

[2021] PBRA 103

Application for Reconsideration by Lindsey

Application

1. This is an application by Lindsey (the Applicant) for reconsideration of a decision dated 17 May 2021 made after an oral hearing on 10 May 2021 refusing to order the release of the Applicant but recommending instead his transfer to open conditions.
2. Rule 28(1) of the Parole Board Rules 2019 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.
3. I have considered the application on the papers. These are the decision letter of 17 May 2021, the reconsideration application, the email from PPCS of 25 June 2021 stating that the Secretary of State was making no representations in response to the reconsideration application and the Parole Board's dossier relating to the Applicant totalling 421 pages.

Background

4. On 1 November 2010, the Applicant, who was then 32 years old, was sentenced to an indeterminate sentence for public protection with a minimum term of 6 years custody, less time spent on remand, following his conviction for offences of wounding with intent to cause grievous bodily harm and conspiracy to commit grievous bodily harm.
5. At the time of the offence, the victim had owed the Applicant money for drugs. The Applicant located the victim and assaulted him in a serious sustained knife attack, inflicting multiple wounds on him.
6. The Applicant, who is now 43 years old, had many previous convictions for acquisitive crime as well as convictions for common assault, affray and wounding. They included a conviction for a wounding offence using a knife on the victim of that offence in 2004. For this offence the Applicant received a three-year custodial sentence.
7. Since the Applicant was sentenced for the index offences, he has completed two training courses to address his tendency to use violence, and a training course addressing his decision-making and learning better ways of thinking. He has progressed to open conditions on three occasions, but on each occasion he had been returned to closed prisons.

8. He was first transferred to open conditions in 2016 but he was returned to closed conditions in March 2017 after misusing Class A and prescription drugs, even though at the time he had been receiving a methadone prescription.
9. The Applicant was transferred again to open conditions in June 2017, but he was returned to the closed estate in January 2018 because of concerns about his drug use although the Applicant had contended that he was innocent, and he blamed others including prisoners and prison staff for matters leading to his recall.
10. On 9 July 2018, a previous panel of the Parole Board recommended the Applicant's transfer to open conditions. He could not be moved to the open estate until 1 November 2018 as he had been assaulted by other prisoners at the prison he was located at, which led to him sustaining a fractured skull and other injuries. The Applicant's supervising officer observed that the Applicant had minimised his behaviour in open conditions, and he did not consistently manage his conduct. He later admitted to selling tobacco to another prisoner. He was returned to closed conditions for the third time in April 2019. As will be explained, the Applicant now accepts full responsibility for his conduct which led to each of his 3 returns to closed conditions and he describes the problems he had in living in open conditions which are relevant to the risks he poses in those conditions.
11. The Applicant was transferred to a prison whose regime provides additional support to offenders on transfer and helps to prepare them for eventual resettlement in the community. The Applicant progressed well and was said to have developed greater insight into his behaviour.

Current parole review

12. The panel comprising of 3 independent members convened remotely via a video-link (due to Covid-19 restrictions in place at the time) to consider the Applicant's case, on 10 May 2021.
13. The panel considered the dossier which comprised 413 pages all of which had been disclosed to the Applicant. The Secretary of State did not submit a written view and was not represented at the hearing of the panel. The Applicant, who was aged 43 at the time of the hearing, was legally represented at the hearing. The solicitor acting on his behalf asked the panel to direct the Applicant's release and made representations to that effect at the conclusion of the hearing.
14. The panel also heard evidence from the Prison Offender Manager (POM), (the keyworker who worked on the regime designed and supported by psychologists to help people recognise and deal with their problems), the Community Manager (COM), a psychologist and the Applicant.
15. The psychological risk assessment completed in October 2020 by the psychologist noted the progress the Applicant had made in understanding his risks as personality traits as well as learning how to manage them. She described the Applicant as "*flourishing*" within the environment of a progressive regime and she concluded that there was no further core offending behaviour work required in closed conditions. The psychologist recommended the Applicant's release on licence to designated

accommodation based on a regime designed and supported by psychologists where he could consolidate his skills in a supportive environment. The panel noted that the Applicant had de-toxed himself from his methadone prescription in September 2020.

