

[2021] PBRA 180

## Application for Reconsideration by Gaskell

### Application

1. This is an application by Gaskell (the Applicant) for reconsideration of a provisional decision by the Parole Board under Rule 25(1) of the Parole Board Rules 2019 (the 2019 Rules) that the Applicant was unsuitable for release (the Decision). The letter by which the Decision was communicated is dated 16 November 2021 (the Decision Letter).
2. I have considered the application on the papers comprising:
  - a) A dossier of 577 numbered pages, including a copy of the Decision Letter; and
  - b) Written submissions on behalf of the Applicant in form CPD2 dated 3 December 2021 in which reconsideration is requested (the Applicant's Submissions).

### Background

3. In April 2003, the Applicant received an indeterminate (Life) sentence of imprisonment for murder. The minimum tariff was set as 13 years less time spent on remand and expired in October 2015.
4. The Applicant was released in December 2018 for the second time during this sentence on a licence that was revoked leading to his recall to prison in February 2020.
5. The Applicant was aged 23 when he received the sentence and is now aged 42.

### Current parole review

6. The Decision was made on the Secretary of State's first referral of the Applicant's case to the Parole Board since the Applicant's recall, to consider whether or not it would be appropriate to direct the Applicant's release.
7. The Decision was made by a three-member panel of the Board that considered the Applicant's case at an oral hearing conducted by remote video links in September 2021. The panel comprised of two Independent Members of the Board and a Psychologist Member.

### Application and response

8. The Applicant's submissions assert that the Decision is marred by irrationality.



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9. By an email dated 13 December 2021, the Public Protection Casework Section notified the Board that the Secretary of State offered no representations in response to the Applicant's reconsideration application.

## The Relevant Law

10. Rule 28(1) of the 2019 Rules provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

### *Irrationality*

11. 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."*

12. 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.

13. 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. 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*

14. 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.

## Consideration

15. The Applicant's submissions are as follows:

*'The decision not to direct release dated 16.11.2021 (received on 18.11.2021) is irrational on the basis that all the witnesses recommended release and were of the view that open conditions was not necessary and indeed could be counterproductive. Furthermore, the panel have assessed the risk to be beyond custody. However, the panel have recommended open conditions for further testing. All the evidence clearly suggests that the only real test will be in the community and not in open conditions. Therefore, it is submitted that it will not be possible for [the Applicant] to be properly tested and satisfy the next panel.'*

*We also note that it was the witnesses view that open conditions was not helpful, necessary or appropriate but the panel find that open conditions could be more challenging and is therefore a necessary step. [sic] However the panel also find that the risks fall outside the custodial environment but still recommend open conditions for testing. This is still a custodial environment and in the panel's assessment the risks fall outside.'*

16. It is important that the Board should explain clearly a decision that is contrary to the opinions and recommendations of professional witnesses, especially in the case of unanimity among professional witnesses: **R (Wells) v Parole Board 2019 EWHC 2710**. However, the Board is not obliged to adopt the opinions and recommendations of professional witnesses. It is the Board's responsibility to make its own risk assessment and to evaluate the likely effectiveness of any risk management plan proposed on the totality of the evidence, which it may be expected to perform with the benefit of its expertise in the realm of risk assessment; see **DSD**, for example.
17. In the Applicant's case, the recommendation of all professionals, in both written and oral evidence was for the Applicant to be released to the community. The Decision Letter however provides clear reasons for reaching a different conclusion, which I summarise as follows. The Board accepted that the Applicant behaves well in custody but it considered there had been a sharp and unpredictability increase in the Applicant's risk when he had chosen to make bad decisions, as illustrated by the events leading to his recalls to prison. The Board found that there was no evidence that the Applicant had faced sufficiently testing situations in custody since his latest recall to challenge that bad decision making. Therefore, the Board was not satisfied that the Applicant's risk could be safely managed in the community over the indefinite period of his life sentence.
18. Those reasons are consistent with the Board's recommendation of the Applicant's suitability for open conditions where he could be in the community unsupervised under licensed temporary release, which among other things would enable him to practice and evidence assertiveness and abstinence from substance misuse.
19. The reasons stated within the Decision Letter are clear, cogent, and supported by reference to evidence. The Decision cannot therefore be described as irrational.

## Decision

20. Reconsideration is not directed.

**Timothy Lawrence**  
**16 December 2021**