

[2023] PBRA 26**Application for Reconsideration by Gaskell****Application**

1. This is an application by Gaskell (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 28 November 2022. The Panel decided not to direct the Applicant's release.
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 papers are:
 - An application for reconsideration submitted by the Applicant's solicitors.
 - the Panel's decision dated 28 November 2022.
 - a dossier of 320 numbered pages.

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

4. The Respondent did not offer any submissions.

Background

5. The Applicant is 66 years old. In 2017, he was convicted of three offences of rape and nine offences of indecent assault committed in the 1970s. The victims of the index offences were three of his first wife's sisters, although all the rape offences and most of the indecent assault offences were committed against one of his first wife's younger sisters. The offences were not reported to the police until 2014. For the rape of a child under 13 years, the Applicant was given a sentence for an offender of particular concern of ten years comprising a custodial term of nine years and a licence period of one year. The other offences attracted a range of concurrent determinate sentences according to the Applicant's police national computer record.
6. The Applicant pleaded not guilty at this trial and has maintained his stance of innocence throughout his sentence.
7. The Applicant has no previous convictions. However, the decision of the Panel refers to a series of allegations made in the 1980s and 1990s. In 1983, one of the Applicant's daughters from his first marriage alleged that the Applicant had sexually abused her. The Applicant was prosecuted but it is reported that the Applicant's statement, in which he made several



admissions, was held to be inadmissible and he was found not guilty. It is not clear if the not guilty verdict was the result of the prosecution offering no evidence. The Applicant's first wife alleged that the Applicant was guilty of voyeurism and a female neighbour (at the time of his first marriage) also made an allegation of voyeurism. The Applicant's first wife also alleged, reportedly to the police, that the Applicant was violent towards her.

8. In 1996, an anonymous report was made to Children's Services alleging that comments made by one of the Applicant's daughters from his second marriage suggested that she might be the victim of sexual abuse by the Applicant. Both the Applicant's daughters from his second marriage were interviewed but did not make any disclosures. According to the Applicant, his daughters were taken to a rape crisis centre as part of the investigation. The Applicant's second wife is reported to have regarded the allegation as malicious and to have believed that the allegation and the court case in the 1980s were instigated by the Applicant's first wife. Save for the allegation in 1983, which was the subject of a prosecution, no further action appears to have been taken in relation to any other allegations and no new sexual allegations have been made for over 25 years.
9. The Applicant and his third wife (wife) have been married for about 14 years. His wife is fully supportive of the Applicant and believes he is innocent of the index offences. The Applicant's wife has a large family in Europe, who have visited the Applicant and his wife in the UK and who the Applicant and his wife have visited.
10. As the Applicant is assessed by OASys assessment tools to present a low risk of reoffending, he is not eligible for any accredited programmes to address his sexual offending risks, irrespective of whether or not he maintains his stance of innocence. Attempts to obtain a clinical override to allow the Applicant to access an appropriate intervention have been unsuccessful. The Applicant is therefore an untreated sex offender. He has completed victim empathy work and a family pathway course.

Request for Reconsideration

11. The application for reconsideration is undated but was received by the Parole Board by email on 12 December 2022.
12. The ground for seeking a reconsideration is that the Panel's decision is irrational. The application refers to the Applicant's enhanced status and submits that the absence of proven adjudications during his sentence and his maintenance of good behaviour are evidence that the Applicant would comply with his licence conditions. The application submits that the Applicant's risk can be managed in the community and that the Panel did not consider or apply the following factors in making its assessment of risk:
 - (a) That the proposed release plan is extremely robust and would identify any warning signs before risk would be imminent and the robustness of the release plan would manage that;
 - (b) the risk posed by the Applicant is not imminent;



- (c) although there are limitations in the understanding of the Applicant's risk, there will be significant external restrictions placed on him to effectively manage risk which will include his licence conditions, a period in approved premises, a curfew, reporting times, polygraph testing and more;
- (d) the Applicant evidenced a willingness and motivation to comply with all the requirements of his licence; and
- (e) although the Applicant does not yet have a working relationship with his COM, he said he had a good relationship with the POM; he understood the role of the COM and was happy to work with her in the community including any offence focused work she referred him for.

