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[2023] PBRA 183

Application for Reconsideration by Gurney

Application

1. This is an application by Gurney (the Applicant) for reconsideration of a decision of an oral hearing panel dated 1 September 2023 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the **Parole Board Rules**) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the decision, the dossier (comprising 548 numbered pages), the timetable for the day's hearings, and the application for reconsideration. I have also taken the unusual step (for reasons that will become apparent) of seeking written evidence from those present at the hearing and email correspondence between certain witnesses and the Applicant's legal representative. In addition to the written material, I have had access to an audio recording of the hearing.

Background

4. The Applicant received a sentence of life imprisonment on 16 December 1998 following conviction for rape of a female over 16 years of age (with a tariff of seven years). He received a further life sentence for attempting to choke, suffocate or strangle with intent to commit an indicatable offence (with a tariff of 54 months). He also received a concurrent 12 month sentence for assault occasioning actual bodily harm.

5. He was further convicted in May 2004 after disclosing during therapy that he had committed further sexual offences against a family member. He received three concurrent determinate sentences of four years for attempted rape of a female under 16 years of age and a one year concurrent determinate sentence for indecent assault of a female under 14 years of age. These sentences are now served.

6. He has been recalled to custody three times while on life licence. He was first released on licence in April 2013 and recalled in April 2014. He was re-released in May 2019 and recalled in November 2019. He was most recently released in August 2021 and recalled in April 2022. All releases followed reviews by a panel of the Parole Board.

7. The Applicant was 32 years old at the time of sentencing and is now 56 years old. This is his first parole review since his third recall.

Circumstances of third recall

8. The Recall Report (dated 27 April 2022) records that the Applicant undertook a polygraph test during which the Applicant disclosed (amongst other matters) information concerning his relationship with a number of females, including an individual to whom I will refer as **Ms A**. This information had not been previously disclosed to the Probation Service.

9. Insofar as Ms A is concerned, the Recall Report stated that she was a friend of the Applicant. He had met her in his local pub. He said he had kissed her, as well as having had some sexual contact with her, specifically, that he masturbated her while they were cuddling and watching television. He said the sexual activity was consensual and he knew it that it was because he had tried to touch Ms A sexually on previous occasions and she had always asked him to stop, whereas on this occasion she did not say anything. He said they were both under the influence of alcohol at the time. Ms A told him the next day that she no longer wanted to have sexual contact with him. She was said to have recently left a violent relationship, to be "*quiet*", and to be medicated for anxiety.

10. Insofar as is relevant to this application, he was recalled on the basis that the Secretary of State (the Respondent) was satisfied that he had breached the condition of his licence requiring him to notify his supervising officer of any developing intimate relationships with women.

11. He was also said to have breached the licence conditions to notify any developing personal relationships (whether intimate or not) with a person known or believed to reside with children under 18, not to contact or associate with a known sex offender, and not to have advertent/avoidable unsupervised contact with any female under 18.

12. The Recall Report did not state that there was any further offending, ongoing police investigations and/or charges, court dates or convictions.

13. Similarly, the Post Recall Risk Management Report (dated 24 May 2022), and the Ongoing Reviews – Release and Risk Management Report (30 January 2023) affirmed there were no further offences or police investigations arising from the circumstances that led to the Applicant's recall.

14. In short, although the Applicant was recalled to custody, there was no report since the time of his recall which alleged any actual or suspected sexual offending.

Request for Reconsideration

15. The application for reconsideration is dated 19 September 2023 and has been drafted by solicitors acting for the Applicant.

16. It argues that the decision was procedurally unfair and/or irrational.

17. It is submitted that the decision was procedurally unfair because the questioning by the panel was "*oppressive and indicated a strong negative bias formed in advance of the hearing".* It describes the panel's approach as "*intimidatory and offensive"* and claims the panel members were not "*objective or impartial in their pursuit of evidence"* and that their reactions to answers provided at times "*amounted to rudeness"*.

18. It is submitted that the decision was irrational because there was no evidence in support of the panel's theory that the Applicant's intimacy with a Ms A was non-consensual, but this nonetheless dominated the panel's risk assessment. It is argued that the panel's stance was underpinned by the statement in its decision that "*in the eyes of the law, an intoxicated individual cannot give consent"*.

19. These submissions are supplemented by further written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Parole Review

20. The Applicant's case was referred to the Parole Board by the Respondent in May 2022 to consider whether to direct his immediate release. If immediate release was not directed, the Board was asked to consider whether the Applicant was ready to be moved to open prison conditions.

21. In July 2022, his case was directed to oral hearing and was listed for 20 February 2023. The hearing was to take place via video link.

