

[2023] PBRA 82

Application for Reconsideration by Nightingale

Application

1. This is an application by Nightingale (the Applicant) for reconsideration of a decision made by a duty member dated 5 April 2023 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 and the IPP licence termination dossier (the **dossier**).

Background

4. The Applicant received a sentence of imprisonment for public protection (**IPP**) on 27 June 2007 following conviction for making indecent photographs of children (16 counts) and attempting to engage in sexual activity in the presence of a child (two counts) to which he pleaded guilty.
5. He was released on licence on 15 January 2013 following an oral hearing.
6. The Applicant was 36 years old at the time of sentencing and is now 51 years old.

Request for Reconsideration

7. The application for reconsideration is dated 26 April 2023. It has been drafted by solicitors acting for the Applicant. It submits that the decision was both procedurally unfair and irrational.
8. This submission is supplemented by written arguments to which reference will be made in the **Discussion** section below. No submissions were made regarding error of law.

Current Reference

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 27 March 2023 under section 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate his licence.
10. On 5 April 2023, a duty member dismissed the reference.

The Relevant Law

Crime (Sentences) Act 1997

11. 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.
12. 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)).
13. 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)).
14. If a prisoner has been released on licence (regardless of whether they have been subsequently recalled) and the qualifying period has expired and if the 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)).
15. 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)).
16. 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)).
17. If the Parole Board directs release under section 31A(4B)(ii), that release is unconditional (section 31A(4C)).

Parole Board Rules 2019 (as amended)

18. 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.
19. Decisions concerning preventative sentences (as defined in section 31A(5) of the 1997 Act) are eligible for reconsideration under rule 28(2).

Procedural unfairness

20. 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.
21. 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.
22. The overriding objective is to ensure that the Applicant's case was dealt with justly.

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.

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

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

Discussion

Re-referral of the application: timescales

27. In refusing the application, the duty member concluded as follows:

"The panel has therefore concluded that licence conditions should remain until the issue of the Safeguarding Agreement is concluded. At that time, the Probation Service is invited to consider whether to submit a further application."

28. The Safeguarding Agreement in question is concerned with the Applicant's attendance at church. An IPP Panel on 3 March 2023 concluded that his attendance at church (albeit only for special occasions) was such that a Safeguarding Agreement was necessary and had to be in place for any further attendance at any church. His Community Offender Manager (**COM**) did not recommend terminating his licence, despite positive engagement and compliance, as there were outstanding actions around safeguarding which needed to be completed.

29. The duty member's decision is consistent with this view. It cannot therefore be said to be an irrational decision, as it is not outrageous to suggest that another panel would have agreed with the COM's stated view.

30. However, the wording of the decision implies almost a conditional conclusion: that, if the Safeguarding Agreement was concluded then the licence could potentially be terminated. The duty member is careful not to bind any future panel by noting that the "Probation Service" could re-refer the matter to the Parole Board. Strictly speaking, any such re-referral would have to be made by the Secretary of State, but the Probation Service would be asked for a report prior to the referral being made.

31. Submissions on the Applicant's behalf point out that further referrals must not be made within a 12-month period, authority for which can be found in para. 5.16.51 of the Parole Board's published guidance: "Duty Member Activities" (August 2022, v2.0) (the 'Parole Board guidance').

32. Although not specifically referred to by the Applicant, there is also a policy document used by the Public Protection Casework Section (**PPCS**) who manage the process on behalf of the Secretary of State. The policy in question is the "Managing Parole Eligible Offenders on Licence Policy Framework" (implementation date 11 November 2020, re-issue date 5 April 2023) (the 'PPCS policy') This policy is publicly available on the gov.uk website at <https://www.gov.uk/government/publications/managing-parole-eligible-offenders-on-licence-policy-framework>.

33. Para. 3.5.15 of the PPCS policy states:

"Where the Parole Board directs that the individual's licence should not be terminated, the case will be reviewed automatically 12 months later, and the process restarts..."

34. The Parole Board guidance therefore reflects the PPCS policy.

35. As such, the duty member decision which suggests that a further application may be considered is inconsistent with both the Parole Board guidance and the PPCS policy. There appears to be no provision within the PPCS policy to make a referral outside the automatic 12-monthly schedule. Therefore, to suggest that the re-referral could be triggered by satisfactory conclusion of the safeguarding arrangements is incorrect, regardless of the length of time it might take for any such arrangements to conclude.

If they are concluded sooner than the next 12-monthly review, the Applicant would need to wait until his case was re-referred. If they are not concluded within 12 months, he would be re-referred and may well find himself in the same position as he is at present.

36. It is submitted that the duty member's decision indicated a lack of awareness of the Parole Board guidance at the time of the decision. I agree. It is further submitted that, as a result of this, the decision was procedurally unfair.
37. The question then becomes whether the apparent oversight of the Parole Board guidance makes the duty member's decision procedurally unfair. The Parole Board guidance (and the PPCS policy), while express procedures, are not laid down by law. There is also no guarantee that the safeguarding arrangements would be concluded before the next automatic review. No indication of timescale is given in the dossier. In fact, it is noted that the Applicant has (historically at least) not wanted full disclosure to take place at churches due to his concerns around confidentiality.
38. I therefore find no procedural unfairness on this ground. As I have already stated, the decision is not irrational.

Oral hearing

39. The second ground for reconsideration is that the duty member failed to consider or address the Applicant's secondary application for an oral hearing if it was determined that the IPP licence could not be terminated on the papers. It argues that an oral hearing "*was not at all considered in this case*".
40. In fact, the duty member did consider the secondary application for an oral hearing and dismissed it. The decision makes this clear, albeit briefly. It concludes that the outstanding matter of safeguarding was such that an oral hearing panel would find itself in the same position of the duty member.
41. This was a decision that the panel was entitled to make, and it did so.

Decision

42. For the reasons I have given, I do not find the decision was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
4 May 2023