

[2023] PBRA 149

Application for Reconsideration by Knights

Application

1. This is an application by Knights (the Applicant) for reconsideration of a decision of a duty member of the Parole Board dated 7 July 2023, who decided not to terminate the Applicant's IPP licence, and not to suspend the requirement that he be supervised.
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, and/or (b) that it is irrational and/or (c) that it is procedurally unfair.

Background

3. The Applicant was made subject to an indeterminate sentence of imprisonment for public protection (IPP) on 26 June 2008, following his conviction of three counts of distributing indecent photographs of children, fourteen counts of making indecent photographs of children and one count of possessing indecent photographs of children. The children who were the subject of the photographs were aged between 6 and 14 years old.
4. A minimum term of eight months custody was specified. That period expired on 26 February 2009.
5. The Applicant was 26 years old at the time of sentence, and is now 41 years old.
6. The Applicant was released from custody on 1 July 2013 following an oral hearing.
7. He was recalled in September 2013 following reports that he had failed to disclose to his supervising officer that he had developed relationships with a number of females (approximately ten) he met via television dating. The Applicant was also found to have engaged in sexual activity with a female who had learning difficulties, contrary to the instruction of his supervising officer. Finally, the Applicant was found to have a photograph of the three year old daughter of another female he had met whilst subject to licence conditions.

8. He was re-released on licence in March 2014, but recalled again in December 2014 after he was found to be in possession of a mobile phone that he had not registered with the Police Public Protection Unit. A polygraph test revealed unauthorised internet access, and the Applicant admitted contact, some of which was unsupervised, with his then-partner's two nieces aged 5 and 8 years old.
9. The Applicant was released for the third time in April 2019, and has remained in the community on indefinite licence since that time, subject to licence conditions. In October 2019 a further licence condition was added, which was deemed necessary and proportionate for public protection.

Request for Reconsideration

10. The application for reconsideration is dated 20 July 2023.

11. The grounds for seeking a reconsideration are as follows:

Ground 1 – The Parole Board acted illegally by failing to adequately review the existing licence and remove redundant or unnecessary conditions.

Ground 2 – The panel acted illegally and in breach of due process by introducing their own test for the suspension of supervision or termination of licence.

Ground 3 – Lack of due process caused by the Probation Service knowingly inflating current risk towards [his child].

Ground 4 – Lack of due process caused by the Probation Service intentionally withholding key information relating to the relevant risk factors in this case.

Ground 5 – The decision reached was irrational.

12. The application was supplemented by written representations to which reference will be made in the **Discussion** section below.

Current parole review

13. On 29 June 2023, the Applicant's case was referred to the Parole Board for consideration of whether or not it would be appropriate to terminate his licence under section 31A of the Crime (Sentences) Act 1997. If the Board was not satisfied that the licence should be terminated, it was asked under sections 31 and 32 of the Crime (Sentences) Act 1998 to consider whether or not it would be appropriate to suspend the supervisory elements of the licence or add/amend/vary any additional conditions contained within the licence.

14. On 7 July 2023 a duty member of the Parole Board considered the application on the papers (i.e. without an oral hearing), together with a dossier of 53 pages which included representations and supporting documents from the Applicant.

The Relevant Law

14. **Section 31A of the Crime (Sentences) Act 1997** provides the process for consideration of licences by the Parole Board which relate to '*preventative sentences*' after the '*qualifying period*' has passed.
15. The '*qualifying period*' is ten years beginning with the date of release on licence, regardless of whether the prisoner has subsequently been recalled to prison (section 31A(5)).
16. A '*preventative sentence*' is an indeterminate sentence of imprisonment for public protection or a sentence of detention for public protection (including such a sentence of imprisonment or detention in a young offender institution or detention passed as a result of section 219 or 221 of the Armed Forces Act 2006) (section 31A(5)).
17. If a prisoner has been released on licence (regardless of whether they have been subsequently recalled) and the qualifying period has expired and if the Secretary of State has previously referred the case to the Parole Board, the case must be re-referred 12 months from the date of the previous determination (section 31A(3)).
18. The Parole Board shall direct the Secretary of State to make an order that the licence is to cease to have effect if it is satisfied that it is no longer necessary for the protection of the public that the licence should remain in force (section 31A(4)(a)).
19. If the prisoner is in prison having been recalled, the test is different. The Parole Board must decide whether it is not necessary for the protection of the public for the prisoner, when released, to be released on licence in respect of the preventative sentence or sentences (section 31A(4B)(b)(ii)).
20. If the Parole Board directs release under section 31A(4B)(ii), that release is unconditional (section 31A(4C)).

Parole Board Rules 2019 (as amended)

21. Rule 28(1) of the Parole Board Rules (as amended) provides the types of decision which may be considered for reconsideration, including decisions made in response to a referral by the Secretary of State under section 31A of the 1997 Act (rule 31(6) or rule 31(6A)): specifically, a decision to terminate a licence or a decision to dismiss the Secretary of State's reference.
22. Decisions concerning preventative sentences (as defined in section 31A(5) of the 1997 Act) are eligible for reconsideration under rule 28(2).

Procedural unfairness

23. 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.

24. 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.

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

Irrationality

23. In **R (on the application of DSD and others) -v- the 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 para. 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."

24. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

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

The reply on behalf of the Secretary of State (the Respondent)

26. The Respondent has submitted representations in response to the application dated 31 July 2023, to which reference is made in the **Discussion** section below.

