for six years, later increased to eight years by the Criminal Division of the Court of Appeal.

### Request for Reconsideration

10. The application for reconsideration is dated 11 December 2023 and has been drafted by solicitors acting for the Applicant. The firm who drafted the application for reconsideration is different from the firm that represented the Applicant at the oral hearing.
11. 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

12. This case was referred to the Parole Board by the Respondent in March 2021 to consider whether or not it would be appropriate to direct the Applicant's release. If release was not directed, the Board was asked to advise the Respondent whether the Applicant should be transferred to open prison conditions.
13. The hearing was listed for 26 April 2023. It was adjourned on the day, at the Applicant's request. Directions were set for an updated psychological assessment, and updates from the Applicant's co-working Prison Offender Managers (**POMs**) and Community Offender Manager (**COM**) in the light of that assessment. Other reports were also directed at the time.
14. The review progressed to an oral hearing on 21 September 2023 before a three-member panel, including a psychologist specialist member. Oral evidence was taken from the Applicant together with the Applicant's POMs, a new COM, a programme facilitator and a HMPPS psychologist. The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.
15. In the professional opinions of the COM, POMs and HMPPS psychologist, the Applicant was not suitable for release. The panel did not direct the Applicant's release nor make a recommendation for open conditions. It is only the decision not to release the Applicant that is open for reconsideration.

### The Relevant Law

16. 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.

#### *Parole Board Rules 2019*

17. 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)).

18. 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)).

19. 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*

20. 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.

21. 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.

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

### **The reply on behalf of the Respondent**

23. The Respondent has submitted no representations in response to this application.

### **Discussion**

24. The application acknowledges that it has been drafted without the benefit of having seen the dossier and is therefore wholly based on the Applicant's comments about the panel's written decision. The Applicant is of the view that the evidence at the hearing was "very positive" and was therefore "shocked to read the extremely negative decision letter".

25. It is submitted that there are a number of errors within the decision, which amount to procedural unfairness. I will deal with each in turn.

### *Incorrect review number*

26. The Applicant states that this parole review was the thirteenth, not the seventh as stated in the decision. The decision reflects the review number put forward by the Respondent. Even if the Applicant is correct, this would have had no bearing on the panel's risk assessment and is therefore irrelevant to any consideration of procedural unfairness.

#### *Incorrect offence information*

27. Paragraph 1.2 of the decision states that the Applicant was convicted in 1987 of "*two offences of unlawful sexual intercourse with a 14 year old girl*". The Applicant states that there was only one conviction, and that the victim was not 14, but almost 16.

28. The printout from the Police National Computer (**PNC**) shows one offence in July 1987, recorded as "*intercourse with a girl under 16*" contrary to section 6 of the Sexual Offences Act 1956. Section 6(1) of the Act (since repealed) provided that it is an offence "*for a man to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen*".

29. The Applicant is correct that there was only one conviction recorded on the PNC, even though the pre-sentence report also refers to "*two offences of unlawful sexual intercourse*". Probation records within the dossier indicate that the victim was aged 14.

30. I do not find that the misstatement of the number of counts of intercourse with a girl under 16 made a material difference to the panel's risk assessment. The conviction is historic, and the Applicant admits at least to have having had intercourse with a girl of 15. The offence is the same, and the simple fact that Parliament chose to bracket the ages of 13-16 together shows that the offence is of equal seriousness regardless of the victim's age within the range. The offence is of lesser seriousness than the other sexual offence committed prior to the index offence (that is, the rape at knifepoint in 1991). In conclusion, although (based on the PNC) there is an error in the decision, it does not amount to procedural unfairness and does not invalidate the panel's decision.

#### *Incorrect assumption of the panel*

31. The panel stated (in relation to the 1991 aggravated burglary and rape) that "*at the time of sentence, [the Applicant] blamed alcohol for the commission of those offences and said he had limited recall because of the amount of the amount of alcohol he had consumed but believed the victim had consented to sex*". The Applicant states that it is wrong for the panel to assume that intoxication was being used as an excuse since both the police and victim had made claims that the Applicant was very drunk.

32. The pre-sentence report stated that "*[a]lthough [the Applicant] pleaded guilty to the offences, he placed the blame for his actions entirely on drink, saying he was drunk at the time and had little recollection of what occurred*".

33. Having read the pre-sentence report, it is difficult for me to accept that the panel made an incorrect assumption regarding the Applicant using intoxication as an excuse at the time of the 1991 offences. The Applicant may disagree, but, insofar as risk is concerned, the Applicant did plead guilty to aggravated burglary and rape before committing the index offences. The seriousness of the Applicant's conduct

would not be any less if the rape had been committed while being sober (or even moderately intoxicated). This does not amount to an incorrect assumption on the panel's part and cannot give rise to procedural unfairness.