22. The hearing was deferred on the day due to a combination of technical difficulties and time constraints, exacerbated by the addition of two further witnesses (a prisoner-instructed psychologist and a prisoner-instructed psychiatrist) both of whom had submitted reports after the case had been directed to an oral hearing. Applications for their attendance had been granted, but the time allowed for the hearing had not been increased. Further directions and revised panel logistics were set, including increasing the allotted time for the hearing from two and a half hours to four hours. The case was relisted for 22 August 2023 before a fresh panel.

23. On 24 July 2023, the new panel chair issued further Panel Chair Directions (**PCD**s). These noted that the revised four hour estimate would not be sufficient and increased the allocation to four and a half hours. The start time was brought forward by half an hour to 9:30 am. The timetable shows that the panel had a second hearing at 3 pm on the day.

24. The case proceeded to an oral hearing on 22 August 2023, via video-link, before a three-member panel, consisting of an independent panel chair (**Chair**), an independent co-panellist (**Co-Panellist**) and a psychologist specialist member (**Panel Psychologist**).

25. Oral evidence was taken from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), a prisoner-instructed psychologist (**Prisoner Psychologist**) and a prisoner-instructed psychiatrist (**Prisoner Psychiatrist**).

26. The Applicant was legally represented throughout proceedings. The Respondent was not legally represented.

27. The application notes that the hearing finished at 2:45 pm and, because the Chair was concerned that the following hearing was running late, closing submissions would be provided in writing. Written legal representations on the Applicant's behalf were submitted after the hearing on 28 August 2023.

28. The panel's decision, dated 1 September 2023, did not direct the Applicant's release, (nor recommend a move to open prison conditions).

The Relevant Law

29. 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 (as amended)

30. 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)).

31. 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)).

32. 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: general

33. 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.

34. 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.

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

Procedural unfairness: bias

36. Procedural fairness demands not only that those whose interests may be affected by an act or decision should be given prior notice and an adequate opportunity to be heard, but also requires that the decision-maker must be unbiased. A decision-maker is biased if they have a "*predisposition or prejudice against one party's case or evidence on an issue for reasons unconcerned with the merits of the issue*" (*Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 1117 [28] (Scott Baker LJ)).

37. One obvious reason why the common law looks to safeguard against bias is a concern for accuracy in decision-making: if a person is influenced by their private interests or personal predilections, they will not follow, or may be tempted not to follow, the required standards and considerations which ought to guide the decision. However, actual bias is rare and notoriously difficult to prove (*Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1743 (Admin) [47] (Cranston J)), not least because prejudice, and its influence, may well be subconscious. The common law, furthermore, is also concerned with protecting and promoting public confidence in decision-making. For these reasons, the law is concerned with not only the possibility of *actual*, but also the presence of the *appearance* of, bias: "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ)).

38. A prisoner also has a right under Article 6 of the European Convention on Human Rights to "*an independent and impartial tribunal*".

39. Independence and impartiality are distinct concepts: "*Impartiality is the tribunal's approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal but also in the perception of the public*." (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 [38] (Baroness Hale)).

40. The Parole Board is an independent non-executive departmental public body established by statute. However, a prisoner's Article 6 Convention right nonetheless requires the panel considering his parole review on behalf of the Parole Board to have taken an impartial (and therefore unbiased) approach.

41. The House of Lords considered the test for apparent bias in *Porter v Magill* [2001] UKHL 67. The test was held to be whether "*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*" (at [103] (Lord Hope of Craighead)).

42. The fair-minded observer is "*neither complacent nor unduly suspicious"* (*Belize Bank Ltd v Attorney General of Belize* [2011] UKPC 36 [36] (Lord Kerr)).

43. In applying the *Porter* test, the circumstances must be considered in the round. The fair-minded and informed observer would not view allegations of bias individually and conclude that if there is nothing in them individually there can be nothing in them in combination. Rather, all factors alleged to indicate apparent bias are to be considered collectively (*Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 [43] (Floyd LJ)). In other words, a number of unfounded allegations of bias can still amount to a biased outcome if the fair-minded and informed observer considers that to be a real possibility.

44. The outcome of a decision-making process is irrelevant to the question of determining whether there was an appearance of bias. If the fair-minded and informed observer would conclude that there was a real possibility of bias, a decision is not lawful simply because it is likely that a different decision-maker would have reached the same conclusion (*Almazeedi v Penner* [2018] UKPC 3 [28] (Lord Mance)). Equally, the fact that a decision-maker reached a conclusion adverse to the complaining party is not a factor pointing to apparent bias. The question is whether the fair-minded and informed observer would have been concerned *before* the outcome of the process was known (*R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 [129] (Arden LJ)).

