

[2023] PBRA 203**Application for Reconsideration by Bradbury****Application**

1. This is an application by Bradbury ('the Applicant') for reconsideration of the decision of a Duty Member of the Parole Board who on 16 October 2023 did not agree to the termination of the licence to which the Applicant is subject under an indeterminate sentence of imprisonment for public protection ('IPP').
2. The Applicant is one of the two parties to parole proceedings: the other ('the Respondent') is the Secretary of State for Justice who represents the interests of the public and the victims of the prisoner's offence(s).
3. 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

4. The Applicant is now aged 41. On 14 February 2006, when he was aged 23, he received the IPP sentence for offences of robbery and unlawful wounding (the 'index offences'). He had robbed a woman in the street. In the course of the robbery she was wounded by a knife which he was carrying: there was a dispute about whether it was a deliberate stabbing, but on any view it was a very serious offence.
5. The minimum term which the Applicant was required to serve in prison before becoming eligible for release on licence from his IPP sentence (his 'tariff') was set at 2 years less the time which he had served in custody on remand.
6. Before the index offences the Applicant had already accumulated a significant criminal record. He was addicted to drugs (including heroin and crack cocaine) and was assessed as having problematic personality traits.
7. The Applicant's tariff expired on 10 February 2008. His progress in custody had not been without problems and it was not until 17 September 2012 that he was released on licence. Under the law he was required to remain on licence for at least 10 years (i.e. until 17 September 2022) after which his licence could be terminated if the Parole Board so directed.
8. Like his time in custody the Applicant's time on licence was not without problems.



9. On 4 June 2017 he was involved in an altercation with another man and threatened him with a claw hammer.
10. On 9 October 2017 the Applicant and another man committed a pre-planned attack on a male victim, in which the Applicant was the principal aggressor. On that occasion he was carrying a screwdriver which he used as a weapon, inflicting significant injuries on the victim. The reason for the attack does not seem to have been established. The Applicant was returned to prison and on 20 April 2018, after pleading guilty, he received a 44 month sentence for the attack. He served that sentence concurrently with his IPP sentence.
11. On 28 January 2019 he received a 3 month sentence for the June 2017 offence, also served concurrently with the IPP sentence.
12. The Applicant remained in prison until 17 August 2020 when he was re-released on licence by direction of the Board. During that period in prison he completed a programme designed to reduce his risk of future violent offending.
13. Although that period in prison (the best part of 3 years) does not count towards the 10 years after which he was to become eligible for the termination of his IPP licence, the offences which he committed whilst on licence are obviously relevant factors in determining whether it is now appropriate to terminate his licence.
14. On his re-release in August 2020 he was initially required to reside at a probation hostel ('Approved Premises') where he received good reports. On 16 November 2020 he was moved to a different supported hostel. While there he was initially engaging with the local drug agency and for a time all went well, though his mood was reported to fluctuate.
15. On 1 July 2021 he received a warning for staying away from the hostel overnight (without prior approval) with a female friend with whom he was developing an intimate relationship. This was not in itself a matter of great concern and was rightly regarded by probation as not warranting a recall to prison. At around the same time the Applicant disengaged from the drug agency, which he considered to be unnecessary as he had been drug-free for some time. That again was not regarded as warranting a recall.
16. There followed a number of problems between the Applicant and the professionals responsible for him (probation, the hostel, the drug agency and the mental health agency with which he had also been engaging). These problems ultimately led to the Applicant's recall to prison on 29 September 2022. He remains in prison but is due to have an oral hearing by a panel of the Board on 23 January 2024 to decide whether he should be re-released again.
17. Some of the matters which were the subjects of his recall to prison in September 2022 are disputed and those disputes will need to be resolved at the oral hearing. It is clear, however, that his behaviour deteriorated significantly. One cause of that deterioration was evidently that the Applicant's case was not referred by the Respondent to the Board for consideration of the termination of his IPP licence until much later than would ordinarily have been expected.

18. It may be that the Respondent's officials were confused by the fact that the Applicant had spent a lengthy period in prison when he would otherwise have been on licence in the community: they may have thought that the time served in prison did not count towards the 10-year period. At all events the referral was not made until October 2023, more than a year after the Applicant became eligible for termination of his IPP licence.

19. Probation had specifically stated, in requesting the Applicant's recall in September 2022, that the Applicant's behaviour had "become more challenging about coming off his IPP licence".

20. When the referral was eventually made, it stated:

"1. This case is hereby referred to the Parole Board by the Secretary of State under sections 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate the licence.

2. Should the Board not agree to termination of the licence then they are also asked under sections 31 and 32 of the Crime (Sentences) Act 1997 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."

21. The rule under which this reference was made states that the reference should be considered by a single member of the Board (in practice a Duty Member) who may either (a) decide himself or herself whether or not the licence should be terminated or (b) send the case for an oral hearing at which that decision will be made.

22. In September 2023 written representations were submitted by the Applicant's solicitors to the Board. The solicitors argued that the case should be sent for an oral hearing. They referred to the decision of the Supreme Court in **Osborn, Booth and Reilly v the Parole Board (2013) UKSC 61** which set out the principles to be applied when a decision has to be made as to whether an oral hearing should be held.

