

[2023] PBRA 76

## Application for Reconsideration by Shepherd

### Application

1. This is an application by Shepherd (the Applicant) for reconsideration of a decision of a Panel of the Parole Board, dated 29 March 2023, following a video-link oral hearing finalised on 20 March 2023. The decision of the Panel was neither to direct release nor to make a recommendation for transfer to open conditions.
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.
3. I have considered the application on the papers. These are the decision of the Panel, the application for reconsideration and the dossier (consisting of 542 pages).

### Background

4. The Applicant was sentenced on 3 March 2006 to imprisonment for public protection with a minimum term of a little over 4 months and a tariff expiry date of 20 July 2006, for an offence of attempted kidnap. The offence involved the Applicant, a man whose previous convictions had included attempted rape and violence, in the early hours, approaching his victim, whom he had previously met briefly, attempting, with sustained force, to drag her into his property. His victim feared she would be raped. A psychiatrist had, however, been unable to understand his actions, leading the Sentencing Judge to accept the Applicant's explanation that he had merely wanted her to listen to his problems.
5. Twice released on licence in May 2017 and December 2020, the Applicant was recalled in June 2018 and November 2021 respectively, there having been, on each occasion, allegations of stalking women. In 2018, he approached, a woman, the same complainant, on 3 occasions, the last involving parking outside her home and, in 2021, there were allegations of separate inappropriate and unwanted sexual advances towards two women. The first followed blocking the complainant's driveway with his car and intimidation to acquire her phone number and the second, during a date, attempting to kiss her and showing indecent pictures of himself. In neither case did the Police prosecute owing to reluctance/non-cooperation on the women's part to pursue the complaints to Court.



## Request for Reconsideration

6. The application for reconsideration is dated 13 April 2023 and submitted by the Applicant's Legal Representative. It seeks reconsideration only on the grounds that the decision is irrational.
7. The grounds for seeking a reconsideration, are set out in concise form in 4 pages of closely argued submissions. It is not necessary to reproduce the application in full, but all sections have been considered and aspects relevant to irrationality are dealt with below.
8. The Applicant submitted:

### Irrationality

The submissions are divided into 6 sections:

- i. That the Panel failed to explore/obtain confirmation as to the protective factors provided by the Applicant's involvement with Jehovah's witnesses.
- ii. Gave insufficient weight to post-recall work done, on emotional wellbeing, since recall.
- iii. Failed fully to "*encapsulate*" the Prison Psychologist's "*rationale for changing her risk assessment on the day.*"
- iv. "*Referenced concern*" that the statistical risk assessment scoring had been underestimated.
- v. Disregarded evidence and assessments that no offending behaviour work or courses remained to be completed.
- vi. Gave insufficient weight to "the *three clear recommendations*" for release given by "*all professional witnesses.*"

## Response from Secretary of State (the Respondent)

9. On 26 April 2023, notification was received that the Respondent offered no representations in response to this reconsideration application.

## Current parole review

10. The Panel considered a Dossier said to be of 508 pages.
11. The case was referred to the Board by the Respondent on 2 December 2021 as a recalled indeterminate sentence and the Board asked to consider whether to direct release, or, in the alternative, whether to recommend a transfer to open conditions. It was the first review since the Applicant's recall to custody in 2021. At the oral hearing, the Panel heard evidence from the Prison Offender Manager (**POM**), the Community Offender Manager (**COM**), the Prison Psychologist, two Police Officers who had dealt with the complainants in June 2018 and November 2021 and from the Applicant.
12. In its lengthy 25-page decision, the Panel dealt in detail with the Applicant's past offending, his failures on return to the community and his custodial conduct, both positive and negative. It found, in common with earlier Panels, his risk factors to include relationships which an earlier psychologist had included



fantasises about idealised relationships and a belief that his contacts with female were more intimate than they actually were. Other risk factors were considered to include social isolation, emotional management problems, poor consequential thinking and minimisation of offending. It specifically listed formal offender management interventions together with therapy work relating to aggression and cognitive analysis and vocational training leading to driving employment during time in the community.

13. The Panel's decision also dealt, in detail, with the evidence before it, including particularised information from two officers involved in the investigation of the complaints leading to the 2021 recall and Police involvement with the victims and the background both as to the serious claims made by them and the decisions to take no further action. The Panel detailed not only the Applicant's denials of improper conduct with either woman but also admissions by him as to accepted meetings and text exchanges with one of them. He had admitted a degree of physical touching and production of a photograph of himself but adamantly denied improper behaviour. In its decision, it recorded that, in the absence of primary evidence as to the matters leading to recall, with the exception of one statement given to the police by a complainant, it was not in a position fairly, on the balance of probabilities, to make formal findings of fact relating to them. It was very concerned, however, that, whilst acknowledging that risk of sexual or actual violence was not imminent, it judged there was, nonetheless, potential imminence and lack of warning signs implicit in continuing behaviour which it found to be fear inducing and involved pursuit of women.

14. So far as its consideration relating to the 6 issues of which complaint was made:

- i. The Panel recorded the Applicant's claim to be much influenced by his Jehovah's Witness faith to which he had turned "*earnestly*" following his second recall but to which his elderly mother had been an adherent for some 15 years. His involvement would work at a local Kingdom Hall, to be followed "*with time*" by work outside the fellowship. Although there were said to be strict limits on contacts with "*sisters*", the Panel found, from the evidence of the COM and referrals to additional enquiries made by the Prison Lead Chaplain, that there was no independent verification of any formal Safeguarding Policy, a matter which concerned the COM and led to the Panel's finding that the faith, untested outside closed conditions, could not be taken as a protective or risk management strategy, at this stage.
- ii. The Panel, under the heading "*Progress since recall*", acknowledged that the Applicant had engaged with the wellbeing service and, in weekly counselling sessions had been found to be reflective and reflexive in his thought process and conversations, able to express frustrations and anger.
- iii. The Panel outlined in considerable detail, L's evidence, not only the basis for her report findings but also the relevance of a previous psychological assessment which reported on the Applicant's belief that women found him attractive, which the witness found analogous to



the recognised behaviour of the "*Incompetent Suitor*" and which was repeated in his recall behaviour. She assessed that the Applicant had failed to learn from the negative consequences of his method of approaching females in the street and considered that there were no viable options for treatment although the London area offered nationwide support through STAC, the Stalking Threat Assessment Centre.