Procedural unfairness: predetermination

45. Predetermination is closely related to the concept of bias: it occurs when a decision-maker approaches the issues with a closed mind. Although bias and predetermination are treated as distinct concepts (*R (Persimmon Homes Ltd) v Vale of Glamorgan Council* [2010] EWHC 535 (Admin)) they clearly overlap: a decision-maker with a strong prejudice against a party is likely to approach the issues with a closed mind. It is therefore common for the grounds to be considered together.

46. As with bias, there is a distinction between actual predetermination and its appearance. A finding of actual predetermination will be made if the available evidence shows that a decision-maker in fact approached the issues without an open mind. The lawful expression of a provisional view on a case is distinct from predetermination (*R (Condron) v National Assembly for Wales* [2006] EWCA Civ 1573). While the law "*certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind*" (*Arab Monetary Fund v Hashim* (1994) 6 Admin LR 348 (CA) 356 (Bingham MR)), a decision-maker may also quite properly indicate that they find an answer impossible to believe when hearing from parties or witnesses without appearing to have predetermined the case (*Michael v Official Receiver* [2014] EWCA Civ 1590 [23] (Vos LJ)).

47. While predetermination (both actual and apparent) is always unlawful, it may be lawful for a decision-maker to approach a case with an inclination towards a particular conclusion. Indeed, in some contexts, such as where the decision-maker has been appointed on the basis of their expertise on a particular subject matter, predispositions towards particular views may be inevitable or even desirable (*R (Fraser) v National Institute for Health and Clinical Excellence* [2009] EWHC 452 (Admin)).

Procedural unfairness: Hostility toward witnesses

48. Hostility towards a party during the course of a parole hearing has been argued (unsuccessfully) to give rise to an appearance of bias (*R (Bates) v Parole Board* [2008] EWHC 2653 (Admin)). The Supreme Court has, however, inclined to the view that such cases are better understood as challenges to the fairness of proceedings. The court assumed but did not decide that the correct definition of bias is a "*prejudice against one party or its case for reasons unconnected with the legal or factual merits*" (*Bubbles and Wine Ltd v Lusha* [2018] EWCA Civ 468 [17]). This narrow definition was said not to capture cases in which a decision-maker demonstrated hostility to a party as a result of reaching an "*immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of…resources*." (*Serafin v Malkiewicz* [2020] UKSC 23 [37]-[39] (Lord Wilson)).

49. That said, in unusual and extreme cases, the manner in which a decision-maker addresses the parties may properly be described as giving rise to an arguable claim regarding the appearance of bias (e.g., *R (Dallaglio) v HM Coroner for Inner London West District* [1994] 4 All ER 139 (CA), *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 and *Gulf Agencies v Ahmed* [2016] EWCA Civ 44).

Irrationality

50. In *R (DSD and others) v Parole Board* [2018] EWHC 694 (Admin), the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at [116]:

> *"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

51. This test was set out by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374. The Divisional Court in *DSD* went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

52. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

Other

53. The matter of time allocation and timekeeping in a parole hearing was considered in *R (Grinham) v Parole Board* [2020] EWHC 2140 (and applied in *Wright* [2020] PBRA 151).

54. Mr Grinham was a recalled determinate sentence prisoner and therefore the decision of the panel not to re-release him did not fall within 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.

55. 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. It did not appear 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.

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

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

The reply on behalf of the Respondent

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

Additional written evidence

Correspondence on the day of the hearing

58. As far as the allegations regarding the panel's approach and negative bias are concerned, the application argues that "*it was the stated common view of [the Applicant], his legal representative and two of the four witnesses…who subsequently contacted the legal representative independently, that the questioning by the panel had been oppressive and indicated a strong negative bias formed in advance of the hearing*". I therefore directed disclosure of the relevant correspondence.

59. The two witnesses concerned were the Prisoner Psychologist and the Community Offender Manager. I will summarise their correspondence in the following sections.

Prisoner Psychologist (email)

60. The Prisoner Psychologist sent an email to the Applicant's legal representative (and copied to the COM) at 2:51 pm on the day of the hearing. This would have been very shortly after the oral hearing had ended. The panel was described as "*hostile".* The email stated that the Prisoner Psychologist was "*appalled by the way the panel managed that hearing, cutting people off and being so dismissive of our recommendations and opinions…[they] presented as vehemently opposed to releasing [the Applicant]"*. It concluded by stating "*I am truly baffled at what I just witnessed"*.

