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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERARD STOKES FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND PRISON SERVICE

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Mr Martin O'Rourke KC with Mr Colm Fegan (instructed by Emmet J Kelly Solicitors) for the Applicant
Ms Nessa Murnaghan KC with Ms Fiona Fee (instructed by The Departmental Solicitor's Office) for the Respondent

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KINNEY J

Introduction

[1] The applicant is a serving prisoner in HMP Maghaberry and is subject to a life sentence. He has served more than his tariff and had been undergoing prerelease testing (PRT). He was in phase 2 of PRT in Burren House in September 2022. However, as a result of a decision made by the prison governor in September 2022, he was removed from phase 2 of PRT located in Burren House and returned to phase 1 located at Wilson house. It is this decision which is challenged in this judicial review.

Background

[2] The applicant had been on unaccompanied temporary release (UTR) on the weekend of 3 and 4 September 2022. He stayed at his nephew's house in Larne. He returned from his UTR on Monday, 5 September 2022 and passed both a drugs test and a breathalyser test. The applicant was then approached by Governor McIlwaine (the governor) on 6 September and was told that the prison had two sources of information that alleged that he had consumed alcohol whilst on leave.

[3] In her affidavit, the governor averred that she was directly approached by a member of the public on 5 September 2022 who informed her that they had seen the applicant visibly intoxicated on Linn Road in Larne and that he was pestering teenagers. The governor was then informed on 6 September that an off duty member of prison staff had also witnessed the applicant intoxicated on the same date and same location. A case conference was held on 6 September 2022 with the applicant present.

[4] There is then a dispute between the applicant and the respondent as to the content of the case conference held on 6 September 2022 and of a subsequent case conference held on 26 September 2022. Having considered carefully the evidence in this case and the submissions of the parties I am satisfied of the following facts:

- The first case conference was called by the governor and took place on 6 September 2022. At that case conference the applicant was told of the allegation against him, namely, that he had consumed alcohol whilst on leave. There is a dispute about the level of detail provided to the applicant about the allegations.

- The applicant denied that he had been drinking alcohol whilst on leave. He acknowledged alcohol was an issue for him but said that he was not drinking and was already engaging with Smart 360 which is a program for recovering alcoholics. The applicant also stated that he was taking the matter seriously and that he would seek the help that he needed.

- The applicant was then told that as a result of the case conference he would be returned to phase 1 of the PRT but would be allowed to remain in Burren House. The governor also informed the applicant that the matter would be discussed again at a further case conference on 26 September 2022.

[5] There are case conference minutes available for 6 September 2022. It is fair to say that they are sparse. The governor chaired the meeting. It is clear from the minutes that the applicant denied that he had been drinking and also confirmed that he was already going to Smart 360 recovery to keep off alcohol. The minutes however do not show any discussion amongst the panel of the issues in the case or indeed any outcome in terms of a finding by that panel. It does not appear, from the minutes, that anyone other than the governor and the applicant spoke at the meeting. The only recorded outcome was that the applicant was returned to phase 1 of the PRT and the matter was to be further discussed at another case conference on 26 September 2022.

[6] The applicant contends that the governor had a closed mind in these proceedings. In her affidavit the governor denied that she had predetermined the applicant's guilt and said she wished to hear the applicant's response to the allegations. She accepted that the applicant had denied the allegations. She then

referenced the applicant's comments that he was taking the matter seriously and was going to Smart 360 recovery and would get help. The governor then avers at paragraph 7 that:

> "from these representations the panel understood that this was an implicit admission that he had been drinking alcohol, despite his denials.… The applicant's responses of denial and then acceptance that he needed help were effectively considered overall as being an admission of guilt."

[7] At the judicial review hearing it was clarified that the applicant had not been told of this finding of guilt at the first case conference, nor was there any further communication with the applicant about the matter, particularly providing any further information, until the next case conference on the 26 September 2022.

[8] After the first case conference the governor initiated further investigations. The applicant was not informed of these further investigations. At paragraph 9 of her affidavit the governor stated that the purpose of the further investigations was to establish whether it was appropriate to remove the applicant entirely from PRT or whether he could remain on the scheme. The investigations appear to have been confined to a visit by prison officers with the applicant's nephew, with whom the applicant had been staying on UTR. The nephew confirmed there was no indication the applicant had been drinking on his UTR. The conclusion of the governor was that, as a finding had already been made that the applicant was drinking on UTR, the nephew could no longer be trusted as a protective factor should the applicant be allowed to continue with PRT.