- iv. The Panel expressed its agreement with the likelihood of serious harm to public adult females being high but medium to known adults and children. Its reservations were limited to the OGRS3, OGP and OSP/I scorings of low and medium so far as contact sexual offending was concerned. The Panel explained its concerns that these were an underestimate, as relating to the nature of the recall allegations.
- v. The Panel recorded, without demur, the closing submission of the Applicant's Legal Representative that "*there are no interventions available for him to complete*". At a number of stages in its decision, however, the Panel, having dealt with formal interventions previously completed, focussed on the difficulty of identifying specific treatment and courses to address what it found to be continuing behavioural concerns.
- vi. In dealing with the "three *clear recommendations*" for release from "all professional witnesses":

15. **POM**. This witness was recorded as confirming a release recommendation. He had commended the Applicant's good conduct. There had, however, been no further intervention available and despite "*what appeared to have been a misunderstanding about how to conduct himself on a first date*", the Applicant had "*appeared very receptive to feedback*" during a subsequent discussion. This recommendation, however, was made despite what the **POM** acknowledged to be a conflict between alleged victims' statements and the Applicant's accounts and focussed on his view that the Risk Management Plan (RMP) would be sufficient to manage the Applicant in the community.

16. **COM**. This witness had confirmed a good relationship with the Applicant but in relation to what was described as a "*blatant matter of non-disclosure in respect of relationships*" she did not accept his suggestion, to her, of a misunderstanding of a licence condition, although she accepted that there were "*blurred boundaries*." The Panel further recorded her concerns as to the Jehovah's Witnesses having no adult safeguarding policies, although going on to suggest that stringent licence conditions had been appropriately designed and her belief he would adhere to the RMP conditions. It recorded that her recommendations for release were "*on the fence*" although, she advised, even if he had been charged or convicted of the recall offences, the situation could be dealt with by way of additional licence conditions.

17. L. As previously indicated, L's evidence was examined in considerable detail including the use of HCR-20 and the SVR-20 tools in her assessment. During the hearing, she had altered her assessment of the risk of inciting fear from



moderate to high on the basis of the Police reports as to the reason for their being unable to go ahead with their investigations or possible charges. Nonetheless, she had listed the presence of protective factors including self-control, empathy, coping and employment. The Panel did not, however, record L as giving any formal recommendation for release.

18. In its conclusion, the Panel found that the recall behaviour had justifiably led to recall. Although it did not seek to make any finding of criminal guilt, nonetheless, it found that the Applicant's conduct demonstrated offence paralleling behaviour with "*a clear pattern to the behaviours alleged*" which it judged, at the worst, were indicative of increased risk of serious harm and, at the best, "*indicative of an idealised view of relationships*". The Panel, specifically, had had "*considerable doubts about the credibility of (the Applicant's) version of events*".

19. Accordingly, while accepting that the RMP was "*as robust as it could be*", the Panel found it to be ineffective in addressing "*seemingly spontaneous acts in approaching women*" which could not be monitored by the plan. It judged that until his revealed characteristics and behaviours were addressed, the risk of repetition remained high.

## The Relevant Law

20. The panel correctly sets out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

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.

22. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

### *Irrationality*

23. 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."*

24. 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.

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

26. 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 uncontested 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.

27. 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.*"

28. The Panel is subject to the '*duty of enquiry*', a duty which has been explained in various decisions of the courts and of reconsideration panels including, for example, **Samuel [2021] PBRA 100**: '*One situation which may give rise to a finding of irrationality or procedural unfairness is where a panel has made a decision in the absence of an important piece of evidence which might have made a difference to the decision and which the panel might reasonably have been expected to obtain (adjourning the hearing, if necessary), for that purpose.*'

29. Additionally, the Applicant's Legal Representative amplified relevant aspects of the law to include:

*"In Wells [2019] EWHC 2710 (Admin) it was suggested that, rather than ask 'was the decision being considered irrational', the better approach is to test the decision maker's ultimate conclusions against all the evidence received and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.*



*It is acknowledged that Panels of the Board are wholly independent and are not obliged to adopt the opinions or recommendations of professional witnesses. A panel's duty is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess the evidence and decide what evidence it accepts and what evidence it rejects.*

*Once that stage has been reached, following the guidance provided by cases such as **Wells** and also **Stokes [2020] EWHC 1885 (Admin)**, a panel should explain in its reasons whether or not it is going to follow or depart from the recommendations of professional witnesses".*

30. For the purpose of this decision, I am content to accept this additional résumé.

### **Discussion**

31. I have carefully considered this application and am satisfied that there has been no irrationality in the decision. The Applicant was represented by an experienced Legal Representative whose submissions are outlined in the decision and, importantly and unusually, the 3-member Panel included 2 specialist Psychology Members. Insofar as "*clear recommendations*" were said to have been made by witnesses, that evidence was thoroughly outlined and examined and the reasons for the Panel's decisions, which included its assessment of the Applicant's credibility, were made clear.

### **Decision**

32. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**Edward Slinger**  
**27 April 2023**