61. A second email sent the following day commented that (in the Prisoner Psychologist's opinion) the Panel Psychologist holds "*extremely negative and damaging attitudes that [all sex offenders are] manipulative and predatory psychopaths".*

Community Offender Manager (email)

62. The COM also sent an email (which was a reply to a message from the Applicant's legal representative entitled "*Today's Ordeal",* and could not therefore be said to have been wholly unsolicited) on the day of the hearing. The email stated that the panel "*appeared to have no interests in the positives and appeared they had already made a decision. Making assumptions about [the Applicant] being manipulative, predator (sic), targeting vulnerable individuals without evidence was appalling… [The Panel Psychologist] was not interested in talking to anyone who did not agree with him and tried to lead witnesses into agreeing with him (as did the chair) with leading questions. Disgraceful".*

Further statements after the hearing

63. Having reviewed the email correspondence, I then asked the HMPPS witnesses (that is, the COM and POM) to provide a written statement. I was not able to contact the Prisoner Psychologist or Prisoner Psychiatrist. In fairness to the panel, I also invited each panel member to provide their own reflections upon the hearing. In doing so, I provided everyone with a broad outline of the concerns raised in the application for reconsideration but did not go into detail regarding the specific examples (which ran to almost three pages). My aim was to get a sense of the mood of the hearing from those present, which I hoped would add some context to my analysis of the audio recording. I will summarise those statement in the following sections.

64. I am grateful to all those who responded to my requests promptly and helpfully.

Community Offender Manager (statement)

65. The COM's statement to me expresses similar views to those outlined in her earlier correspondence with the Applicant's legal representative. It describes "*[t]he most biased hearing I have attended. It appeared the panel already had made a decision and were not interested in listening to anyone who had different views".* It then provides the details of a complaint made to the Parole Board. This will follow an entirely separate process to this application for reconsideration and the two matters are not linked.

66. The complaint largely reiterates (although in slightly less emotive terms) the sentiments expressed in the COM's earlier email to the Applicant's legal representative. It alleges that the Panel Psychologist "*laughed"* at the COM when she offered "*a different view to the one he wanted",* describing his questioning as "*scathing"* and questioning her objectivity. It also describes the Chair's questioning as "*hectoring"* and assuming the Applicant's sexual behaviour with Ms A was without consent, including describing her as a "*victim".* It concludes by stating that the hearing was not fair due to the "*negative and biased manner in the way the panel managed the hearing"*.

Prison Offender Manager (statement)

67. The POM did not contact the Applicant's legal representative after the hearing. Her statement to me indicates that "*the conduct of the panel was oppressive and indicated strong negative bias…the panel had made up their minds prior to the hearing that the did not wish to recommend release and they directed questioning to achieve evidence to support their decision, rather than gathering evidence to enable them to make a decision".*

68. Her view was that the panel's focus was "*on negatives almost to the exclusion of considering any positive evidence".* She describes the questioning of the panel psychologist as "*dismissive and unprofessional"* including "*actually laughing at witness responses on some occasions".* She further notes that the panel referred to "*some of the females identified in the recall report and in evidence as 'victims', when there have been no charges brought, let alone convictions relating to these individuals"* considering that the panel were "*ascribing a nefarious and predatory aspect to [the Applicant's] friendships in spite of there being evidence from some of the individual's (sic) that suggested the opposite"*.

69. It is further noted that the Panel Psychologist was "*dismissive"* of the COM's evidence and that the COM was "*barely given any time for questioning"* and, given the time constraints upon the panel, it "*felt very much that the panel wanted to finish up quickly".*

70. It concludes with a view that the hearing "*did not feel very fair or balanced in its approach".*

71. Although the POM did not feel moved to contact the Applicant's legal representative in the immediate aftermath of the hearing, her view concurs with those of the COM and Prisoner Psychologist who did do so.

Panel Chair (statement)

72. The Chair has provided a lengthy statement. I will summarise its key points here insofar as they are relevant to the application for reconsideration.

73. She notes that the Panel Psychologist may have referred to certain females as "*potential victims"* during the hearing itself, but they were not described as such in the panel's decision.

74. She notes that the panel had a pre-hearing discussion in which the areas of focus were identified and agreed. During this the panel "*did not express any bias towards [the Applicant] … or indicate they had already made their minds up: they were open to hearing all of the evidence, as they did, over the course of 5 hours".*

75. She acknowledges that some of the questions had to be "*of a sensitive nature"* and "*challenging"* given the sexual nature of the Applicant's convictions and the panel's need to understand the extent to which his risk factors were active in the community.

76. She further notes that the panel were justified in exploring issues relating to consent and alcohol but did not go so far as making a finding of fact.