16. The Applicant's POM told the panel that the Applicant's work (referenced at paragraph 11) had been completed. She described the Applicant as open and candid during discussions, although her contact with the Applicant had been limited because of Covid restrictions. She observed that he had taken responsibility for his previous failures in open conditions and that he recognised the link between grievous thinking and making poor decisions.
17. According to the POM, there had been no drug testing at that prison while Covid restrictions were in force, but that there were no indications or security intelligence to suggest ongoing drug misuse by the Applicant. She explained that Covid restrictions meant that the Applicant had spent the majority of time in custody in his cell. She noted that the Applicant had become more reflective about his past and used coping diaries to help monitor his tendency towards impulsive conduct. The POM supported the Applicant's case for being released on licence. She acknowledged the benefit to the Applicant of a return to open conditions with access to temporary releases, but significantly she did not consider this to be a necessary first step because she believed the Applicant's risks to be manageable in the community. She recommended release of the Applicant ideally to designated accommodation based on a regime designed and supported by psychologists, as this mirrored to some extent the regime of the specialised unit at the prison where the Applicant resided.
18. The Applicant's key worker told the panel that she been his allocated key worker when he was involved in the specialised unit, and that he had progressed through to the 3rd and final stage. She explained that the unit promoted independence and was "*future-focussed*". Her evidence was that the Applicant had engaged very positively for a sustained period of time and that he had targeted objectives that were relevant to his needs.
19. The Applicant in his oral evidence to the panel was very positive about his experience on the specialised unit and he explained that it had provided him with improved listening skills, patience and the need for him to take responsibility for his actions.
20. When questioned by the panel about his 3 failed attempts to adjust to open conditions, the Applicant admitted making bad mistakes to self-medicate and that he had become consumed with feelings that he was not being listened to. He said that he had engaged in distorted thinking and a sense of entitlement which he only realised later. The Applicant accepted full responsibility for his conduct in the open estate adding the important fact that this environment made him feel nervous and anxious as there was insufficient support for his needs. He did, however, accept responsibility for breaking the rules at his open prison by supplying another prisoner with tobacco, with the consequence that the other prisoner had incurred a debt. The Applicant accepted that he had initially blamed the other prisoner for his recall but that he now accepted that he had made the other prisoner "*feel uncomfortable*".
21. The Applicant gave evidence about the attack on him in closed conditions while he was waiting to be transferred to the open prison, which resulted in him being hospitalised with multiple injuries, including a skull fracture. He explained that there

was information being spread in prison that he was a "grass", and in consequence he had feelings of anxiety in open conditions and problems about securing a single cell which were eventually resolved. His faith, he said, had helped him to keep things in perspective.

22. When the Applicant was asked by the panel whether he considered that there would be any value in a return by him to open conditions as he had progressed through the specialised unit, his response was that he did not consider it necessary, but that he could see the benefit of going to designated accommodation in the community which was designed and supported by psychologists, where he could demonstrate the skills he had learnt in custody. He confirmed that he would comply with all licence conditions, including tagging.
23. The psychologist explained in her oral evidence that the Applicant when giving evidence had demonstrated insight into his risks and that he had presented well. She noted that the Applicant had come a long way in the progressive regime of the specialised unit mentioned above and that he had completed all the core work required. She did not consider it necessary for the Applicant to return to open conditions which she also thought could have a negative impact on his motivation. Her preferred option was for the Applicant to be released on licence to designated accommodation designed and supported by psychologists as it would mirror the support provided on the unit where the Applicant had previously resided.
24. When the panel asked the psychologist how the Applicant had changed after failing 3 times in open conditions, her reply was that he had reflected on his conduct so that he was able to recognise and manage the traits of his historic Personality Disorder diagnosis by using his coping diary effectively, whilst staying alert to potential future risks. She agreed with the COM's assessment that the Applicant posed a medium risk of serious harm in the community, although in her opinion the Applicant's risk was not imminent. She said that she supported his application for release on licence to a designated accommodation designed and supported by psychologists. She also confirmed that his risks could then be managed in a standard designated accommodation.
25. The Applicant's COM confirmed in his oral evidence to the Panel that he had made the necessary referrals, but that the Applicant was considered ineligible for the designated accommodation designed and supported by psychologists and that, in the light of the medium risk of serious harm posed by the Applicant in the community, he was doubtful whether the Applicant would be accepted at a standard designated accommodation. Indeed, no designated accommodation has been identified as available on the Applicant's release.
26. According to the COM, there had been a great change in the Applicant since he returned to the closed estate and he had accepted responsibility for his past behaviour while putting much thought into his release and his resettlement in the community. The COM assessed the Applicant as posing a medium risk of serious harm to the public in the community, but he agreed that any increase in his assessed level of risk was likely to be linked to a relapse into substance misuse.
27. The COM supported the Applicant's release on licence, explaining that he considered release to a private address (with someone trusted who was known to him), coupled



