

[2023] PBRA 23

Application for Reconsideration by Simpson

Application

1. This is an application by Simpson (the Applicant) for reconsideration of a decision made by a duty member dated 15 December 2022 not to terminate the licence imposed upon him 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, the IPP licence termination dossier (the **dossier**) and a response from the Applicant's Community Offender Manager (**COM**) in response to the points that he raised in his application. I have also seen the trial judge's sentencing remarks and a copy of the Applicant's list of previous convictions as held on the Police National Computer (PNC). I have also seen a prison psychology report dated 15 September 2014, and an independent psychology report dated 18 March 2015, both of which were prepared for his 2015 parole hearing.

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) on 21 March 2006 following conviction for sexual activity with a female child under 16 (with penetration of the anus, vagina or mouth by penis or body part) to which he pleaded guilty. The minimum term was set at 18 months less time spent on remand. The Applicant was also made subject to an indefinite sex offender notice. His tariff expired in May 2007.
5. The Applicant was 21 years old at the time of sentencing and is now 38 years old.
6. He was most recently released on licence on 9 November 2015 following an oral hearing. This was his second release on this sentence, He was first released in July 2012, but was recalled in 2014 after multiple breaches of his licence relating to allegations of grooming the teenage daughter of his employer (**PR**). He had previously received warnings as an alternative to recall.
7. In May 2022 his licence was varied. It is reported that his employment as an agricultural worker led to him occasionally working in locations in which children were present. It was said that he failed to disclose this to probation as required by his licence.



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The Applicant offered no representations regarding the proposed licence variation but was aware that the application was being made. As an alternative to recall, two additional licence conditions were proposed which subjected the Applicant to GPS trail monitoring for a period of six months. A duty member considered the application and concluded that the additional conditions were necessary and proportionate. The application was therefore granted, and the conditions were added to the Applicant's licence.

Request for Reconsideration

8. The application for reconsideration is dated 9 January 2023. It has been drafted by the Applicant. It submits that the decision was irrational, procedurally unfair and contained an error of law.
9. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Reference

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 9 December 2022 under section 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate his licence.
11. His COM did not support terminating the IPP licence. She considered that there was further work necessary before the IPP licence could be safely suspended. She notes a history of non-compliance and dishonesty and a lack of responsibility-taking. It is also noted that there are current police concerns in connection with an allegation of domestic abuse. The Applicant was arrested in November 2021 for alleged assault against a former partner. It is said that the matter was originally dealt with by way of an unrecorded caution, but that the police were re-investigating. There were also allegations of controlling and coercive behaviour within his former relationship.
12. The dossier contained written representations from the Applicant dated 6 November 2022, a letter from his partner and a character reference from an employer. He denied the allegations of domestic abuse and expressed his frustrations over the way in which he feels his licence has been managed since his release.
13. On 15 December 2022, a Duty Member dismissed the reference.

The Relevant Law

Crime (Sentences) Act 1997

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 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)).
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 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 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).

Irrationality

23. 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."

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.

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.

Procedural unfairness

26.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.

27.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.

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

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

29.The Respondent has submitted representations in response to this application dated 25 January 2023 to which reference will be made in the **Discussion** section below.

Discussion

Ground 1 – Error of law

30.The Applicant first submits that the decision contained an error of law as the COM had incorrectly listed the index offence as rape.

31.This was noted in the decision as follows:

"The report from [the COM] notes the index offence as rape, whereas the Parole Board decision letter notes the offence as unlawful sexual intercourse with a girl under 13".

32.The COM's response was that she did not recall identifying the index offence as rape and that the word rape did not appear anywhere in her report. The COM said she was "not sure what the [Public Protection Casework Section] (**PPCS**) are referring to in their comment in their decision letter". The Respondent notes that the COM has since confirmed that her statement should have read that she was "not sure what the Parole Board are referring to in their comment in their decision letter".

33.I have searched the dossier carefully. The word 'rape' appears within it twice.

34. It appears in the Parole Board decision of 17 August 2015 which states "*In the absence of a conviction for rape, the Panel accepts that the act of intercourse was consensual*".
35. It also appears on the 'Termination of IPP Licence Proforma Case Summary Page' in which the index offence is recorded as "*Rape of a child under 13 (section 5 of the Sexual Offences Act 2003)*".
36. The proforma case summary is produced by the PPCS or the prison on behalf of the Respondent. The COM may not have seen it and is correct in her assertion that she did not use the term 'rape' in her licence termination report. The termination report correctly records the index offence as 'sexual activity with a female child under 16 – offender aged 18 or over – penetration' which matches the PNC entry.
37. The trial judge's sentencing remarks to refer to "*This offence of sexual activity with a child which means [the Applicant] has sexual intercourse with this girl who was not 13 at the time*".
38. The PNC records the offence as sexual activity with a female child under 16 (with penetration of the anus, vagina or mouth by penis or body part) contrary to section 9(1)(a) of the Sexual Offences Act 2003.
39. The Applicant argues that the COM's misstating of the index offence undermines the quality of the assessment. While it is clear that the index offence on the case summary sheet is incorrect, the summary sheet is produced by the PPCS or the prison after the termination report has been written. The COM did not say the Applicant had been convicted of rape. It cannot therefore be said that the error on the summary sheet fatally undermined the content of the termination report as the report would have been written in ignorance of this.
40. In any event, the misrecording on the summary sheet is not an error of law. It is an error of fact relating to an offence defined by law. As a matter of fact, the Applicant was convicted of sexual activity with a child (albeit penetrative sexual activity) and not the rape of a child.
41. The panel has not erred in law and there is no argument to suggest that it has incorrectly stated or misapplied the test provided by section 31A(4)(a) of the Crime (Sentences) Act 1997. The correct wording of the test appears in the panel's decision.
42. Under this ground, the Applicant also poses further rhetorical questions regarding sources of information. These do not raise any arguments concerning an error of law and therefore do not fall to be considered on this ground for reconsideration.
43. Therefore, this ground fails.