77. She describes the COM as presenting as "*defensive"* during her evidence.

78. Overall, she refutes the suggestion that the panel presented as biased.

Co-Panellist (statement)

79. The Co-Panellist reflected upon a long hearing, but "*[a]t no point during or after the hearing did I feel that myself or the other panel members had been unprofessional in their treatment of the witnesses, biased or lacked objectivity or impartiality in any way*". She recalls a "*very thorough risk assessment*" with "*some key areas that we had to be very clear about, and therefore asked a lot of questions*". She also raised the panel's concerns about the COM's management of the case.

Panel Psychologist (statement)

80. The Panel Psychologist's response was simply, "*I do not want to provide a statement at this time*". This is distinctly unhelpful, but, to be clear, I draw no adverse inference from their unwillingness to comment.

Discussion

Ground 1 – Procedural unfairness

81. The essence of the application on the ground of procedural unfairness raises three key matters:

    (a) the panel was biased against the Applicant;
    (b) the panel's decision was predetermined; and
    (c) the panel was hostile toward witnesses.

82. These matters are closely linked, and I will therefore deal with them together.

83. Two further points arose from the witness statements: the matter of leading questions and time constraints upon the hearing. For completeness, I will also deal with those as preliminary matters under the heading of procedural unfairness since they also relate to the conduct of the panel and the conduct of the hearing.

84. Rule 24(2)(b) is clear that the panel may ask any question to satisfy itself of the level of risk of a prisoner, and rule 24(6) provides that a panel may receive any evidence whether or not it would be admissible in a court of law. There is nothing in the Parole Board Rules that specifically prohibits the use of leading questions and therefore objections to their use cannot give rise to a finding of procedural unfairness.

85. *Grinham* establishes a decision may be procedurally unfair if there is insufficient time being available for the hearing to be conducted in an unhurried and seemly manner or a prisoner's legal representative was unable to cross-examine witnesses fully for lack of time. Neither of these points are raised in the substantive application. Even if they had been, the hearing (while clearly constrained by time) was not, in my view, rushed to the point of unseemliness. Neither did the Applicant's legal representative seem to struggle to question witnesses fully. There is no evidence to support a finding of procedural unfairness for lack of time.

Bias, pretermination and hostility

86. The application for reconsideration, the email correspondence between some witnesses and the legal representative, and the statements received from witnesses and panel members depict two very different versions of the oral hearing. From the point of view of the Applicant, his legal representative, and the witnesses present, the conduct of the panel was, in short, reprehensible. From the panel's perspective, it conducted a challenging and robust risk assessment exercise, focusing on its key areas of concern and tested the evidence of the witnesses from whom it heard. There is unanimity as far as the witnesses are concerned and unanimity as far as the panel is concerned.

87. I turn first to the timing of the challenge to the panel's conduct. As a general principle, cases in which the party to Parole Board cases have been represented by a lawyer are highly unlikely to generate a successful application for reconsideration if there had been no challenge made to the alleged irregularity by an applicant, save in the event for instance of a failure by the other party (for example, a failure to disclose material relevant to the ultimate decision to that applicant).

88. This begs two questions. First, if the manner in which the panel conducted the hearing was so bad as to prompt almost immediate written expressions of dissatisfaction and incredulity from two witnesses, and later agreement from the third, then why, in the five hours of proceedings, did the Applicant's legal representative not protest?

89. Second, given the six days between the oral hearing and the submission of closing written submissions (by which time the initial flurries of dissatisfaction had been exchanged via email), why did the Applicant's legal representative not take the opportunity to raise those concerns in those closing submissions, having had ample time to reflect upon them?

90. The lack of challenge at the time of the hearing could have fatally undermined this first ground, and I have carefully considered whether I should simply dismiss it without further ado. Indeed, it would be unusual for me not to do so.

91. However, on balance, I have decided that I should, in fairness to the Applicant, engage with it since the negative views about the panel were expressed with such vehemence by the witnesses that those views, of themselves, merit further exploration. Moreover, by the time it came to providing closing submissions in writing, the moment to object had passed and written objections would not have adduced any further evidence for the panel to consider in its deliberations. Therefore, the more sensible and appropriate course of action would have been to put forward the Applicant's best case for release in those closing submissions but use the reconsideration mechanism to seek redress if the panel was unpersuaded and the decision went against the Applicant, as the legal representative and witnesses say they expected.

92. In approaching the allegations of bias, I must first ascertain all the circumstances which have a bearing on the suggestion that the panel was biased. I must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the panel was biased.

93. The application sets out a number of individual examples of occurrences in the hearing which, it is said, are indicative of bias. Following *Zuma's Pet Choice Products,* I must, in applying the *Porter* test, considered the conduct of the hearing in the round and deal

with all factors alleged to indicate apparent bias both individually and collectively.