[9] The second case conference took place on 26 September 2022. It was a differently constituted panel. It included two individuals who were not present at the case conference on 6 September 2022. This panel discussed the applicant before he was brought into the case conference. It considered the fact that the applicant's nephew had said there was no indication the applicant had been drinking and how this conflicted with the evidence provided by a member of staff and a member of the public. The panel was concerned that the applicant's nephew was not a supportive factor. The panel also considered evidence from the PDP coordinator, who reported that she had asked the applicant to write a reflective piece in his diary about the issue to try to get him to think about the risks of his behaviour, but he had failed to do so.

[10] At paragraph 14 of her affidavit the governor states:

> "It is important for the panel to be able to have discussions before the applicant is brought into the case conference to ensure all panel members have fully up-to-date information on the matter and everything that they

had each undertaken to do had been done. Anything which was discussed in the absence of the applicant was then discussed with him."

[11] The governor averred at paragraph 15 that

> "the applicant did not engage or offer any explanation in response to the allegations."

[12] The governor repeated the use of the word "allegations" even though it is the respondent's case that a finding of guilt had been made at the previous case conference and these matters were no longer allegations. The case conference minutes of 26 September 2022 also use the same terminology of allegations. The panel discussed the matter as outlined by the governor in her affidavit. The minutes for this phase of the case conference conclude with the sentence:

> "A discussion takes place on the way to proceed with the allegations regarding Mr Stokes consuming alcohol."

[13] The minute then reflects the applicant entering the case conference and the first sentence of the minutes following his entrance is:

> "The chair welcomed Mr Stokes and explains that there has been a lengthy discussion about Mr Stokes breach.
>
> The chair advised Mr Stokes that an investigation has taken place with regard to the allegations that Mr Stokes having been seen in Larne drunk.
>
> The chair advised Mr Stokes that he has not demonstrated at any time since the case discussion on 6 September 2022 that he has taken responsibility for his actions.
>
> The chair advised Mr Stokes that he would be returned to Wilson House, HMP Maghaberry today to start the process again."

The law

[14] The central issue is that of procedural unfairness. In *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 the court said:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to

> producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

[15] In *Osborn v the Parole Board* [2013] UKSC the court considered the domestic principles of procedural fairness. It said:

> "64. Following the approach I have described, it is necessary to begin by considering the practice followed by the board in the light of domestic principles of procedural fairness. In doing so, it may be helpful to clarify three matters at the outset.
>
> 65. The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant Osborn, Langstaff J refused the application for judicial review on the ground that "the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable" (para 38). In the case of the appellant Reilly, the Court of Appeal in Northern Ireland stated at para 42:
>
> > 'Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board.'
>
> These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on Wednesbury grounds. That is not correct. The court must determine for itself whether a fair procedure was followed (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71; [2006] 1 WLR 781, para 6 per Lord Hope of Craighead). Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required.
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> 66. The second matter to be clarified concerns the purpose of procedural fairness. In the case of the

appellant Osborn, Langstaff J stated at para 6 that in determining whether an oral hearing was necessary, what fell to be considered was the extent to which an oral hearing would guarantee better decision making in terms of the uncovering of facts, the resolution of issues and the concerns of the decision-maker, due consideration being given to the interests at stake. In the Court of Appeal, Carnwath LJ interpreted Lord Bingham's speech in R (West) v Parole Board [2005] UKHL 1; [2005] 1 WLR 350 as implying that the underlying rationale of procedural fairness at common law was one in which "the emphasis is on the utility of the oral procedure in assisting in the resolution of the issues before the decision-maker" (para 38).

67. There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed, however, in *Secretary of State for the Home Department v (AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.

68. The first was described by Lord Hoffmann (ibid) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. As Jeremy Waldron has written ("How Law Protects Dignity" [2012] CLJ 200, 210):

> 'Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.

> As such it embodies a crucial dignitarian idea – respecting the dignity of those to whom the norms are applied as beings capable of explaining themselves.'

69. This point can be illustrated by Byles J's citation in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 195 of a dictum of Fortescue J in Dr Bentley's Case (*R v Chancellor of Cambridge, Ex p Bentley* (1748) 2 Ld Raym 1334):

> 'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence.'