Current parole review

13. The Secretary of State referred the Applicant's case to the Parole Board on 18 February 2021 to consider whether or not it would be appropriate to direct his release. The Applicant's case was directed to an oral hearing on 29 July 2021. The Applicant's case was originally due to be reviewed by a panel of the Parole Board at an oral hearing, conducted remotely, on 8 or 10 March 2022 (panel chair directions give different dates). The review was deferred before the hearing because the Applicant's community offender manager (*COM*) became unavailable and a stand-in probation officer could not be identified in time for the hearing.
14. The Applicant's case was relisted and a remote hearing to review the Applicant's case was conducted by the Panel on 17 November 2022. The Panel comprised two independent members and a specialist psychiatrist member. The Panel had considered a dossier of 320 numbered pages which included a psychological risk assessment (*PRA*) of the Applicant dated 27 May 2021 completed by a prison psychologist (*Psychologist*), an addendum dated 7 November 2022 (*Addendum*) to the *PRA*, an OASys Assessment dated 7 November 2022, reports from the POM and the COM, and six letters of support from the Applicant's family and friends.
15. At the hearing, evidence was taken from a prison offender manager (*Stand-In POM*) standing in for the Applicant's usual POM, the COM, and the Psychologist. The Applicant also gave evidence to the Panel.
16. The COM said that although the OASys assessments of the Applicant's risks of future re-offending were low, she stated that in her professional judgement he presented a medium or high risk of reoffending. The COM noted that the Applicant had not undertaken any offending behaviour work and said that ideally, she would have preferred core risk reduction work to be completed in custody. She said that her intention was for the Applicant to complete core risk reduction work with her on a one-to-one basis.
17. In a report dated 29 October 2021, the Applicant's then COM had said that the probation service recommended that the Applicant should remain in



closed conditions with a view to being transferred to open conditions so that the risk management plan could be tested. The then COM stated, “*Given that an important part of effective risk management in the community will involve external strategies and [the Applicant] working collaboratively with those involved in his case, open conditions would provide further evidence of his ability to adhere to rules and engage with supervision in less stringent conditions*”. The then COM noted that the Parole Board did not have the option in the Applicant’s case of recommending a progressive move to open conditions.

18. It was noted that the Applicant’s evidence did not always tally with evidence previously given by him, and that some of his responses were ambiguous, qualified, or incomplete. This was notably the case when the Applicant was asked whether he was aggressive or violent towards any of his wives although he was adamant that there had been any violence in his current relationship.
19. The Applicant denied all the allegations made against him in the 1980s and 1990s and the Psychologist said that it was difficult to know what weight to place on the allegations. When asked to identify risky situations, the Applicant replied that he would not be on his own with any children and would not have contact with anyone under 18. When questioned further by the Panel, the Applicant said that he did not think he presented any risks but accepted that others did. The Applicant went on to say that if he was in a public place and a child came near him, he would remove himself from the situation before a problem arose. The Applicant said that he had made it clear to his family that he was not permitted to have contact with anyone under 18 years of age and that his wife was fully aware of the restrictions that would apply to him.
20. In her PRA, the Psychologist stated that there remained a lack of understanding about the Applicant’s risk factors. In her case formulation, the Psychologist highlighted insecure attachments, lack of emotional intimacy, low self-esteem, attempts to gain control, sexual pre-occupation, and sensation-seeking/impulsivity as possible relevant factors in relation to the index offences.

The Relevant Law

21. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The Panel’s decision dated 28 November 2022 correctly sets out the test for release.

Parole Board Rules 2019 (as amended)

22. Under Rule 28(1) of the Parole Board Rules, the only types of decisions which are eligible for reconsideration are those concerning whether the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is 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)).

23. 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

24. 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 paragraph 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."

25. 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.
26. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Duty to give reasons

27. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in cases such as **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board [2020] EWHC 1885 (Admin)**.
28. 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."*
29. It is suggested that a panel's conclusions are best tested by asking whether the conclusions reached can be justified on the basis of the evidence placed before it, while giving due deference to a panel's experience and expertise.