Material considered

27. In reaching this decision, I have considered the following documents which were submitted:

- The application
- The Respondent's submissions
- The dossier considered by the duty member, which includes the Applicant's original representations, the termination report prepared by the probation service, the Parole Board release decision letter dated 14 March 2019, the Applicant's licence and the licence variation order dated 3 October 2019.

28. In support of his application for reconsideration, the Applicant submitted a Parenting Capacity Assessment Report dated 11 July 2019. This was not material available to the duty member who made the decision which is the subject of this application, and therefore I have not considered it in reaching this decision.

Discussion

29. The Applicant submits that the decision of the duty member was procedurally unfair (Grounds 1 and 2) and irrational (Ground 5).

30. In relation to Grounds 3 and 4, these relate to alleged failures by the Probation Service, and therefore fall outside the remit of the reconsideration procedure under Rule 28. I have therefore not addressed Grounds 3 and 4 in this decision.

31. I will address each of Grounds 1, 2 and 5 in turn.

Ground 1

32. The Applicant submits that the duty member failed to adequately review the existing licence, and to remove redundant or unnecessary conditions. He submitted that his original representations detailed several of his conditions which he asserted were redundant because they had not been in use for a period of many years, and that therefore those particular conditions were no longer necessary and proportionate and should have been removed.

33. Specifically, the Applicant requested, in the representations considered by the duty member, that a licence condition restricting his access to internet-enabled devices should be removed, because he had made good progress and had satisfactory inspections of his devices over a four year period. He also requested that a condition relating to his vehicle be removed due to his progress and the lack of any risk associated with his vehicle use since his release. The Applicant also requested the removal of licence conditions relating to a place of residence where he had not been living for four years. Finally, he requested variation of a licence condition relating to his ability to have unsupervised contact with children.

34. The Respondent made representations in response to this application, in relation to the variation or removal of conditions on the Applicant's licence, confirming the probation service's view as expressed in the termination report that the licence conditions "*continue to serve to manage [the Applicant]'s risk, including any potential risk to children*". The Respondent also highlights that the condition restricting unsupervised contact with children includes the provision for contact provided there is prior authorisation by the Applicant's supervising probation officer.

35. The duty member refers in their decision to the referral by the Respondent, which includes a request to consider whether to suspend the supervisory element of the licence or add/amend/vary any licence condition.

36. In the decision notice, the duty member sets out clearly their rationale for not terminating the licence.

37. In relation to the rationale for not suspending supervision, or removing or varying licence conditions, the duty member says the following:

"For the same reasons, the panel does not support the suspension of supervision".

38. In relation to the Applicant's original representations, the duty member says:

"The panel noted [the Applicant's] personal representations which outlined the progress he had made since his last release, and submitted that his partner and child were protective factors."

39. There is however no reference within this decision notice to the specific representations made by the Applicant about several of the licence conditions, nor is there a conclusion expressed as to whether it would be appropriate to "add/amend/vary" any of those conditions, as required by the Respondent in the referral.

40. I cannot therefore be satisfied that the duty member considered all parts of the referral. I have therefore concluded that this amounted to a procedural irregularity.

Ground 2

41. The Applicant submits that, instead of applying the test set out at Section 31A(4) Crime (Sentences) Act 1997, the duty member applied their own test, namely that *"it is important that Probation have absolute confidence that he will comply over a longer period of time and that he poses no risk to his daughter"*.

42. The Respondent makes no submission in relation to this ground.

43. The duty member correctly refers in their decision notice to section 31A Crime (Sentences) Act 1997.

44. In explaining their rationale for concluding that the licence should not be terminated, the duty member explains that:

"Given his offending, the panel agrees that it is important that Probation have absolute confidence that he will comply over a longer period of time and that he poses no risk to his daughter. It is concluded that it remains necessary for the protection of the public that [the Applicant] is subject to licence conditions. Therefore the IPP licence is not terminated".

45. It is clear therefore that the duty member understood and applied the correct test as set out in Section 31A(4), namely whether *"it is no longer necessary for the protection of the public that the licence remain in force"*.

46. The reference to the Probation Service having *"absolute confidence"* in the Applicant's compliance and level of risk is, in my judgment, explanation of why the duty member has reached their conclusion, and not the application of a separate and incorrect test.

47. I therefore do not find that this ground amounts to a procedural irregularity.



Ground 5

48. The Applicant submits that the decision reached by the duty member was irrational because the duty member accepted the opinion expressed in the termination report despite (as the Applicant believes) there was *"little or no evidence to support the recommendations made"*. He also submits that as there was no indication of how long he would need to comply before he could provide the required level of confidence, he was not afforded a hope for the future.
49. The Respondent, in their submissions in response to this application, rely on the content of the termination report and underline that it is the Applicant's offending history and previous non-compliance with licence conditions, as well as the involvement of a child protection plan, which provide the rationale for not terminating the licence.
50. The test for irrationality is high. The Applicant submits that there was *"little or no evidence"* to support the recommendations made. I note however that the duty member is clear in their rationale that the reason for refusing to terminate the licence is essentially twofold, namely the ongoing concerns about monitoring the Applicant's risk to children, and the Applicant's history of poor compliance in light of his offending history. There is evidence in the dossier in support of both those factors.
51. I am not therefore satisfied that the decision made by the duty member is *"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."*
52. I therefore do not find that the decision was irrational.

Decision

53. Accordingly, whilst I do not find there to have been an irrational conclusion, I do consider, applying the test as defined in case law, that the decision of the duty member not to add/vary/amend the licence conditions procedurally unfair. I do so solely for the reasons set out above.
54. The application for reconsideration is therefore granted.

Victoria Farmer
11 August 2023