with the support of a robust risk management plan, as being sufficient to manage his risks in the community.

28. Finally, I add that none of the professionals involved considered that the Applicant posed an unacceptable risk of absconding from open conditions.
29. Turning to the assessment of the Applicant's current risk, his assessment of risk of reoffending score indicated a low risk of the Applicant being reconvicted while an assessment of risks and their origin assessed the Applicant as having a low risk of violent reoffending and a medium risk of causing both general harm and serious harm to the public. He is also said to pose a medium risk of serious harm to the victim of his index offence, a previous partner and the victim of a previous wounding in 2004, who according to the Applicant is now in prison serving a life sentence.
30. The psychologist, using a specific diagnostic assessment, explained that the Applicant had several historical factors linked to risk, but the clinical factors of "*recent problems with lack of insight*", "*recent problems with violent ideation or intent*" and "*recent problems with instability*" were not present.
31. The panel, in reaching its own conclusion, was concerned about the Applicant's present medium risk assessment in the light of the planned, premeditated and extremely violent nature of the Applicant's index offence as well as his previous conviction which involved the use of a knife when he stabbed an earlier victim several times including once in the back. The panel attached importance to the fact that the ability of the Applicant "*to manage [his] risks beyond the closed estate has not yet been tested*". The panel concluded that the Applicant's risk of serious harm was "*in its view high*". It also agreed that the Applicant's risk is "*likely to escalate if ...[he] relapsed into substance misuse, associated with negative criminal peers or experienced instability in the community.*"
32. The panel was provided with a risk management plan which included requirements that he should be accommodated at a private address (with someone trusted who was known to him), with an overnight curfew, that he should not associate with or contact certain individuals, that he should engage in offending behaviour work as directed, that there should be in place controls over his use and possession of mobile phones and vehicles as well as an exclusion zone. All the professionals supported the Applicant's release but for the reasons set out especially in paragraphs 51 to 58 below, the panel explained that having taken account of all the evidence and the representations made on the Applicant's behalf by his legal representative, it concluded that it remained necessary for the Applicant to be detained in custody for the protection of the public. The panel also recommended to the Secretary of State that the Applicant should be transferred to open conditions. The Applicant seeks his immediate release and has brought the present application for reconsideration.

Request for Reconsideration

33. The application for reconsideration is dated 18 June 2021.
34. The grounds for seeking a reconsideration are as follows:

- a) The decision to refuse to release the Applicant was irrational in that it incorrectly considered the Applicant's risk to be too high, it failed to direct the Applicant's release to designated accommodation and in any event it found the evidence of the Applicant's progress on the specialised unit was not sufficient to justify his release (Ground 1);
- b) The decision to refuse to release the Applicant was irrational in the light of the recommendation of the professional witnesses that it was safe to release the Applicant (Ground 2); and
- c) The hearing and/or the decision was procedurally unfair for a variety of reasons, including that it did not properly explain several matters such as the reasons for rejecting the professional assessments of the Applicant's risk as medium (Ground 3).

The Relevant Law

35. The panel correctly sets out in its decision letter dated 17 May 2021 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.