23. The case was considered by the Duty Member on 16 October 2023. In her ruling the Duty Member set out in considerable detail the history of the case, and concluded as follows:

"[The Applicant] is assessed to pose a medium risk of violent reoffending and a medium risk of causing serious harm if he commits another offence. The Duty Member is not satisfied [the Applicant] can consistently manage the factors that increase the risk he poses to others. His behaviour still needs to be managed and monitored.

The panel is satisfied it is necessary for the protection of the public that [the Applicant] be subject to his IPP licence. There is insufficient evidence that [the Applicant] can self-manage risk when the monitoring and supervision is removed. For similar reasons the panel does not recommend that supervision be suspended. The Duty Member considered directing this review to be combined with the review of recall. The Duty Member had sufficient information to make a decision regarding the Termination of the IPP Licence and decided an oral hearing is not necessary."

24. On 7 November the Applicant's solicitors requested that the Duty Member's direction should be reconsidered and an oral hearing directed. The solicitors made detailed submissions, explained below, in support of that request.

The law relating to reconsideration of decisions

The Parole Board Rules 2019 (as amended)

25. Rule 28(1) provides for applications to be made for reconsideration of various kinds of decisions made by panels of the Board, including decisions about the termination of licences under Rule 31 (see above).

26. Reconsideration of a decision will only be directed if one or 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.

Irrationality

27. 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."

28. 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.

29. 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**.

30. 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.

Procedural unfairness

31. 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 from the issue of irrationality which focuses on the actual decision.

32. The kind of things which might amount to procedural unfairness include:

- (a) A failure to follow established procedures;
- (b) A failure to conduct the hearing fairly;
- (c) A failure to allow one party to put its case properly;
- (d) A failure properly to inform the prisoner of the case against him or her; and/or
- (e) Lack of impartiality.

33. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The application for Reconsideration in this case

34. In their application for reconsideration of the Duty Member's decision, the Applicant's solicitors submitted that the Duty Member made no attempt to address the substance of their legal representations other than to state that she had sufficient information before her to make a decision regarding the termination of the IPP licence. The solicitors state that *'it is not the test in **Osborn, Booth and Reilly** that the Panel has sufficient information on the papers to base a negative decision. The test for an oral hearing of a post tariff prisoner is whether there is any unfairness to the inmate and where there is doubt, that doubt should be exercised in the inmate's favour.'*

35. The solicitors went on to submit that it was it was procedurally and substantively unfair to consider the Applicant's legitimate complaint about the delay in referring his case to the Board for consideration of the termination of his licence as evidence of a negative outlook on his part towards supervision (meaning that he was unlikely to comply with future supervision in the community), when it was in fact a legal right that his licence be reviewed in a timely manner: referring to his legal rights was not fairly described as *'being challenging'*.

The position of the Respondent

36. The Respondent has not submitted any representations to the Board in response to this application for reconsideration.

Documents considered

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

- a. The dossier provided by the Respondent for the Applicant's recall case, which contains 249 numbered pages;
- b. The dossier provided by the Respondent for the Applicant's licence termination case, which contains 115 numbered pages;
- c. The Duty Member's decision; and
- d. The application for reconsideration.

Discussion

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38. This is an unusual case. I believe that the correct way for me to approach it is to ask myself whether there is any realistic prospect of the January 2024 panel not only directing the Applicant's release from prison but also deciding that his IPP licence should be terminated. If I decide that there is a realistic prospect of that happening, I must quash the Duty Member's decision and direct that the licence termination referral should be combined with the recall referral so that both matters may be considered together by the oral hearing panel. If I do not believe that there is any such prospect I must refuse the application: to do otherwise would not be in the Applicant's best interests as it would merely delay the annual review of his licence termination application.
39. I have given very careful consideration to this problem and at the end of the day I am satisfied that, whilst there is certainly a reasonable prospect of the oral hearing panel directing the Applicant's re-release on licence, there cannot be a realistic prospect of that panel directing his release into the community without any form of supervision.
40. To justify termination of an IPP licence the Board would need to see a prolonged period of compliance and good behaviour demonstrating an ability on the prisoner's part to manage his own risks without supervision. That has simply not happened in this case, as is apparent from the history set out above (and by the Duty Member in her decision). Whilst it is correct that the Duty Member did not specifically address the solicitors' representations, her reasons for deciding against termination of the Applicant's IPP licence are apparent from her detailed recital of the facts of the case.
41. I have considerable sympathy with the Applicant's concern about the delay in referring his case to the Board for consideration of the termination of his IPP licence. However he did not handle his frustration well and there are bound to be other sources of frustration when he is released into the community and he will need to handle those more appropriately. I agree with the Duty Member that he will need a further period of supervision and monitoring before his IPP licence can be terminated. I am confident that that would also be the view of any oral hearing panel (even if that panel resolves any disputed issues of fact in the Applicant's favour).

Decision

42. For the reasons which I have explained above I must dismiss this application.

Jeremy Roberts
28 November 2023