Ground 2- Irrationality

44. The second ground is argued under the heading of irrationality. However, it does not put forward any coherent arguments as to why the panel's decision was so illogical that no other panel would have concluded as it did.

45. I accept, however, that the application has been drafted without the benefit of formal legal advice and, in fairness to the Applicant, have considered whether the panel's decision does meet the high bar set by the legal test for irrationality.
46. The Applicant takes issue with three parts of the panel's decision, the first two of which concern points raised by the COM in her report.
47. It is first noted that, in January 2016, the Applicant did not tell the Probation Service that his partner had spoken to PR and asked him to come and speak to the Applicant. The Probation Service became aware when PR made a complaint to police. The Applicant says that he was not aware that this had happened so could not inform the Probation Service. He argues that it is unfair to 'use this against [him]'.
48. The panel's decision repeats what had been said by the COM in her report. I have no way of determining the veracity of the Applicant's account. However, it is reported that the Applicant admitted that he saw PR (and his daughter) and got his partner to approach PR. Whatever the truth of the matter, it is not irrational for a panel to consider a report of an event which was of sufficient concern to the Probation Service for a warning letter to have been issued.
49. It is next noted that the Probation Service had concerns that the Applicant had contacted his sister (who was subject of a non-contact licence condition) at a public event in July 2016. The Applicant states he did not know his sister was present. The Applicant's position is also made clear in the COM's report. Again, it is not irrational for a panel to consider a matter that was of concern to the Probation Service at the time, even if it fell short of formal warning or recall to custody.
50. The dossier requires the COM to document any licence enforcement issues that had taken place and the matters described were considered to be such issues. It was not irrational for the panel to take them into account.
51. There are more recent enforcement issues (from March 2021, November 2021, and May 2022 onwards) which are also listed but are not contested by the Applicant. It cannot be said that the examples of which the Applicant complains were the only matters of concern before the panel in making its decision.
52. Finally, the Applicant submits that it was unfair for the panel to have relied upon the report of a prison psychologist from 2015. It is argued that, in 2015, the Parole Board did not use the report of the prison psychologist, but instead agreed with the report of an independent psychologist commissioned on the Applicant's behalf. He argues that the panel should have used the independent psychologist's report to inform its decision.
53. The 2015 panel did not discard the prison psychologist's report. It is referenced within its decision, as is the independent psychologist's report. There was, in fact, agreement between the two psychologists on a number of points relating to risk: that the Applicant has failed to manage sexual preoccupation, showed poor problem solving, and that there was evidence of poor emotional control.
54. The Applicant strongly contends that the independent psychologist's report should have been used to get an opinion on his character in 2015.

55. This report concludes as follows:

"I am unable to recommend [the Applicant's] re-release because on his own account he knowingly breached licence conditions, he in effect states that he did not benefit from [sexual offending risk reduction work] he completed and there is evidence that he failed to manage his risk factors".

56. It is therefore difficult to see how the current panel's decision would have been different if this report had been before it.

57. There is nothing in the Applicant's submissions that satisfies me that the legal test for irrationality has been met. Therefore, this ground also fails.

Ground 3- Procedural unfairness

58. It is next submitted that it was procedurally unfair for the Applicant's COM to have given a recommendation without having performed an Offender Assessment System (**OASys**) assessment.

59. The dossier notes the last OASys was completed on 11 November 2022. As such, the Applicant's submission is incorrect. Moreover, the dossier contains a summary of the pertinent points of the OASys sufficient for the panel to make its decision regarding licence termination. This includes the assessment of current risk levels, which note a very high risk of sexual reoffending. There is no procedural unfairness on this point.

60. Finally, the Applicant argues that it is procedurally unfair for the COM to have put forward the re-investigation of the alleged domestic matter as supporting information for the decision. He states that there has been no further police interview (as he had already been cautioned) and the police had not been able to give a reason for the re-interview.

61. The COM states that she was advised by the police that the matter remained under consideration and therefore was required to disclose it in the termination report.

62. The section of the termination report in which it appears is headed as follows:

"8. Have checks been undertaken with the following statutory and other agencies? These checks should be completed for all individuals. Dates of the checks should be provided as well as a summary of the information obtained."

63. One of the agencies in question is the police. Therefore, the report required the COM to disclose what she had been told by the police and she has done so. The fact that the Applicant disagrees with what the COM has been told does not relieve her of her duty to disclose the information in her report: indeed, she would be failing in her responsibilities if she did not do so.

64. As such, there has been no procedural unfairness on this point and this ground also fails.

Decision

65. For the reasons I have given, I do not find the decision was procedurally unfair or irrational. Neither did I find any error of law. Accordingly, the application for reconsideration is dismissed.

Stefan Fafinski
13 February 2023