30. Panels of the Parole Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. If a panel intends to reject the evidence of a witness, then detailed reasons will be required. This is implicitly recognised in the case of **Wells** at paragraph 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."

Discussion

31. In its decision, the Panel concludes that the Applicant does not meet the test for release *"despite the raft of external controls proposed"* due to *"the absence of full exploration of risk and the absence of internal controls"*. Earlier in its decision, the Panel outlines its assessment more fully by saying that the Applicant lacks an understanding of relevant risk factors and that without having a full understanding of his motivation for offending and risks, *"it would be difficult to be confident that all possible external controls would be sufficient to manage (unknown) risks indefinitely"*. The Panel expands on the issue of indefinite risk by stating that it *"must consider the risks of physical and psychological harm over an indefinite period and particularly following on from any period in Approved Premises when the level of monitoring and supervision will inevitably reduce. Once in the community with less monitoring and visibility to professionals, the Panel could not be confident in risk being manageable particularly as [the Applicant] does not see himself as a risk"*.
32. The application for reconsideration submits that the Applicant's risk can be managed in the community and that the Panel did not consider several factors in making its assessment of risk. Those factors are set out in detail in paragraph 12 above, and I will deal with them on a global basis here.
33. In considering the submissions made in the application for reconsideration, the following issues are relevant:
- (a) The professionals highlight that their understanding of the Applicant's risk is limited since it has not been possible to explore the Applicant's motivation or triggers to his offending behaviour. This is inevitably the case where an offender consistently maintains his innocence and has not undertaken any offending behaviour work.
 - (b) The Psychologist and the Panel have identified the Applicant's likely risk factors based on their knowledge and understanding of the index offences, information about allegations relating to sexual abuse and intimate partner violence made against the Applicant in the 1980s and 1990s, and the Applicant's accounts and evidence.
 - (c) The Psychologist and the Panel have not identified any unexplored areas of risk which might have a material impact on their assessments of risk. However, there was evidence of minimisation and victim blaming when the Applicant discussed relationship



difficulties during each of his three marriages but there is no discussion by the Panel of how this might impact on the Applicant's understanding of his risk to intimate partners and his ability to be open and honest.

- (d) In the PRA, the Psychologist's opinion is that the Applicant's risk can be managed in the community, and she recommends his release to approved premises (AP). In the Addendum, the Psychologist states that she remains of the view that there are limitations to her understanding of the Applicant's risk "*and therefore, external controls, as well as [the Applicant's] compliance with these, are necessary in order for risk to be effectively managed*".
- (e) At the hearing, the Psychologist concludes that the Applicant's biggest risk is the one he presents towards female children and in that context, she opines, "*with a raft of external controls in place, risk could be managed*". In the context of not wanting to return to prison, the Psychologist states that the Applicant is motivated to comply with the licence to avoid being recalled and "*could be relied on for his own risk management*".
- (f) The Panel does not explain why it disagrees with the Psychologist's assessment of the manageability of the Applicant's risk in the community.
- (g) The COM confirms her previous conclusion from May 2021 that the Applicant's risk cannot be managed in the community on the basis that his risks have not been addressed and therefore not reduced. The COM believes that a period in open conditions, to test the risk management plan (RMP) and the Applicant's compliance, would be appropriate.
- (h) The Psychologist does not assess the Applicant's risk as imminent and indicates possible warning signs of risk increasing such as non-compliance, pushing boundaries, poor coping, and lack of routine. There is no discussion by the Panel about what issues would make the Applicant's risk imminent.
- (i) The Panel states that there is an "*absence of internal controls*" on the part of the Applicant and expresses its concern that the Applicant does not see himself as a risk. However, the Applicant tells the Panel that although he does not think he presents any risks, he accepts that others do. This indicates some level of insight on the part of the Applicant which is not acknowledged or discussed as part of the Panel's conclusion. The Applicant indicates his understanding that he is considered to be a risk to children and states that he is aware that he must not have contact with anyone under 18 and that he has made this clear to his family. The Applicant states that his wife is fully aware of the restrictions that would apply to him on licence.



