

[2024] PBRA 13

Application for Reconsideration by Webb**Application**

1. This is an application by Webb (the Applicant) for reconsideration of a decision dated 8 November 2023 not to terminate the licence imposed upon him in connection with a sentence of detention for public protection (the **DPP licence**). The decision was issued to the Secretary of State (the Respondent) on 9 November 2023. The Secretary of State did not, however, issue the decision to the Applicant or his legal representative until around 29 November 2023.
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 (the **dossier**).

Background

4. The Applicant received a sentence of detention for public protection (**DPP**) on 20 July 2007 following conviction for wounding with intent to cause grievous bodily harm. His tariff was set at two years and six months less time spent on remand and expired in 2009.
5. He was first released on licence in January 2013 following an oral hearing. He remained in the community for nearly five years until his recall to custody in July 2018. It is reported that he had failed to update his Community Offender Manager (**COM**) about a change in address and had also failed to attend several probation appointments. He was re-released by the Parole Board on the papers in October 2018.
6. He was recalled to custody for a second time in April 2022. The key issues on licence were reportedly a return to drug misuse, his level of engagement with the Probation Service, and making poor choices of associates.
7. His case was considered at an oral hearing in March 2023 before a two member panel of the Parole Board which directed his re-release on licence. In its conclusion, the panel noted as follows:

"There is little before the panel to suggest that [the Applicant] will not try and do his best in sustaining change. He has had two extended periods in the community and there has been no evidence of violence that would have placed the public at risk of serious harm. He is likely to work hard at building a life for himself on release. There will always be a risk of substance misuse and Probation are capable of monitoring this as they did on the last occasion. [The Applicant] appears to better understand the dangers of lapse and relapse and this mitigates the risk in this case."

8. The Applicant was re-released on 27 April 2023 subject to additional licence conditions. These included a period of residence at designated accommodation (with a sign in), engagement in any work specified in connection with drug and alcohol offending behaviour, drug testing, restrictions on mobile phone use and notification of any developing intimate relationships with women.
9. The Applicant was 18 years old at the time of sentencing and is now 35 years old.

Request for Reconsideration

10. The application for reconsideration is dated 10 December 2023 with further addendum representations dated 18 December 2023. It has been drafted by solicitors acting for the Applicant.
11. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Reference

12. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 12 October 2023 under section 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate his licence.
13. 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.
14. The dossier contained a termination report dated 9 October 2023 written by the Applicant's COM. This reports that an IPP Progression Panel was held on 27 September 2023 which did not consider that termination of supervision was suitable. The IPP Progression Panel took the view that, although the Applicant was currently stable in the community, residing in his own accommodation and working with a friend, these were not seen as protective factors as they were previously in place when the Applicant breached his licence conditions through drug use and non-attendance at probation appointments. It considered that close monitoring was still needed as the Applicant tends to push boundaries and avoid complete engagement when he can.
15. The Applicant's COM did not recommend licence termination so that he would be able to continue to access the support and supervision from Probation and partner agencies to ensure that he has been able to develop skills in managing his emotions and substance misuse. It was noted that the Applicant has been recalled twice and

has shown limited compliance with his licence, tending to engage more when he is requiring assistance. It was also noted that the Applicant does appear to be motivated to remain in the community and continue to address his substance misuse and maintain a pro-social lifestyle and stable accommodation and employment which would place him in an improved position for a future recommendation to terminate his licence.

16. Written legal representations within the dossier sought termination of the licence, or, in the alternative, for the “*vast majority*” of licence conditions to be removed or suspended. If the matter could not be completed on the papers alone, then those representations sought an oral hearing in line with the fairness principles set out in *Osborn, Booth and Reilly v Parole Board* [2013] UKSC 61.

17. On 8 November 2023, a single-member panel of the Parole Board dismissed the reference. The Applicant’s licence was not terminated and not varied.

The Relevant Law

Crime (Sentences) Act 1997

18. 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.

19. 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)).

20. 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)).

21. 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)).

22. 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)).

23. 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)).

24. If the Parole Board directs release under section 31A(4B)(ii), that release is unconditional (section 31A(4C)).

Parole Board Rules 2019 (as amended)

25. 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.
26. Decisions concerning preventative sentences (as defined in section 31A(5) of the 1997 Act) are eligible for reconsideration under rule 28(2).