94. I will begin by considering the general attitude of the panel in the hearing.

The general attitude of the panel in the hearing

95. Several examples are given in which it is said the reactions of panel members to oral evidence given by witnesses were sarcastic, derisory, laughing or sneering.

96. The matters complained of here are similar to those in *Bates.* Mr Bates argued that the treatment by a panel of the evidence of an independent consultant psychiatrist and the prisoner was indicative of apparent bias. It will be helpful to provide further detail of the tenor of the complaints in *Bates* to support my analysis of the present application.

97. The witness statement supplied by the psychiatrist in *Bates* included the following passages:

> *"During the course of my evidence the Chairman expressed scepticism that Mr Bates would be honest with his supervisors and expressed the view that it would be quite possible that despite being told how important it was to let them know if he was starting to form a relationship, Mr Bates would quite likely conceal this fact from his supervisors. When I observed that there was no evidence as far as one could tell regarding dishonesty on the part of Mr Bates, whose most striking characteristic was 'bloody mindedness' rather than deviousness, the Chairman interrupted my evidence and in effect dismissed me, stating that as far as he was concerned Mr Bates remained a danger to any woman that he was likely to form a relationship with subsequently and he seemed to imply that Dr Halsey and I were being naive in thinking that he could be effectively supervised in the community."*
>
> *"In other words, there was a strong impression that the leading member of the panel had formed his own unshakable opinion in regard to this case prior to the hearing of the evidence."*

98. The claimant in *Bates* (the prisoner) said as follows:

> *"I found the hearing to be a complete farce, and the attitude from the judge from the very beginning was very hostile. He introduced everyone around the room and when he came to me, his first words to me were, 'Good morning, Mr Bates, you are truculent.' He then asked whether I knew what the word meant. I did know what it meant but was given no time to reply or question why he had made such a statement to me, especially when he had never met me before."*
>
> *"In his closing, I felt that the judge of the panel continued to show bias and seemed nonchalant about the importance of the hearing to me. I felt he had already formed his opinion and disregarded anything said that disagreed with his preformed opinion."*

99. Having considered the circumstances of *Bates* there is nothing in the present application that strikes me as being worse conduct on the part of the panel. I say this with the benefit of having heard the audio recording of the entire hearing. The panel's questioning of the professional witnesses did not explicitly call their professional

competence into question. Even if it had, *Gulf Agencies* would suggest that going so far as to question whether a witness was, in fact, professionally qualified based on their presentation would not give rise to a finding of apparent bias (provided that the decision which followed was free of any actual or apparent bias).

100. Set against this high bar, it is not surprising that the application for judicial review in *Bates* was unsuccessful. In applying the *Porter* test, the court in *Bates* held that there was no evidence that the Parole Board approached the claim with a closed mind (despite the manner in which witnesses were questioned).

101. It could be argued that present case is distinguishable from *Bates* in the sense that mention was made in *Bates* that no criticism was made of any other panel member apart from the chair: here, criticism has been levelled at all panel members.

102. That said, I can empathise with the positions of witnesses who experienced robust cross-examination verging on hostility. I have heard reactions from panel members which could reasonably have been said to be sarcastic, derisory, laughing or sneering. While this is regrettable, there was certainly nothing as grave in the panel's treatment of witnesses as in those cases that had been successful: these involved the use of the terms "*mentally unwell*" or "*unhinged*" toward witness (*Dallaglio*) or a witness from Saudi Arabia being so unreliable as to have been "*on his flying carpet*" (*El-Farargy*). Moreover, while the panel's responses may have indicated that they found some answers impossible to believe, that would also not be indicative of apparent bias (*Michael*).

103. Overall, I find nothing in the approach and demeanour of the panel members (either individually or collectively) towards questioning witnesses that would lead a fair-minded and informed observer to make a conclusion that the panel was biased against the Applicant.

104. Moreover, following *Royal Brompton,* the fact that the panel disagreed with the views of the professional witnesses is not, of itself, a factor pointing to apparent bias.

105. Panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in *DSD*, they have the expertise to do it.

106. A panel's view may therefore legitimately differ from the views of professional witnesses. Of course, no professional witness would offer a view that they would not stand behind, but this is not to say a panel has to agree with that view, regardless of any other factor, including the length of time that the witness has known the prisoner, and their professional qualifications and expertise. While professional standing will naturally give evidence significant weight, it does not render it determinative.

107. The crucial question, though, is whether the fair-minded and informed observer would have been concerned *before* the outcome of the process was known.

108. It is certainly true that some witnesses raised concerns about the conduct of the hearing which suggested they expected the panel's decision to go against the Applicant immediately after the hearing. Those witnesses were concerned about bias before the outcome of the process was known. They thought it was unfair and considered that the panel had already made up its mind prior to the hearing. There is therefore an allegation of predetermination to be considered.