- (j) The Applicant states his willingness to comply with licence conditions. In her report dated 28 October 2022, the POM's view is that the Applicant's fear of custody would motivate "*his full compliance with any directions or conditions made*". This view is shared by both the Psychologist and the COM (albeit that the COM concludes that the Applicant's risk cannot be managed in the community). Like the POM, the Psychologist placed an emphasis on the Applicant's motivation to comply so as not to be recalled, and the COM also said that the Applicant is motivated to remain in the community and not return to jail and therefore would be compliant. The Panel states that it "*considered the view that his compliance in custody was a positive sign to provide confidence about repeating this in the community and adhere to licence conditions*". However, the Panel does not give its own view and does not comment on whether it believes the Applicant will comply with his licence conditions.
- (k) Although the evidence of the Applicant is set out in detail in the decision, there is no analysis of whether the Panel believes the Applicant will be open and honest with the COM. The Applicant acknowledged that he did not have a working relationship with the COM but said he understood the role of the COM and expressed a willingness to work with her in the community including undertaking any offence focused work for which she referred him. The Applicant is reported to have indicated a willingness to undertake offending behaviour work in custody. The Panel noted that the Applicant had completed work on victim empathy but said that much of it was not applicable to him since the index offences "*really did not happen*".
- (l) There is no comprehensive discussion of the Applicant's current protective factors or of protective factors he might develop or strengthen in the community. The index offences were committed in the 1970s and the most recent sexual abuse allegations made against the Applicant were made in 1996. There has been no evidence of sexual offending or allegations of sexual offending for over 25 years, but no reference is made to this period of desistance by the Panel, although it is highlighted by the Psychologist in the PRA. All the professionals highlight that the Applicant does not wish to return to prison and will comply with his licence. This is a protective factor but its importance and how it might strengthen the RMP are not examined by the Panel.
- (m) There is a discussion about whether the Applicant's wife is a protective factor. The COM states that while the Applicant's wife believes in the Applicant's innocence, she does not want the Applicant to be recalled and the COM therefore considers that she would be protective in supporting him to comply. The Psychologist assesses the Applicant's wife as protective and that both the Applicant and his wife have accepted that the restrictions on his licence are necessary. The Psychologist also says that the Applicant appears to



have an increased sense of purpose to be released to spend time with his wife.

- (n) The Panel refers to a “*raft of external controls*” forming part of the RMP but does not discuss them in detail and does not highlight which external controls it believes would be effective and which would not. The Panel does not comment on whether the Applicant is likely to comply with the bespoke licence condition suggested by MAPPA (Multi-Agency Public Protection Arrangements) namely that the Applicant should inform the COM of any visits by his wife’s family so that the police could decide whether disclosures about the Applicant’s index offences should be made to them.
 - (o) In looking at the management of indefinite risk, the Panel does not discuss what additional monitoring might be provided as a result of the Applicant’s case being managed as a MAPPA Level 2 case. The COM states that she will undertake one-to-one work with the Applicant with a view to reducing his risk but the possible impact of this work is not considered. How polygraph testing might be used as part of risk management, particularly after the Applicant moves on from the AP, is also not considered.
 - (p) An assessment of the risks the Applicant presents should not be confined to the UK. However, the Panel does not consider the Applicant’s risk to the young children in his wife’s extended family even though most appear to live in Latvia and therefore will not be subject to standard UK safeguarding assessments and discussions.
34. In conclusion, the Panel appears to have provided a comprehensive account of the evidence taken at the hearing in its decision. However, in my view, the Panel fails to give adequate reasons for its decision not to make a direction for release and fails to explain why it does not agree with the Psychologist who believes that the Applicant’s risk can be managed in the community. While I have given due deference to the Panel’s expertise, the Panel does not analyse the evidence to reach its own views on the key issues of the Applicant’s compliance with his licence, his protective factors, his openness and honesty with the probation service and other agencies, and his level of insight. It is my view that the Panel does not provide sufficient justification for its conclusion that the Applicant’s risk would not be manageable in the community.

Decision

35. Accordingly, I find the Panel’s decision dated 28 November 2022 to be irrational for the reasons set out above. The application for reconsideration is therefore granted.

Hedd Emrys
18 February 2023