#### *Incorrect information*

34. In relation to the 1997 conviction for carrying a bladed article, the Applicant states that it was accepted by the police that carrying the knife was not deliberate.
35. The Applicant was convicted under section 139 of the Criminal Justice Act 1988. Sections 139(4) and 139(5) provide statutory defences: that the person charged had good reason or lawful authority for having the article with him in a public place, had it work use at work, for religious reasons or for part of any national costume.
36. Even if the Applicant is correct in saying that the police accepted that carrying the knife was not deliberate, the court did not. In any event, if the Applicant is correct, it is difficult to understand why the police would have made the decision to charge.

#### *Judge's sentencing remarks*

37. It is submitted that the trial judge believed the Applicant to be innocent of the index offences, having read undisclosed Social Services files.
38. The trial judge's view of the Applicant's innocence is irrelevant. The panel must proceed on the basis that the Applicant was convicted beyond reasonable doubt. To do otherwise would be plainly unlawful. There is no evidence to suggest that the trial judge thought otherwise. Indeed, he describes the Applicant as "*a very dangerous man*" and notes "*Your acts were planned, deliberate, callous, and cruel. Even had not the statute required it, I would in any event have imposed a sentence of life imprisonment for these offences*". In my view, these are not the words of a judge who feels compromised by a miscarriage of justice or a perverse jury verdict.
39. More fundamentally, the trial judge's view at the time of sentencing has no bearing whatsoever on the procedural fairness of the Applicant's parole review.

#### *Incorrect information*

40. In paragraph 1.7 the decision notes as follows:

*"In December 1997, [the victim and the Applicant] attended a meeting with...Social Services...where [the Victim] was informed that [the Applicant] could present a danger of harm to her children and that she must end the relationship. Until then [the victim] was unaware of [the Applicant's] previous convictions."*

41. The Applicant states this is untrue and that a third party present at the meeting had witnessed the victim stating that she knew everything about the Applicant's previous convictions. The Applicant also says there is a sworn statement from the victim which contradicts the statement in the decision.
42. The pre-sentence report within the dossier refers to the victim's statement which concurs with that within the decision. It notes that the victim was "*extremely shocked by the allegations, not being aware at the time, of the [Applicant's] previous sexual offending*". This statement is also contained within Probation Service records.

43. This matter was not raised in the Applicant's oral evidence. Even if the Applicant had raised it, it would not have been procedurally unfair for the panel to prefer the account within the pre-sentence report. In any event, the matter of disclosure does not change the fact that the Applicant was found guilty on eleven counts of rape against the victim, whether or not she knew of the previous sexual conviction(s). The contested matter of disclosure is, at best, peripheral to the panel's assessment of the Applicant's current risk.

#### *Lack of evidence*

44. The Applicant submits that there is no evidence to support the panel's account in paragraphs 1.8, 1.10, 1.11 and 1.13 of its decision.

45. Paragraphs 1.8, 1.10 and 1.11 relate to the circumstances of the index offence. The account put forward by the panel is consistent with the written evidence within multiple reports in the dossier. It is not surprising that the Applicant, in maintaining innocence, disagrees with reports which refer to convicted sexual offending. However, it is neither unreasonable nor unfair for the panel to reflect documented views from the time of the Applicant's trial.

46. Paragraph 1.13 refers to an allegation that the Applicant attempted to procure a photograph of a child while in custody. The Applicant denies doing so. The decision notes that "*the panel has seen no evidence to either confirm or deny*" the allegation. In that sense, the Applicant's assertion in regard to paragraph 1.13 is partially correct. The Applicant says there is no such evidence, and the panel says it has seen no evidence. The panel goes on to say it gave the allegation no weight. Therefore, it cannot be said to have acted unfairly.

#### *Maintaining innocence*

47. It is submitted that the Applicant has the right to maintain innocence and there is no intervention that would change that stance. The decision reflects the Applicant's stance. The panel's conclusion that any change in stance would be unlikely unless offence-related treatment is undertaken is equally valid. It is not procedurally unfair.

#### *Incorrect behaviour information*

48. The decision notes that the Applicant's custodial behaviour has improved since transferring to the current establishment in 2021. The Applicant disputes that there were behavioural concerns prior to transfer.

49. The POM report dated 11 May 2021 (just prior to transfer) notes two Incentives and Earned Privileges (**IEP**) warnings. The first, in May 2020, reports the Applicant picking up a metal tray and walking towards another prisoner in a threatening manner. The second, in December 2020, report the Applicant refusing to comply with an order. The report stated that the Applicant "*demonstrates some concerning behaviours and can push the boundaries with staff*". In addition, the dossier reflects some 14 proven adjudications between 2003 – 2019.

50. It therefore cannot be sustainably argued that the Applicant did not present any behavioural concerns prior to transfer. The decision fairly reflects this.