Predetermination

109. As the Chair noted, the panel had (as is customary practice) a pre-hearing discussion. It would not surprise me if the panel had formed a preliminary view during that discussion. It is not uncommon for a panel to do so. Indeed, such a discussion may assist a panel in identifying the key areas on which it needs to probe evidence in order to support or counter any preliminary view formed on the basis of the dossier. It is equally common for a panel, having formed a preliminary view, to later reject it in the face of the evidence. The ability to test propositions is one of the fundamental benefits of an oral hearing.

110. The Applicant is serving a life sentence and has been recalled to custody on three occasions. Even though a panel that considered his case in 2021 considered his second recall to have been inappropriate and redirected his release, he was nonetheless recalled again after around eight months in the community. Moreover, even if I were to ignore the second recall entirely, the Applicant is nonetheless a life sentenced prisoner who has been subject to two recalls considered to have been appropriate by the Parole Board. The panel therefore was entitled, and indeed would be expected, to carefully examine the evidence before it, be that written evidence *before* the hearing and oral evidence *at* the hearing.

111. Forming a preliminary view on the content of the dossier before a hearing is not the same as predetermining the outcome of a hearing. The fact that the panel subsequently heard oral evidence for around five hours also suggests a lack of predetermination. There is no sense from the recording of the hearing that the panel simply *'went through the motions'* and performed nothing more than a cursory examination of the evidence before reaching its decision. In fact, a fair-minded and informed observer would consider that the panel had examined the areas of focus that it had earlier identified very robustly: so robustly, in fact, that witnesses were moved to complain.

112. One of the panel's key areas of focus in the hearing was whether the sexual contact between the Applicant and Ms A was consensual. This is apparent from listening to the hearing itself, as well as parts of the panel's decision, which I will summarise in the following section.

The panel's treatment of consent

113. At para. 2.25 of its decision the panel states that "*The Panel had obvious concerns regarding [the incident with Ms A] because in the eyes of the law an intoxicated individual cannot give consent".*

114. At para. 2.24, the panel notes that "*[The Applicant] acknowledged that he assumed consent because [Ms A] did not tell him to stop on that occasion*."

115. At para. 2.24, it is noted that "*The Panel noted that whilst [the Applicant] had not been convicted of a further sexual offence, they did consider that the boundaries of consent with [Ms A] had been blurred (whilst acknowledging that they did not have her version of events)*".

116. At para. 4.8, it is stated "*Whilst the Panel noted [the assertions of the Applicant's legal representative] that [he] understood the importance of seeking consent with intimate partners, they had concerns regarding the incident described by [the Applicant] with [Ms A] after they had been drinking, whereby she had declined his sexual advances before and after that occasion. The Panel was unable to make a finding of fact regarding that incident because neither [the COM] nor the Police had spoken with [Ms A] regarding it, to seek her view*."

117. During the hearing, the Chair stated during questioning, "*Because we know that if an individual is intoxicated, through the eyes of the law, they can't consent, can they?"*

118. The Panel Psychologist stated during questioning, "*You've heard the Chair earlier describe what could under the law probably be considered as an offence during his last release?*"

119. At other points of the hearing, Ms A, and others, were referred to as "*victims"* and "*potential victims"*.

120. The panel's understanding of the law of consent expressed both during the hearing and in its decision is wrong.

121. There are four offences within the Sexual Offences Act 2003 which require the prosecution to prove an absence of consent: rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity.

122. Consent is defined in section 74 of the 2003 Act as agreement by choice, by a person who has the freedom and capacity to make that choice. CPS guidance to prosecutors suggests that determination of consent should be considered in two stages:

    (a) whether a complainant had the capacity (i.e. the age and understanding) to make a choice about whether or not to take part in the sexual activity at the time in question; and

    (b) whether he or she was in a position to make that choice freely and was not constrained in any way.

123. The issue of capacity to consent is particularly relevant when a complainant is intoxicated by alcohol or affected by drugs.

124. The leading authority on this point is *R v Bree* [2007] EWCA Crim 804, which provides (at [34]):

> *"If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendant's state of mind, if intercourse takes place, this would be rape.*

> *However, where the complainant has voluntarily consumed even substantial quantities of alcohol, but nevertheless remains capable of choosing whether or not to have intercourse, and in drink agrees to do so, this would not be rape. We should perhaps underline that, as a matter of practical reality, capacity to consent may evaporate well before a complainant becomes unconscious. Whether this is so or not, however, is fact specific, or more accurately, depends on the actual state of mind of the individuals involved on the particular occasion."*

125. Although *Bree* concerned rape, the passage above refers to the proper construction of section 74 of the 2003 Act and the principles are equally applicable to the other sexual offences set out above which have a lack of consent as a constituent component of the *actus reus*.

