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[2024] PBRA 85

Application for Reconsideration by Langdale

Application

1. This is an application by Langdale (the Applicant) for reconsideration of a decision of a single member panel (the panel) considering a referral to the Parole Board by the Secretary of State under section 31A of the Crime (Sentences) Act 1997 to consider whether or not it would be appropriate to terminate the IPP licence in the Applicant's case. The date of the panel's decision was 13 March 2024, and the decision was not to terminate the licence. The panel also decided not to suspend the supervisory element of the licence. Some amendments were made to the licence by the member, these are not in contention and will not be referred to in this decision.

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. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. These are the amended application for reconsideration provided by the Applicant's legal representatives on his behalf; the decision of the panel and the IPP termination licence dossier of 112 pages. I have also had sight of the Judge's Sentencing Remarks (JSR) for further offences committed by the Applicant while on licence and an excerpt from the official list of convictions relating to the Applicant.

Background

4. The Applicant was sentenced in 2007 to a sentence of imprisonment for public protection (IPP) following his conviction of s.18 grievous bodily harm and kidnapping. He was sentenced on the same day for the offence of affray. His tariff expired in 2012. He was first released in 2012 but recalled to custody in 2018. He was re-released in March 2021, and has remained in the community since then. As more than 10 years has passed since his first release the Applicant is eligible for consideration of the termination of his IPP licence.

5. Further background is necessary for this case. When released on licence the first time, the Applicant reoffended. In 2017 he committed the offence of conspiracy to commit burglary. He was subsequently sentenced in 2018 to a determinate sentence of six years and five months. There is a dispute as to whether this sentence has expired (the application states this would have been in December 2023) or

whether the applicant continues to be on licence for this further offence until November 2024 as indicated in the decision of the panel. The JSR for this further offence indicates that the Applicant, with co-defendants, was involved in a series of burglaries and thefts across parts of the country. The Applicant admitted to four of these incidents when the Applicant was finally apprehended, after a vehicle police pursuit. The panel that made the decision on the IPP termination referral noted the serious nature of the offences, and I have to agree. The sentence imposed on the Applicant reflected the seriousness of these matters.

Request for Reconsideration

6. The application for reconsideration is dated 15 April 2024. There was an earlier and on time application however I required further particulars that were provided on 15 April.

7. The grounds for seeking a reconsideration are as follows:

   a) There was an error of law;
   b) The process was procedurally unfair;
   c) The decision is irrational.

8. I will provide greater detail about the particulars of the grounds in the discussion below in order to prevent repetition.

Current parole review

9. The referral to the Parole Board to consider termination of the IPP licence is dated February 2024. The Applicant is now 38 years old.

10. IPP Termination referrals are initially considered by a single member panel in a process called Member Case Assessment. The panel can make a decision on the papers or in some circumstances send the case to an oral hearing. The panel in this case made a decision on the papers.

The Relevant Law

11. The panel correctly sets out in its decision letter dated 13 March 2023 the context of the referral from the Secretary of State.

Parole Board Rules 2019 (as amended)

12. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A)).

13. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

Irrationality

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

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

Other

20. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home Department [2004] QB 1044** sets out the preconditions for such a conclusion: "*there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.*" See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide "*objectively verifiable evidence*" of what is asserted to be the true picture.

21. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said: "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

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

22. The Respondent has stated that they will not be offering any representations in regards to this application.

Discussion

23. I will take each ground in turn. Where the application is unclear as to which ground should be considered under, I will make a judgement as to my approach to that particular.

24. *Error of law*: I cannot see where this ground is particularised or made out. An error of law occurs when there has been an error in construction or interpretation of the law. I accept that there is on occasion some muddling of the waters in Judicial Review cases where an error of fact is considered under this ground. I choose not to do so, and will consider any complaint in relation to error of fact under the ground of irrationality. The Applicant argues that there was an error of fact. This ground is therefore not made out.

25. *Procedural unfairness:* The application argues that the panel did not take the following factors into account, making the decision unfair:

    a) That the Applicant put excessive weight for his "*expired burglary sentence*" and the panel should have made a judgement about the '*lack in residual risk*'. The application correctly refers to guidance provided to members on IPP licence terminations.

26. I do not accept that the further offending was just a '*burglary'* matter as indicated in the application. It is clear from reading the JSR and from the conviction list that the Applicant was involved with other offenders in conspiring to carry out offences over a period of time. On reading the JSR these offences included burglaries on dwellings as well as non-dwellings, and the use of weapons or equipment that cannot be discounted. The panel considers these to be serious matters and I must agree. The length of sentence corresponds with the seriousness of the offence.

27. The panel in this case took the following into consideration when making its decision:

- The further offending took place while the Applicant was on licence following the first release.
- The further offending was of a serious nature.
- The further offending put in question the reports of good progress made before this further conviction.
- That it was reasonable to assess that the Applicant had not been open and honest with those supervising him prior to the further offending.
- There were other unconvicted concerns relating to the Applicant's behaviour that also needed to be taken into account. (it does not appear that the panel put much weight on this, however they do refer to it).

28. I note that the panel also took positive reports into account. These included support from the relevant criminal justice agencies and the Applicant's Community Offender Manager (COM) for termination of the IPP licence; the good progress that the Applicant had been making since re-release on licence in March 2021 and an offer of employment.

