

## [2023] PBRA 28

### Application for Reconsideration by Anderson

#### Application

1. This is an application by Anderson (the Applicant) for reconsideration of a decision made by a duty member dated 24 January 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 7 August 2008 following conviction for robbery.
5. He was most recently released on licence on 14 January 2020. This is his first request for suspension of supervision. He is currently in custody after his fourth recall on this sentence.
6. The Applicant was 24 years old at the time of sentencing and is now 38 years old.

#### Request for Reconsideration

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

#### Current Reference

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 23 January 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 24 January 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 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

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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.

### *Duty to give reasons*

23. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.

24. When reasons are required, or where they are provided, even though not strictly required, those reasons must be both adequate and intelligible. They must therefore both rationally relate to the evidence in the case (**Re Poyser [1964] 2 QB 467, 478**) and be comprehensible in themselves (**Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153 (HL) 165**).

25. The duty to give reasons was most recently considered in the context of parole decisions in **R(Wells) v Parole Board [2019] EWHC 2710**. Saini J acknowledged (at para. 38) that a panel of the Parole Board is not bound by the expert evidence before it, but that (at para. 40):

*'The duty to give reasons is heightened when the decision-maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting.'*

26. In **Wells**, Saini J also noted that (albeit in the context of general civil litigation) the observations of Henry LJ in **Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377 (CA) 381** regarding the duty to give reasons are apposite:

*'The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in **R(Dave) v Harrow Crown Court [1991] 1 WLR 98**) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence*

*than if it is not.'*

And

*'The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter...[W]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where...there is disputed expert evidence; but it is not necessarily limited to such cases.'*

27. In summary, a failure to give reasons may give rise to procedural unfairness, irrationality, or both. Reasons must relate to the evidence in a rational way and be adequate, intelligible, and comprehensible. The more a panel departs from expert evidence, the more heightened its duty to give reasons for doing so, particularly when the liberty of the prisoner is at stake. This includes any restrictions placed on a prisoner's liberty by licence conditions.

### The reply on behalf of the Respondent

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

### Discussion

29. The Applicant submits that the decision was procedurally unfair.

30. The primary submission is that the decision failed to provide sufficient reasons for not terminating the Applicant's IPP licence.

31. A failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First, it may be said that such a failure is procedurally unfair. Secondly, a failure to give adequate reasons may indicate that a decision is irrational.

32. The duty to give reasons was most recently considered in the context of parole decisions in **R(Wells) v Parole Board [2019] EWHC 2710** in which Saini J also noted (albeit in the context of general civil litigation) the observations of Henry LJ in **Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377 (CA) 381** regarding the duty to give reasons are apposite:

*"Whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not."*

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*"The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter...[W]here the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced*

*on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where...there is disputed expert evidence; but it is not necessarily limited to such cases."*

33. In summary, a failure to give reasons may give rise to procedural unfairness, irrationality, or both. Reasons must relate to the evidence in a rational way and be adequate, intelligible, and comprehensible so that, in this instance, the Applicant can understand fully the reasons for the decision for the IPP licence conditions to continue to apply on release.
34. Moreover, it cannot automatically follow that a recalled prisoner may not have his IPP licence terminated: if that were the case, there would be no need for the statutory discretion given to the Parole Board under section 31A(4B)(b)(ii) of the Crime (Sentences) Act 1997.
35. Given that the panel had discretion to make a decision, then that decision must be sufficiently well explained to discharge the panel's duty to give reasons.
36. Although the 'reasons' section of the decision is around a page in length, most of the content is descriptive. The reasoning behind the decision is very brief:

*'Given the seriousness of [the Applicant's] offending, and his now fourth recall to custody because of concerns which include substance abuse, the panel concludes that it is necessary for the protection of the public that [the Applicant] is subject to licence conditions on release.'*

37. The decision notes that the Probation Service does not support termination of the IPP licence.
38. The decision also notes that personal and legal representations were received and were 'fully taken into account'. The personal representations comprised six pages and the legal representations ran to 12 pages. These raise concerns with the licence termination report on which the decision was based. While noting the views of the Probation Service, the decision does not set out or engage with the content of the representations.
39. It is impossible to ascertain from the decision the reasons why the panel was not persuaded by the representations from the Applicant and preferred the views of the Respondent. While I do not doubt that the reasons were fully taken into account by the panel, I cannot tell that from reading its decision.
40. I find that the panel has not discharged its duty to give reasons and its failure to do so is sufficient to amount to procedural unfairness.

## Decision

41. Accordingly, applying the test as defined in case law, I find the decision not to terminate the Applicant's licence to be procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted.

**Stefan Fafinski**  
**23 February 2023**