126. It is clear that although a complainant is not able to consent if they are incapacitated through drink, they may give valid consent if intoxicated to a state short of incapacity. *Bree* is very clear that "*drunken consent is still consent"* (at [32], Sir Igor Judge P) even if the complainant has voluntarily drunk a significant amount of alcohol.

127. On the face of the evidence before me, the panel steadfastly subscribed to the view that an intoxicated individual cannot consent to sexual activity. It made mention of this six times within its decision and its questioning of witnesses. The panel's error was not confined to a one off throwaway comment: it pervaded its questioning and the analysis within the decision.

128. Closing written representations to the panel on the Applicant's behalf stressed that the Applicant was fully aware of the boundaries of sexual consent, that Ms A would have been able to tell him to stop because she had done so in the past, and that the Applicant and Ms A were not drunk but had been drinking. The Applicant has said that Ms A had consumed a couple of glasses of wine over two hours.

129. The panel said it made no finding of fact in relation to the incident.

130. A panel will only engage in a fact-finding exercise in response to an allegation. The Parole Board's published *Guidance on Allegations* (September 2023, v2.0) sets out the principles that panels must follow when considering a disputed allegation against a prisoner. For the purposes of the Guidance, an 'allegation' refers to conduct alleged to have occurred which has not been determined or proven during a legal process.

131. Examples of forms of allegations are provided in the Guidance. These include:

(a) A prison officer's evidence that the prisoner appeared under the influence of a substance;
(b) Prison intelligence that the prisoner is suspected of hitting another prisoner;
(c) A COM's evidence that the prisoner was abusive during a telephone call;
(d) Police intelligence that a prisoner has breached an exclusion zone;
(e) Police domestic abuse call out logs;
(f) An allegation that the prisoner has further offended but no charge is brought; or
(g) A charge of criminal offending that is awaiting trial or has resulted in an acquittal.

132. These examples are all examples of potential wrongdoing that would be brought to the attention of the panel. However, there were no similar allegations on the evidence before the panel. To engage with a discussion of fact-finding indicates that, in the panel's mind, there was an allegation of further offending arising from the Applicant's admitted sexual conduct with Ms A without consent by virtue of her intoxication.

133. The inference of the panel that a sexual offence had been committed was further borne out by its use of the word "*victim"* in questioning (albeit not in its written decision). There could only have been a victim if further offending had taken place. The panel's use of language is further evidence of the allegation which was at the forefront of its mind.

134. The panel concluded that it made no finding of fact because neither the COM not the police had spoken with Ms A to seek her view. This further suggests that the allegation remained formed in its mind. It would be unusual for a COM or the police to seek a view from someone who had never raised a complaint in the first place, particularly when the Applicant was recalled for reasons which did not raise concerns that further offences had been committed.

135. The panel's line of questioning, its use of the term *'victim'*, its consideration of a fact-find, and its misunderstanding of the law of consent, leads me to conclude that the panel may well have considered in its pre-hearing discussion that the Applicant had committed further sexual offences on licence, even if these were never investigated, prosecuted, or charged.

136. Based upon that, I find that the fair-minded and informed observer (and I take *'informed'* to include '*properly informed as to the applicable law'*) would have concluded that there was a real possibility of bias on the panel's part. This bias stems from the panel's evaluation of the facts surrounding recall against a statement of law that was plainly wrong.

137. Moreover, if the panel's preliminary (and incorrect) evaluation of the issues was leading towards a firm hypothesis that the Applicant had committed further offences, then this would account (at least in part) for its tenor towards witnesses that considered, equally firmly, that he had not.

138. With all of that said, the panel's repeated misstatement of law in the hearing, should have been evident to the Applicant's legal representative, who again, should have sought to correct it, either at the time or in the closing written submissions.

139. Nonetheless, I find that the panel's decision was marred by procedural unfairness, and this ground succeeds.

Irrationality

140. I have already found procedural unfairness, and this is sufficient for the application to be granted. However, irrationality has also been raised, and I will briefly deal with that here for completeness.

141. I also find the panel's decision to be irrational since it is underpinned by a fundamental

misunderstanding of relevant law which appears to have been pivotal to its assessment of the Applicant's risk in relation to his sexual conduct with Ms A.

142. I am not, however, persuaded by the argument that the panel was irrational to conclude that the Applicant's current medical condition and prognosis did not impact on his current assessed levels of risk, even though it may do so in the future.

Stefan Fafinski
23 October 2023