

[2024] PBRA 47**Application for Reconsideration by Cunningham****Application**

1. This is an application by Mr Cunningham ('the Applicant') for reconsideration of the decision of a Duty Member of the Parole Board ('the Board') who did not agree to the termination of the licence to which the Applicant is subject under a sentence of imprisonment for public protection ('IPP').
2. 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

3. The Applicant is now aged 37. In March 2008 he received an IPP sentence for an offence of wounding with intent. His minimum term ('tariff') was set at 3 years and 53 days.
4. His tariff expired on 26 April 2011, and he was released on licence by direction of the Board on 15 November 2013.
5. On 27 April 2016 he was recalled to prison as a result of having committed a further offence for which he received a fresh 12-month sentence.
6. On 21 December 2017 a panel of the Board directed his re-release on licence, and he was duly released. Since then he has been consistently law-abiding. He and his partner run a successful business.
7. On 7 December 2023 the Secretary of State referred his case to the Board to decide whether to terminate his IPP licence and, if not, to suspend the supervisory elements of the licence.
8. Probation did not support termination of the licence or suspension of the supervisory elements. That was largely if not entirely due to the fact that the Applicant had failed a recent drug test. In contrast to probation's view an independent psychologist whose report had been commissioned by the Applicant did support termination of the licence.
9. On 6 December 2023 the Applicant's solicitors submitted detailed representations arguing for termination of the licence. The representations included the following: "[The Applicant] invites the Panel to terminate his IPP licence on the papers submitted which include [the psychologist's] independent risk assessment." In fact the psychologist's



report was not included in the dossier provided by the Secretary of State for the purposes of the Board's consideration of the case.

10. The case was considered in January 2024 by a Duty Member of the Board. The Duty Member had three options: (1) to decide on the papers to direct termination of the licence (2) to decide on the papers not to direct termination of the licence or (3) to send the case for an oral hearing at which it could be considered with the benefit of oral evidence. On 16 January 2024 the Duty Member issued a decision on the papers not to direct termination of the licence.
11. The Public Protection Casework Section of the Ministry of Justice ('PPCS') noted that, although the Applicant's solicitors had submitted detailed representations in support of termination of the licence, the Duty Member's decision made no mention of those representations and the Duty Member had evidently not considered them. It appears that due to an administrative error the representations had not been sent to the Duty Member.
12. PPCS very sensibly and properly referred the case back to the Duty Member for further consideration. The solicitors submitted supplementary representations on 6 February 2024, and the Duty Member then reconsidered the case and issued a revised decision (again dated 16 January 2024 but that was obviously a mistake) in which she again decided on the papers not to direct termination of the licence.
13. Neither the Duty Member's original decision nor her revised one made any mention of the independent psychologist's report and the inference must be that despite the reference to it in the solicitors' representations of 6 December the Duty Member had not seen it or considered it. She could, of course, have asked for it to be provided.
14. The solicitors now apply for reconsideration of the Duty Member's decision (the revised version). They have provided detailed representations in support of this application.

The Relevant Law

The Parole Board Rules 2019 (as amended)

15. Provisions for termination of IPP licences are made in Rule 31 of the Rules (as amended); and Rule 28 includes provisions for reconsideration of decisions on referrals to consider termination of licences.
16. Rule 31 provides for references to be made by the Secretary of State to the Board and considered by a single member who may either (a) decide whether or not a licence should be terminated or (b) send the case for an oral hearing to make that decision.
17. Rule 28(1) provides for applications to be made for reconsideration of various kinds of decisions including decisions about the termination of licences under Rule 31.
18. Reconsideration of a decision will only be directed if one of 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.

19. The application in this case is made on the grounds of irrationality and procedural unfairness.

Irrationality

20. 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."

21. 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.

22. 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**.

Procedural unfairness

23. 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.

24. 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.

25. 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

26. In support of this application the Applicant's solicitors advance several grounds to which reference will be made below.

The position of the Respondent (the Secretary of State)

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27. The Secretary of State is a party to all parole proceedings (the other party in each case being the prisoner) and is therefore entitled to make representations to the Board in response to an application for reconsideration made by or on behalf of the prisoner.

28. PPCS on behalf of the Respondent have stated that he offers no representations in response to this application.

Documents considered

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

- i. The dossier provided by the Secretary of State for the Applicant's case, which contains 35 numbered pages;
- ii. The Duty Member's decision;
- iii. Representations by the Applicant's solicitors in support of this application;
- iv. Copies of various e-mails; and
- v. A copy of the decision of HH Judge Jarman KC in the case of **R (on the Application of Shane Wylie) v Parole Board and the Secretary of State (2024) EWCH 52 Admin** which has been helpfully provided by the Applicant's solicitors.

Discussion

30. It is unnecessary to set out all the submissions advanced by the Applicant in support of this application. I am satisfied that a number of things went wrong in this case and that I must direct reconsideration of the Duty Member's decision. The principal reasons for this decision are as follows.

31. The Duty Member did not consider the evidence of the independent psychologist. It should have been included in the dossier provided to her, but was not, and this was a significant procedural irregularity. Not all procedural irregularities result in unfairness to the prisoner, but the independent psychologist's opinion was an important piece of evidence which should have been made available to and considered by the Duty Member. It was referred to in the solicitors' representations of 6 December, and fairness required it to be obtained and considered.

32. There was a significant issue of fact which needed to be examined and assessed by the Board. The allegation that the Applicant had taken drugs was the principal if not the only reason for probation's opposition to termination of the licence, and by inference it must have been a significant reason for the Duty Member's decision. The Applicant has consistently denied the allegation and, whilst I do not think it would have been appropriate to make a positive decision on the papers, I am satisfied that it was irrational to make a negative decision on the papers instead of directing an oral hearing.

33. I do not think the Duty Member gave adequate reasons for her decision.

Decision

34. For the reasons explained above I must allow this application on the grounds of irrationality and procedural unfairness, and direct that the case should be reconsidered.

Jeremy Roberts
01 March 2024