

[2024] PBRA 145

**Application for Reconsideration by the Secretary of State for Justice
in the case of Marshall****Application**

1. This is an application by the Secretary of State for Justice (the Applicant) for reconsideration of a decision dated 25 June 2024 to terminate the licence imposed upon Marshall (the Respondent) in connection with a sentence of imprisonment for public protection (the IPP licence).
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.
3. I have considered the application on the papers. These are the decision and the IPP licence termination dossier (consisting of 54 pages) and the application for reconsideration, dated 11 July 2024.

Background

4. The Respondent received a sentence of imprisonment for public protection (IPP) in December 2006 following conviction for wounding with intent to cause grievous bodily harm. His tariff was set at two years and expired in 2008.
5. He has been recalled to custody once on this sentence. He was released on licence in November 2013 but recalled in November 2015 after failing to maintain contact with the Probation Service. He remained unlawfully at large until June 2018. He was re-released following an oral hearing on 8 February 2019.
6. The Applicant was 37 years old at the time of sentencing and is now 55 years old.

Request for Reconsideration

7. The application for reconsideration has been drafted by HMPPS Public Protection Casework Section (PPCS) on behalf of the Applicant. It submits there has been an error of law. No submissions are made on grounds of irrationality or procedural unfairness.
8. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.



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Current Reference

9. The Respondent's case was referred to the Parole Board by the Applicant in May 2024 under section 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate his licence.
10. If the Board did not agree to the termination of the licence, it was also asked to consider whether or not it would be appropriate to suspend the supervisory elements of the licence or add/amend/vary any additional licence conditions.
11. The dossier contained a termination report dated 22 April 2024 written by the Respondent's Community Offender Manager (COM). The COM supported licence termination.
12. On 25 June 2024, a single-member panel of the Parole Board directed that the Respondent's IPP licence should be terminated.

The Relevant Law

Crime (Sentences) Act 1997

13. 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.
14. 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)).
15. A 'preventative sentence' is a 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)).
16. If a prisoner has been released on licence (regardless of whether they have been subsequently recalled) and the qualifying period has expired and if 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)).
17. 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)).
18. 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)).
19. If the Parole Board directs release under section 31A(4B)(ii), that release is unconditional (section 31A(4C)).

Parole Board Rules 2019 (as amended)

20. Rule 28(1) of the Parole Board Rules 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.
21. Decisions concerning preventative sentences (as defined in section 31A(5) of the 1997 Act) are eligible for reconsideration under rule 28(2).

Error of law

22. An administrative decision is unlawful under the broad heading of illegality if the panel:
- a) misinterprets a legal instrument relevant to the function being performed;
 - b) has no legal authority to make the decision;
 - c) fails to fulfil a legal duty;
 - d) exercises discretionary power for an extraneous purpose;
 - e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - f) improperly delegates decision-making power.
23. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

The reply on behalf of the Respondent

24. The Respondent has submitted no representations in response to this application and the deadline for representations (which was extended to 30 July 2024) had now passed.

Discussion

25. The application notes that the Respondent was recalled to custody on 17 May 2024 having been stopped by the police in connection with alleged motoring offences. Police conducted a search of the Respondent's vehicle and are said to have found four weapons: a saw/knife, a baseball bat, an axe and a hammer. The Respondent was arrested. It is argued that the Respondent was showing offence-paralleling behaviour and his PTSD (from which the dossier shows he has suffered since his discharge from the British Army in 2000) was unstable. His risk of serious harm was increased from medium to high.
26. The Respondent remains in prison following his recall on the IPP licence; the matters which led to recall are to be tried in the Crown Court and a warrant of detention is in place.

27. It is argued that, since the Applicant revoked the Respondent's licence under section 32 of the Crime (Sentences) Act 1997 on 17 May 2024, his licence no longer existed at the time the panel decided to terminate it.
28. It is acknowledged that the panel was not aware that the Respondent had been recalled when making its decision and was therefore unaware that his licence had been revoked.
29. Consequently, it is argued that an error of law has been made (although the application is unhelpfully silent on elaborating what that error of law might be).
30. As a matter of simple logic, it cannot be possible to terminate something that no longer exists. However, that does not, of itself, constitute an error of law.
31. In making its decision to terminate the Respondent's IPP licence, the panel applied the test set out in section 31A(4)(a) of the Crime (Sentences) Act 1997: this is clearly stated in its decision.
32. However, at the time of the determination, the Respondent was in prison having been recalled under section 32. In these circumstances, section 31A(4B) is engaged, modifying the test in section 31A(4)(a) such that the panel must instead consider whether it is satisfied that it is not necessary for the protection of the public for the prisoner, when released, to be released on licence in respect of the IPP sentence.
33. The panel therefore (albeit unwittingly and unknowingly) applied the wrong legal test in determining the referral by the Applicant and this is an error of law. An error of law does not have to be made intentionally or recklessly. This situation is analogous to the operation of the *per incuriam* device in the common law system of judicial precedent (see *Morelle Ltd v Wakeling* [1955] 2 QB 379 (CA)). If I were to find otherwise, and render the decision final, this could be likely to produce serious inconvenience in the administration of justice (see *Secretary of State for Trade and Industry v Desai* The Times, 5 December 1991 (CA)). To be very clear, I make no criticism of the panel: the error arose only as a result of the Applicant's failure to notify the Parole Board of the Respondent's recall in a timely manner.

Decision

34. For the reasons set out above, I find there to have been an error of law and the application for reconsideration is granted.

Stefan Fafinski
02 August 2024