The point of the dictum, as Lord Hoffmann explained in AF (No 3) at para 72, is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making. As Byles J observed (ibid), the language used by Fortescue J "is somewhat quaint, but … has been the law from that time to the present."

71. This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hoffmann referred. Courts have recognised what Lord Phillips of Worth Matravers described as "the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result" *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 63). In the present context, research has established the importance attached by prisoners to a process of risk assessment which provides for their contribution to the process (see Attrill and Liell, "Offenders' Views on Risk Assessment", in Who to Release? Parole, Fairness and Criminal Justice (2007), ed Padfield). Other research reveals the frustration, anger and despair felt by prisoners who perceive the board's procedures as unfair, and the impact of those feelings upon their motivation and respect for authority (see Padfield, Understanding Recall 2011, University of

> Cambridge Faculty of Law Research Paper No 2/2013 (2013)). The potential implications for the prospects of rehabilitation, and ultimately for public safety, are evident."
>
> 72. The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions (see eg Fuller, The Morality of Law, revised ed (1969), p 81, and Bingham, The Rule of Law (2010), chapter 6)."

[16] The third value related to costs involved in providing a fair procedure.

[17] In *Re McAree's and Watson's applications for Judicial Review* [2010] NIQB 79 the court said:

> "It is common case that the concept of fairness is context sensitive and involves a degree of elasticity. The present case concerned the requirements of procedural fairness applicable not to a trial or other adversarial process but to a decision concerning prison management."

Submissions of the parties

[18] The applicant argued that the contextual background is important. He is a life sentence prisoner at an advanced stage of his rehabilitation. Being the subject of temporary release allows him to evidence to the Parole Commissioners that his risk to the public can be managed with appropriate conditions. As a result of the decisions made by the respondent the applicant was placed back in this process which had an impact both on his everyday living conditions and also on his prospects of rehabilitation and release. The applicant contends that the decisions affecting him were in fact made at the second case conference on 26 September 2022. At the first case conference the allegations were put to him, and he was demoted from phase 2 of the PRT to phase 1 but remained at Burren House. He contends that no decision was made at that time regarding his guilt. The decisions regarding both his guilt and the penalty imposed were taken at the second case conference on 26 September 2022. Those decisions were made in his absence, and he was simply told of the outcome. He was given no opportunity to prepare or to respond to any adverse inferences or findings. The applicant contends that the issues were predetermined by the respondent. He did not have knowledge of the case made against him in advance nor did he have sight of the information relied upon by the decision-maker. He did not have the opportunity to make informed representations and respond to the case against him when that decision was still at a formative stage.

[19] The respondent argued that the decision to find the applicant guilty of a breach of the terms of his temporary release was made at the first case conference on 6 September 2022. He was informed of the allegations against him and allowed to make representations to deny them. He was then allowed to remain in Burren House whilst further investigations were made. The failure to provide advance warning of the allegations would not have had any material impact. The second case conference of 26 September 2022 was not a rehearing of the matter but the conclusion of the process and the determination of the appropriate sanction. The applicant was in fact returned to Burren House in February 2023 and allowed to recommence UTR. In those circumstances the matter is now academic and should not be determined by the court. The respondent urged the court to take into account the nature of the decision being one of prison administration and management and the court should not seek to "judicialise " the process.

Consideration

[20] The respondent contends that the decision to find the applicant in breach was made at the first case conference. I am prepared to accept on the evidence before me that this is in fact correct. It still however leaves a myriad of questions as to the procedure and process used by the respondent.

[21] In line with the legal authorities, both parties have acknowledged that procedural fairness is an elastic concept which is context and case specific. It is the function of this court to determine whether a fair procedure was followed in all the circumstances.

[22] In this case there is some dispute over factual matters. However, of more import is the lack of evidence identifying core facts. In judicial review proceedings the respondent's version of the facts is normally to be preferred. However, that is not an all embracing rule. In this case some aspects of the respondent's case are internally contradictory. This is particularly so in considering the contemporaneous minutes of the two case conferences and the governor's subsequent affidavit. A minute is of course not meant to be a verbatim account of everything that happens in a meeting, but it is unusual that significant aspects of the meetings which go to the core of the case conferences have not been recorded at all.