Parole Board Rules 2019

36. Under Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that 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)).

Irrationality

37. 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."

38. 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 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.

39. 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

40. 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 to the issue of irrationality which focusses on the actual decision.
41. 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.

The overriding objective is to ensure that the Applicant's case was dealt with justly.

42. 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 uncontroversial 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 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.
43. 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.*"

The Reply on behalf of the Secretary of State

44. The Secretary of State has not made any representations in response to the request for reconsideration.

Discussion

45. In dealing with the grounds for reconsideration, it is necessary to stress three matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his or her view of the facts in place of those found by the panel, unless, of course, it is *manifestly obvious* that there was an error of fact of *an egregious nature* which can be shown to have directly contributed to the conclusion arrived at by the panel.
46. The second matter of material importance is that, when deciding whether a decision of the Parole Board was irrational, due deference must be given to the expertise of the panel in making decisions relating to parole.
47. The third matter is that the panel is not bound to follow the recommendations of professionals but must give reasons if it does not follow them.

Ground 1

48. The Applicant contends that the panel's decision to refuse to release the Applicant was irrational in that first, it incorrectly considered the Applicant's risk to be too high; second, it failed to direct the Applicant's release to a designated accommodation; and that third, it in any event found the evidence of the Applicant's progress on the specialised Unit was not sufficient to justify his release.

Risk of serious harm.

49. The panel concluded that the Applicant's risk of causing serious harm was "high" while the evidence of the professionals and the assessment of risks and their origin was that he posed a "medium" risk of causing harm as did the psychologist and the Applicant's COM. The issue is whether the panel's assessment of the risk posed by the Applicant as being "high" reaches the high threshold of being irrational and that entails considering the reasons given by the panel for its decision not to adopt the assessment that the risk posed by the Applicant was "medium", but instead to adopt a "high" risk classification.
50. The assessment of risks and their origin definition of high risk is that *"there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious"*.
51. In support of the contention that the panel's approach was irrational, it is stressed that the professionals all assessed the Applicant's risk as medium on the basis that there would need to be a change in circumstances for the risk to be imminent and therefore meeting the criterion of "serious risk".
52. The panel explained how it reached its assessment, stating towards the end of the decision letter that *"when taking everything into account [it] is satisfied that [the Applicant] continue[s] to present a significant risk of reoffending and serious harm"*. The matters considered are those set out earlier in the decision letter and which I will now set out in no particular order of importance.

53. First, the index offence was a savage carefully planned attack which occurred after the Applicant, armed with knives, had hunted down his victim who owed him money for heroin. The Applicant carried out a sustained attack on the victim who sustained serious injuries. The sentencing judge explained in relation to the index offence that the Applicant was *"quite prepared to plan and execute this attack in cold blood purely to enforce the drug debt and to emphasise his position in the drug trade."*
54. Second, the panel noted that at the time of the index offence the Applicant's lifestyle *"revolved around heroin misuse and the supply of Class A drugs to others, including the victim of [his] index offence"*, as was shown by the sentencing judge's comments.
55. Third, the Applicant at the time of the index offence had a history of previous offending linked to drugs and he also had a conviction for wounding in 2004 which led to the victim with whom the Applicant had a feud suffering stab wounds to his chest and back.
56. Fourth, the Applicant had difficulties complying with conditions and living a lawful life when he progressed to open conditions on three occasions during his sentence but on each occasion, he was returned to the closed estate and these failures in open conditions *"have involved substance misuse and some offence paralleling behaviour"*. The Applicant in his evidence to the panel accepted full responsibility for his conduct in the open estate adding that the environment made him feel nervous and anxious as there was insufficient support for his needs.
57. Fifth, the Applicant has more recently acknowledged his fault in leading to his 3 recalls to the closed community from open conditions.
58. Sixth, although the professionals believe that the Applicant could be safely released into the community, the panel noted in respect of the Applicant that *"[his] ability to manage his risks beyond the closed estate has not yet been tested"* and that there was *"insufficient objective evidence to show that [the Applicant has] the ability to manage [his] risks beyond the closed estate"*. In other words, the panel concluded that the Applicant could not be safely released into the community especially in the light of the factors set out above and in the following paragraph (such as his three failed transfers to open conditions and the reason why they failed which are set out in paragraph 55 above) and the absence of any evidence that the Applicant could manage his risks in the community.
59. Seventh, the panel were concerned that the risk posed by the Applicant in the community was likely to *"escalate"* if he relapsed into substance misuse, associated with negative criminal peers or if he experienced instability in the community. These were realistic fears which the panel was entitled to take into account in assessing the Applicant's particular risk on release into the community as these escalating factors had occurred and were present at and before the time of the index offence and when transferred to open conditions. At those times, he had been a drug user who associated with negative peers and who had experienced instability in the community. This factor is significant in showing that the potential event could happen at any time and the impact would be serious as it was when he committed the index offence and the wounding offence which led to his 2004 conviction referred to above.