#### *Lack of evidence*

51. The decision notes that there are some concerns around entitlement and rigid thinking when the Applicant's needs are not met by staff and that there is a mistrust of the Probation Service. The Applicant is also said to have refused to comply with some of the proposed licence conditions. The Applicant disputes that there have been concerns raised by staff and there is no evidence to support the panel's view.
52. The COM report dated 4 January 2022 notes (with examples) that the Applicant continued to display attitudes around entitlement and rigid thinking in custody. It cannot be said that there have been no concerns raised by staff. There is also written evidence that supports the panel's view. There is no procedural unfairness on this point.

### *Interventions*

53. The decision notes a discussion concerning the Applicant's refusal to undertake accredited programme work based on accepted sexual offending (as opposed to the index offences which are denied). The Applicant submits that there is little else to be said on this point, due to experiencing drink-induced blackouts at the time.
54. There is nothing in the Applicant's submissions on this point that gives rise to any inkling of procedural unfairness.

### *Incorrect information*

55. The Applicant disputes the panel's statement that there is "*evidence of ongoing rumination...about the victim (as evidenced by the production of the documents referring back to the trial)*". It is submitted that the Applicant produced a document simply to evidence that the victim had a documented history of making false rape allegations. The Applicant denied ruminating about the victim.
56. At the end of the hearing, the Applicant presented a witness statement from the time of the trial. This appears to be an extract from the statement of a social worker who had worked with the victim. It mentions the victim disclosing that she had been raped at the age of 16. This has been annotated (presumably by the Applicant) who states "*Once again, [the victim] has made up a story of being raped as she knows it gets her attention and people feel sorry for her. She has never been raped...[she] is a fantasist and uses other people's traumatic events to gain attention*". A contact sheet about a meeting between the victim and Social Services which also refers to a rape is annotated "*All the above are false*".
57. This is not evidence of the victim having made false rape allegations. It is evidence that the Applicant vehemently believes that the victim has made false rape allegations and continues to do so.
58. In any event, if the victim did have a history of making false rape allegations, the Applicant was nonetheless convicted after trial and beyond reasonable doubt of 11 rapes against her. Although the Applicant is maintaining innocence, it is not unreasonable for the panel to consider that an attempt to establish that the victim was not a credible witness almost 22 years after conviction was evidence of focussed attention on the cause of the Applicant's incarceration (and hence evidence of ongoing rumination about the victim). This is not procedurally unfair.

59. The panel's statement that the Applicant "*remains angry and aggrieved about the police officer*" who was in charge of the investigation is also disputed. It is submitted that the only time the Applicant spoke about the officer was to deny threatening her. In oral evidence, the Applicant mentioned "*constant hassle from the police officer in charge of my case*", and stated, "*outside influences have kept me in prison*" and "*I still don't know why I was put under surveillance*". The Applicant denied making a threat to kill a female police officer at the time of sentencing, but alleged that the officer in question harassed family members and tried to get them to make false statements.

60. The Probation Service report of January 2022 states that the Applicant "*acknowledges that he remains very angry toward the arresting officer*".

61. In light of the above, the panel's conclusion regarding the Applicant's view of the arresting officer on the basis of the written and oral evidence before it was neither unreasonable nor unfair.

#### *Misinterpreted information*

62. The decision states that the Applicant "*would be very angry and bitter*" and "*would blame authorities*" if the Applicant's mother were to die while the Applicant was in custody. The recording reflects this, along with the Applicant's comment that "*a man with no hope is a man with no fear*".

63. It is submitted that the Applicant did not show any anger or threatening behaviour at any time, but that anger towards the police would be a natural response if the Applicant suffered a close bereavement while serving a prison sentence for offences that are denied.

64. The decision does not state that the Applicant was, in fact, angry or bitter. The account in the decision accurately records what the Applicant said in the hearing. As such, there cannot be procedural unfairness on this point.

#### *Incorrect information*

65. It is submitted that the panel raised concerns regarding the Applicant's insight into relationship difficulties. The Applicant submits that there have never been any relationship difficulties. The decision simply reports the evidence of the HMPPS psychologist who considered the Applicant to have no insight into relationship difficulties. This was simply a written note of witness evidence. The Applicant is entitled to disagree with the psychologist's views and the panel is just as entitled to consider those views to be of concern.

66. The Applicant also submits that the panel should consider why it is only the victim of the index offences that has raised concerns about relationships when no other previous partner has done so. This was a point that was also raised in oral evidence and would have been within the panel's contemplation when making its decision.

#### *Abscond*

67. The decision notes that there could be an increased risk of absconding from open conditions if the Applicant's mother died. It is argued that this is unreasonably penalising the Applicant simply for having feelings.



68.The matter of abscond was only discussed in the context of a move to open conditions, which does not fall within the reconsideration mechanism. As such, it is irrelevant to this application.

## Decision

69.For the reasons set out above, the panel's decision was not procedurally unfair and the application for reconsideration is refused.

**Stefan Fafinski**  
**10 January 2024**