

[2023] PBRA 179

## Application for Reconsideration by Kennedy

### Application

1. This is an application by Kennedy ('the Applicant') for reconsideration of the decision of a Duty Member of the Parole Board ('the Board') who on 11 September 2023 did not agree to the termination of the licence to which the Applicant is subject under a sentence of imprisonment for public protection ('IPP').
2. I am one of the members of the Board who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

### Background and History of the Case

3. The Applicant is now aged 35. At about half an hour after midnight on Sunday 12 November 2006, when he had been out with his girlfriend celebrating his 19th birthday, they decided to stop at a takeaway. A group of young people were throwing chips at each other, and one of the chips struck the Applicant's girlfriend. In the ensuing altercation the Applicant punched the victim and knocked him to the ground, causing a head injury from which he died in hospital.
4. On 15 June 2007, when he was still only 19, the Applicant was sentenced to an indeterminate sentence following his conviction for manslaughter. The sentence is referred to in the papers as one of imprisonment but in fact, because of his age, it must have been detention for public protection. Since he has been an adult for many years, I will refer to the sentence as one of imprisonment for public protection ('IPP'). His minimum term ('tariff') was set at 2 years less the time he had already served in custody. It expired on 16 May 2009.
5. On 8 August 2012 he was released on licence, and 10 years later on 8 August 2022 he became eligible for the termination of the licence. In his 10 years on licence, he had succeeded in establishing a lawful and hard-working life for himself.
6. He rather spoiled his record by his behaviour in a 'road rage' incident on 11 December 2021 which resulted in his being convicted of common assault and fined the substantial sum of £3000. There is very little information in the dossier about the incident, but the Applicant has given an account which seems to be reasonable. It is as follows:

*"A complainant alleged that I had failed to give way on a roundabout. There was a subsequent confrontation during which the complainant alleged that I punched him, although I always denied that".*



7. Common assault does not necessarily involve physical contact: an immediate threat to make physical contact is sufficient. That appears to have been what happened in this case: a probation report states that the Applicant showed aggressive and confrontational behaviour and that *"instead of driving away from the event, he showed no fear in approaching the victim to "resolve matters"."*
8. The Applicant's case had been referred by the Secretary of State to decide whether to agree to the termination of his licence. On 30 August 2022 a Duty Member considered his case but did not agree to termination, stating: *"It is clear that [the Applicant] has not yet had a continuous and trouble-free period on licence and risk issues remain. Probation do not support the termination of [the Applicant's] licence. The Duty Member is of the view that this is not the appropriate time to be considering the termination of an IPP licence or the suspension of supervision."*
9. This is now the annual review of the Applicant's case, the Secretary of State ('the Respondent') having referred the case again to the Board for further consideration.
10. Unfortunately, the Applicant's otherwise excellent record has again been rather spoiled by another incident of aggression. This incident occurred on 2 February 2023 and is described as follows in the record made by the police who attended the scene:  
*"[The Applicant] has contacted the police after he was logged out of his snapchat by his ex-partner. He has decided to take matters into his own hands and turned up at [his ex-partner's] address at 3am shouting at her and demanding she gave him the passwords to his account. [The Applicant] had kicked her front door and caused further issues by shouting in the street. When police arrived he was reminded his behaviour wasn't acceptable and agreed he would go home. He complied with police and no arrest was made."*
11. The Applicant's case was considered on 11 September 2023 by the same Duty Member who had considered his case in August 2022 (it is quite normal and acceptable for the same Duty Member to consider a case on more than one occasion). The Duty Member again decided not to agree to the termination of the Applicant's licence.
12. On 28 September 2023 the Applicant's solicitors made this application for reconsideration of the Duty Member's decision.

## **The Relevant Law**

### ***The Parole Board Rules 2019 (as amended)***

13. Provisions for termination of IPP licences are made in Rule 31 of the Rules (as amended) and provisions for reconsideration of decisions on referrals to consider termination of licences are made in Rule 28.
14. Rule 31 provides for references to be made by the Secretary of State to the Board and considered by a single member who may either (a) decide whether or not a licence should be terminated or (b) send the case for an oral hearing to make that decision.
15. Rule 28(1) provides for applications to be made for reconsideration of various kinds of decisions including decisions about the termination of licences under Rule 31.
16. Reconsideration of a decision will only be directed if one of more of the following three grounds is established:

- (a) It contains an error of law or
- (b) It is irrational or
- (c) It is procedurally unfair.

17. The application in this case is made on the ground of irrationality. It is not suggested that there was any error of law or procedural irregularity.

### ***Irrationality***

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

*"the issue is whether the 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."*

19. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.

20. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing irrationality. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

21. The reasons why a panel's decision may be found to be irrational include the giving of manifestly disproportionate or inadequate weight to a relevant consideration.

### **The Application for Reconsideration in this Case**

22. In support of this application the Applicant's solicitors advance several grounds which will be discussed in the 'Discussion' section below.

### **The Position of the Respondent**

23. By e-mail dated 2 October 2023 the Public Protection Casework Section ('PPCS') on behalf of the Respondent informed the Board that they wish to offer no representations.

### **Documents Considered**

24. I have considered the following documents for the purpose of this application:

- i. The dossier provided by the Respondent for the Applicant's case, which contains 27 numbered pages;

- ii. The Duty Member's decision;
- iii. The application for reconsideration; and
- iv. PPCS's e-mail of 2 October 2023.

## Discussion

25. It is convenient to set out in turn the various submissions made by the solicitors, and my responses to them.

26. The solicitors' submissions start by criticising the following passage in the Duty Member's decision:

*"Probation are supporting the application for the termination of [the Applicant's] IPP Licence. The Duty Member noted that [the Applicant's] COM [Community Offender Manager] was of the view that the Common Assault matter for which he received a conviction in 2022 is now considered not to be of "a serious enough nature to indicate concerns that would require [the Applicant] to remain on licence." However, that view contradicts the view put forward by probation in [the Applicant's] last IPP licence termination review in 2022, when the same matter was considered as follows, such that the termination of his IPP licence was not supported: "[The Applicant] showed aggressive and confrontational behaviour in that situation. Instead of driving away from the event, he showed no fear in approaching the victim to 'resolve matters'. His COM argues that this demonstrates offence paralleling behaviour". It was not clear why that view has changed in the course of a year. The Applicant in his personal submissions concedes that: "I bitterly regret that incident in 2021, which was borne out of frustration out of what I perceived as an inappropriate reaction to my driving from the complainant. I understand that I ought to have confronted the complainant and should have employed the tools that I gained during courses I undertook in prison and have dealt with the matter in a less confrontational manner." This does show insight. However, insight was not shown at the time of the offence when it mattered."*

27. The solicitors are critical of the Duty Member's observation that probation's view in 2023 contradicted their view in 2022. They suggest that logic dictates that with the passage of time (12 months) the COM had had an opportunity to re-visit the decision and based upon an updated assessment of the Applicant's suitability 'had reversed the decision'.

28. This submission is, I am afraid, based on a misunderstanding of the passage in question. A careful reading of that passage shows that the point which the Duty Member was making was that the Applicant's lack of insight at the time of the common assault was a factor which could not be changed and had to be taken into account, though his subsequent development of insight was a positive factor, which also needed to be taken into account. I can see nothing irrational in that.

29. The solicitors go on to suggest that the Duty Member failed to acknowledge the Applicant's change of stance and that that failure 'does not appear rational as it suggests that [the Applicant] is not capable of reflecting upon past circumstances and with the skills and tools that he employs to approach these matters, being able to accept the inappropriateness of his behaviour at that time.'

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30. It is quite clear from the above passage that the Duty Member did acknowledge the Applicant's change of stance and regard it as a positive factor. However, there was also an important negative factor (of which the solicitors make no mention), namely the Applicant's behaviour on 2 February 2023. There was no conviction in relation to that matter but the Duty Member was fully entitled to place weight on the contemporaneous record made by the police.
31. The solicitors then go on to refer to the fact that the Duty Member noted that the Applicant had not yet been subject to a period without supervision, the suggestion being that if he had been he might have been able to demonstrate his ability to avoid any risky situation. Again, that suggestion is weakened by the incident of 2 February 2023 when he was unable, whilst subject to supervision, to demonstrate that ability.
32. The final criticism made of the Duty Member's decision is that '*no credit appears to have been given for the progress made by the Applicant since his last review.*' The Duty Member did in fact give the Applicant credit for his progress throughout his time on licence, but as against that set the 2021 and 2023 incidents which spoiled his progress. He wrote:

*"The Duty Member noted that there is much to be positive about in the reports of [the Applicant's] progress since his release. He should be rightly proud of how he has worked hard to develop a pro-social life. However, the Duty Member remains concerned that there has been recent indications that [the Applicant] has not managed to implement the learning from programmes in times of extreme emotion, frustration or when facing conflict, both in the Common Assault offence in 2021 and in the reports of the alleged behaviour towards his ex-partner in February 2023."*

33. I agree entirely with the Duty Member's approach and I cannot find anything irrational in this decision.

## **Decision**

34. I must therefore dismiss this application.

**Jeremy Roberts**  
**5 October 2023**