60. Even after giving due weight to the opinion of the professionals that the Applicant posed a medium risk and could be safely released into the community, the decision of the panel that the Applicant constituted a high risk cannot be regarded as reaching the high threshold for a finding of irrationality which, as has been explained in paragraph 37 above, requires a finding to be *"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."*

61. I am fortified in reaching that conclusion by the need to show deference to the expertise of the panel which had the advantage of seeing and hearing the Applicant. Furthermore, as has been explained in paragraph 45 above, the Reconsideration Mechanism is not a process by which the judgment of the panel when assessing risk can be lightly interfered with unless, as has been explained in paragraph 45 above, it is manifestly obvious there has been an error of fact of an egregious nature which can be shown to have directly contributed to the conclusion under challenge. No such error had been identified in relation to the panel's assessment that the Applicant posed a high risk of serious harm in the community.

62. So, I reject the claim that the panel was irrational in concluding that the risk of serious harm posed by the Applicant in the community was "high".

Release to a designated accommodation

63. The next allegation is that the panel was irrational as it failed to direct the Applicant's release to designated accommodation. There are at least six reasons which individually or cumulatively show why it was not irrational for the panel to reach that conclusion.

64. First, the Applicant's COM, had explained in evidence that he had made the necessary referrals, but the Applicant was considered ineligible for the designated accommodation which was designed and supported by psychologists and that in the light of the assessment that the Applicant posed a medium risk of serious harm, he was doubtful as to whether the Applicant would be accepted at a standard designated accommodation either.

65. Second, no evidence has been adduced to show that the Applicant would now be accepted at designated accommodation .

66. Third, no designated accommodation had been identified as available at the time of the hearing for the Applicant's possible release.

67. Fourth, the panel found that in the light of its finding that the risk posed by the Applicant of serious harm was high that there was insufficient objective evidence to show that he had the ability to manage his risk other than in the closed estate. As will be explained when considering Ground 2, this was not an irrational decision especially in the light of the Applicant's evidence to the panel about his 3 failed attempts to adjust to open conditions when he admitted making bad mistakes to self-medicate and that he had become consumed about feeling that he was not being listened to. He accepted that when in open conditions he had engaged in distorted thinking and a sense of entitlement which he only realised later.

68. Fifth, I am fortified in coming to this conclusion by the deference owed to the panel as the specialised body, and the fact that the Reconsideration mechanism is not a process by which the judgment of the panel can be lightly interfered with.
69. Sixth, there is limited scope for ordering reconsideration because, as has been explained above, it is not a mechanism in which the member carrying out the reconsideration was entitled to substitute his or her view of the facts in place of those found by the panel, unless as has been explained in paragraph 45 above, it is *manifestly obvious* that there was an error of fact of *an egregious nature* which can be shown to have directly contributed to the conclusion arrived at by the panel. No such error has been identified, let alone established.