29. The panel, having gone through the above consideration was clear in their decision. The panel disagreed with the assessment and recommendations of the professionals to terminate the licence and provided an explanation for this disagreement. In summary, the panel considered that the further offending was serious, that at the time of the offending the Applicant was not being open and honest with those tasked with managing his risk, and that a 'significant period' of effective supervision or progress would be required before the licence could be terminated. In relation to that last point, the Applicant has been in the community on licence since re-release in March 2021.

30. I find that there was no procedural unfairness in the weighing exercise the panel carried out with the evidence before it. It came to a considered decision that was not the same as that of the professionals and the panel explained clearly why it came to that conclusion. I note that in the guidance to members from the Parole Board in relation to consideration of terminations of IPP Licences, while not dealing specifically with a prisoner who has been re-released following further offending, consistently advised members to consider risk and public protection when considering a licence termination. The panel's decision was reasonable.

b) The panel was unreasonable because it did not agree with the authorities that recommended termination of the licence:

31. Whether a panel of the Parole Board should accept the recommendations of professionals (whether in oral hearings or in reports) is frequently cited as a ground for reconsideration. There are now a number of reconsideration decisions that are clear in this respect. It is for any panel to make its own independent decision. It is of course the duty of any panel to consider fully the opinion, assessment and recommendation of any professional before it. If a panel disagrees with any recommendation, they should provide reasons for this disagreement.

32. I accept that the relevant authorities in this case, the group of professionals known as the IPP Progression Panel, which included the Applicant's COM did recommend termination of the licence. The dossier indicates that during the Progression Panel meeting in January 2024 prior to the referral, the relevant agencies discussed the Applicant's progress. The following comments are noted in the dossier about these discussions: that although the Applicant had a high level of anxiety about being recalled back to prison, this had not acted as a deterrent in 2017 when he was involved in a pro-criminal group; however, although this was concerning behaviour it was not offence paralleling (had different motivations to the index offence) and there had been no violent behaviours since the index offences

33. As I have already explained under a) above, the panel disagreed with this analysis, and explained why, the main disagreement being in relation to the seriousness of the further offending and the potential risks attached to those behaviours. I can also see that in fairness to the Applicant, the panel has discounted some evidence relating to the circumstances of the further offending that the Applicant denies. This particular of the application is not made out.

34. *Irrationality:* The Applicant argues that:

a) The panel made an error in relation to the Sentence Expiry Date (SED) for the further offence.

35. The application argues that the panel made an error in referring to the SED for the further offence as November 2024. The representations indicate that the Applicant's sentence expired on December 2023, and they attach an excerpt from a conviction list as evidence of this. The representations indicate that time served on remand had been taken into consideration to work out the SED. I have carefully looked at the conviction list as supplied by the representations and they do not provide any detail as to the SED. The only information is in the material supplied on behalf of the Respondent in his referral, and this indicates that the sentence will expire in November 2024. I cannot assess whether or not the Respondent's representatives have got this date wrong, it is possible. However, it is firstly, not a mistake the panel made. A panel is entitled to consider that sentencing information provided to it by the Respondent is accurate. Secondly, in any event, I cannot see where it could be said that the panel relied upon this date, correct or not, in its decision. The panel was clear in that it stated that in its view a significant further period (trouble free) on licence was required before consideration of termination of licence conditions.

b) No other panel would have come to the same conclusion given the evidence before it.

36. The test for irrationality as provided in the case of **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)** indicates that there is a high bar before a judicial decision can be said to be irrational. The application argues that the panel did not give correct weight to the periods of time that the Applicant spent in the community trouble free when making its decision. In my view the panel's reasoning is clear, it did not consider the first admittedly lengthy period of time to be trouble free, specially as the Applicant had clearly been engaging with negative associates and planning further offending without those supervising him knowing this. Secondly, the panel disagrees with the assessment that the further offending was not of a serious nature, and thirdly, that in the panel's view the Applicant needed a further time on licence to evidence being pro-social. The panel was clear that three years (following re-release) was not sufficient time to evidence sustained good behaviour. In my view all these considerations are relevant to the panel's duty to consider the protection of the public and the conclusion made by the panel was reasonable.

37. The application also indicates that the panel did not properly take into consideration the impact of the IPP sentence on the Applicant's mental health, and provides research evidence about the nature of IPP sentences on prisoners. It is not disputed that IPP sentences have given rise to considerable concerns, and there is evidence of prisoners subject to these sentences experiencing hopelessness and distress. The dossier indicates that the Applicant has expressed feelings of anxiety and paranoia due to his sentence, and has been seeking appropriate help for these issues. The application states that the panel '*overlooked'* this impact in making its decision.

38. While recognising the mental health concerns of the Applicant, I cannot see how it impacts on the decision that the panel had to make unless the mental health is linked to risk. There is no suggestion that the issues suffered by the Applicant has a link to risk, either to increase or decrease it, and it is therefore acceptable that the panel does not refer to it in its decision.

Decision

39. For the reasons I have given, I do not consider that the decision contains an error in law, or that it was irrational or procedurally unfair and accordingly the application for reconsideration is refused.

Chitra Karve
26 April 2024