[23] There are very significant gaps in the evidence provided by the respondent relating to the decision-making process. At the first case conference there is no reference to any discussion between the panel members about arriving at either a conclusion as to the guilt of the applicant or the interim sanction imposed. At the second case conference there is no reference at all to the applicant being informed of the nature of the panel's preliminary discussions. There is no record in the minutes or in the governor's affidavit that the panel discussed the issues either in front of or in the absence of the applicant before arriving at a final conclusion.

[24] The most serious omission is the inexplicable failure to inform the applicant of the finding that he been drinking alcohol and was in breach of his UTR conditions. He was not told of this finding until the end of the second case conference, even though the decision itself had been reached at the first case conference.

[25] I was informed in submissions that no one has responsibility for reviewing or approving the minutes taken of case conference meetings. There is no evidence that the minutes are shared with the applicant. There appears to have been no contact with the applicant between the two case conferences to give him any reasonable opportunity to understand the purpose of the second case conference, how it was to be conducted or what evidence would be presented. There is no evidence of any process of decision-making or indeed who in fact the decision-makers were. Neither the minutes nor the governor's affidavit reflect how the actual finding of guilt was made or why the applicant was not told of such a finding of guilt.

[26] The applicant made no express admission of guilt. The panel implied the applicant's guilt because he acknowledged that he had an alcohol problem and was seeking help. The panel never sought to clarify the applicant's representations with him. The decision was reached by the panel based on an interpretation of the applicant's comments rather than on the substantive evidence available to the panel. In other words, the decision was made not on the evidence, but on the applicant's reaction to the evidence and how that reaction was viewed by the panel.

[27] The applicant had no further information provided to him between the first case conference and the second case conference. The purpose of the second case conference was not made clear to him other than in what can, at best, be described as a rather ambiguous fashion at the first case conference, where he was not even told of the decision to find him guilty of a breach of the terms of his temporary release. Before he was called into the second case conference the applicant was unaware that his nephew had been contacted, the nature of that contact, the information elicited or how that information was to be treated. He did not, for example, have an opportunity to offer alternative supports in the community to facilitate future temporary release if his nephew was deemed no longer to be trustworthy.

[28] Mystery also shrouds the procedure at the second case conference. This was a differently constituted panel and there is no evidence that the members were provided with any minutes or other documentary information before their meeting. The minutes consistently refer to discussions regarding "allegations" and it appears the applicant was expressly criticised in his absence because he had not accepted his guilt and had made no diary entry regarding his response to the finding of the original case conference. That is, at the least, surprising as it was common case that he was never told of the outcome of the first case conference. The minutes clearly reflect the applicant's entry to the case conference and, whilst sparse, are quite clear that this consisted of the chair of the panel simply addressing the applicant and advising him of the outcome of the earlier discussions which took place in his

absence. There is no reference to anything said by the applicant, there is no evidence in the minutes that the contents of the lengthy discussion were put to the applicant or that he had an opportunity to respond. Of particular note is that there is no record of when any decision taken by the panel was in fact made.

[29] The better course in this matter would have been to have kept the applicant informed from the outset. If he had been notified a reasonable time in advance of the first case conference and informed of its purpose, together with the gist of the allegations made against him, he would have been in a position to consider that material in advance. It is clear that an individual in the applicant's circumstances could have considerable difficulties in assimilating the information provided to him at a case conference with such serious consequences and this could impair the opportunity to make meaningful representations. There was no consideration of the need for such urgency in convening the first case conference and this was not addressed in the respondent's evidence.

[30] I am satisfied that the process engaged by the respondent was procedurally unfair and must be quashed. The applicant was given an inadequate opportunity to present his case at either of the case conferences. He had no opportunity to challenge those who made the complaints against him. He had no meaningful opportunity to provide alternative options to the panel. He was not informed of the finding of guilt at the first case conference nor of the purpose of the second case conference.

[31] In light of that finding I do not propose to deal with the other grounds of judicial review in detail. However, I am not satisfied in this case that the decision reached by the respondent was Wednesbury unreasonable. I am satisfied that the applicant's article 8 rights were engaged and were breached by the actions of the respondent.

[32] The respondent argues that as the applicant has been returned to Burren House earlier this year the matter is academic. However, the negative finding against him is clearly of significant import in any consideration of him being made by the parole board in the future. I do not accept that the application is academic.

[33] I, therefore, conclude that the respondent's process was procedurally unfair and unlawful.

[34] The court will hear the parties as to the appropriate remedy.