Procedural unfairness

27. 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.
28. 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.
29. The overriding objective is to ensure that the Applicant's case was dealt with justly.

Irrationality

30. In *R (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."

31. 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.
32. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: *Preston* [2019] PBRA 1 and others.

Error of law

33. 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.
34. 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

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

Discussion

36. The submissions of 10 December 2023 largely replicate the written submissions within the dossier. They go on to say that the request for an oral hearing on *Osborn* principles were mostly unaddressed by the decision and were not given appropriate consideration.
37. On the face of it, this appeared to be an application for the decision not to grant an oral hearing to be reconsidered, rather than the decision not to terminate the Applicant's licence. The additional submissions of 18 December 2023 argue that, following *Somers v Parole Board* [2023] EWHC 1160 (Admin), the failure to apply *Osborn* properly amounts to an error of law, which would make the decision not to terminate the licence unfair. It then repeats several of the arguments in favour of termination which were raised in the first set of submissions together with some additional points relating to irrationality.
38. *Somers* involved a post-tariff life-sentenced prisoner requesting that consideration of release or a move to open conditions be conducted at an oral hearing. This concerned a reference from the Secretary of State under section 28 of the Crime (Sentences) Act 1997 and the application of rule 19 of the Parole Board Rules.
39. In *Somers*, Mrs Justice Foster noted (at para. 23) that the *Osborn* fairness principles should "form the backbone of any consideration as to affording an oral hearing where release or transfer to open conditions is in issue".
40. The Applicant's circumstances are different to those in *Somers*: he is not seeking release or progression to open conditions, and he is not a life-sentenced prisoner. The Secretary of State's reference is different and rule 19 is not engaged. *Somers* does not explicitly establish that *Osborn* is to apply, as is argued, to all important

decisions made in respect of an IPP prisoner including the decision whether to terminate a licence. *Somers* does not mention IPP prisoners or licence termination in any part of the judgment. Whether or not it does apply in the Applicant's specific situation is a matter for the High Court.

41. However, as a general principle, I do accept that refusing an oral hearing and concluding on the papers in a situation where there was no support from the Applicant's COM or the IPP Progression Panel for licence termination would be far more likely than not to result in a negative outcome for the Applicant. I am therefore prepared to take the matters as linked such that, if the panel failed to consider *Osborn* properly, this would amount to procedural unfairness and/or an error of law since it would most likely lead (as is the case here) to a decision not to terminate the Applicant's licence.
42. The panel did consider the secondary application for an oral hearing and dismissed it. The decision makes this clear, albeit briefly. It states that, in the panel's view, the Applicant had been released less than six months previously and had not challenged the necessity and proportionality of the licence at the time. The panel that directed his release concluded additional licence conditions were required to manage risk. As such, the panel concluded that an oral hearing was not required since the Applicant had the opportunity to participate in the review by way of written representations and there was enough information in the dossier on which to make a decision. While the Applicant may disagree with the outcome from the way in which *Osborn* was treated by the panel, it cannot be said that the panel did not engage with *Osborn* (which would have amounted to procedural unfairness) nor misinterpret or misapply its principles (which would have amounted to an error of law).
43. It is also argued that the decision was irrational since the panel failed to give weight to the fact that the Applicant had spent some considerable time in the community and there was no evidence of violence which would have placed the public at risk of serious harm and therefore that the link between substance misuse and violence had been broken 17 years previously. It is also argued that disproportionate weight was given to the relatively short period since the Applicant had been re-released given the time it took for his case to be heard and that the releasing panel could only release the Applicant subject to licence conditions.
44. Irrationality essentially requires a decision to be so illogical that every other reasonable panel would have decided otherwise. I do not find that to be the case here. The panel which directed release was clear that the proposed risk management plan was prepared with care and was robust. In imposing licence conditions, that panel had to be satisfied that they were both necessary and proportionate. It follows that panel considered drug testing (and the other conditions) to be necessary and proportionate at the point of release. There was no support for licence termination from the Probation Service. The panel agreed. The decision made in relation to licence termination was well within the range of reasonable responses to the evidence before the panel. The legal test for irrationality sets a high bar which this case does not meet.

Decision

45. For the reasons I have given, I do not find the decision was procedurally unfair, irrational or contained an error of law and accordingly the application for reconsideration is refused.

Stefan Fafinski
10 January 2024