The specialised unit

70. The final complaint under this head is that the decision was irrational because it "*found the evidence of progress on the specialised Unit was not sufficient*". The panel noted "*the very positive progress [the Applicant has] made in the Unit*" and it observed that having heard the evidence, including that of the Applicant and the professionals that "*[the Applicant's] ability to manage his risks beyond the closed estate has not yet been tested*". It proceeded to conclude "*without further evidence of [the Applicant's] ability to manage his risks in the conditions beyond the closed estate, it was not confident the current risk management plan was sufficient to manage [his] risks if it directed [his] release into the community*".
71. This was a decision open to the panel as the specialised decision maker to whom deference is due, especially in the light of the Applicant's 3 failure in open conditions and his admission that he made bad efforts to self-medicate and his important admission in evidence that the environment in open conditions made him feel nervous and anxious. This raised crucial concerns as to how he would cope in open conditions if the panel recommended transfer to open conditions. Nothing has been put forward to show that the panel's conclusion that the Applicant's progress at the specialised Unit was not sufficient to justify his release into the community reaches the high threshold for a finding that this was an irrational conclusion.
72. As I have explained, reconsideration is not a mechanism in which the member carrying out the reconsideration was entitled to substitute his or her view of the facts in place of those found by the panel, unless, of course, it is *manifestly obvious* that there was an error of fact of *an egregious nature* which can be shown to have directly contributed to the conclusion arrived at by the panel. No such error has been identified in arriving at the conclusion that the Applicant's progress at the specialised unit was not enough to justify release.
73. A further or alternative reason why this complaint falls is that the panel found that the Applicant had "*developed on the [specialised] Unit a good deal of insight into [his] risks and [has] a theoretical understanding of how risk in future should be managed*" (emphasis added). The panel was concerned that there were gaps in the evidence as to how the Applicant would behave in practice beyond the closed estate, especially in the light of the problems he had on his relatively recent failed attempts in open conditions. That was a reason which justified the decision to refuse parole, especially in light of the other concerns about the risk posed by the Applicant which are set out in paragraphs 52 and the following paragraphs above.

74. For all those reasons, the claims for reconsideration on the grounds of irrationality fail.

Ground 2

75. This ground is that the decision to refuse to release the Applicant was irrational in light of the recommendation of the professional witnesses that it was safe to release the Applicant.

76. As stated above, the panel explained that it reached its assessment stating towards the end of the decision letter that "*when taking everything into account [it] is satisfied that [the Applicant] continue[s] to present a significant risk of reoffending and serious harm*". It then proceeded to state that having considered all the evidence and the representations made on behalf of the Applicant that it remained necessary for him to be detained in custody for the protection of the public.

77. The matters taken "*into account*" were those set out in paragraphs 52 to 58 above. They show, among other things that the Applicant was an offender who behaved well in closed conditions, but significantly who when transferred to open conditions on 3 occasions between 2016 and 2018 was returned after short periods to closed conditions on 3 occasions between 2017 and 2019. The reasons for his failure in closed conditions was conduct which involved substance misuse and some offence paralleling behaviour. In addition, it is very significant and relevant to the present claims that the Applicant accepted full responsibility for his conduct in the open estate, adding that the environment made him feel nervous and anxious as there was insufficient support for his needs. Each of these matters raised doubts about how he would behave if released by the panel beyond the closed community and could have justified a decision.

78. Bearing in mind each of these matters and the factors set out in paragraph 52 above together with the subsequent paragraphs and the absence of further evidence of the Applicant's ability to manage his risk in the community, the Panel was entitled even after considering the opinion of the professionals to conclude that it remained necessary for him to be detained in custody for the protection of the public. To succeed in their claim that this was irrational, the Applicant must show that in the words of the Divisional Court in **DSD** "*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.*"

79. The Applicant's case fails to reach that high threshold and the panel's decision to refuse to release the Applicant cannot be regarded as irrational. A further or alternative reason for reaching that conclusion is, as has been explained, that reconsideration is not a mechanism in which the member carrying out the reconsideration was entitled to substitute his or her view of the facts in place of those found by the panel, unless, of course, it is *manifestly obvious* that there was an error of fact of *an egregious nature* which can be shown to have directly contributed to the conclusion arrived at by the panel. No such error has been identified, let alone proved and that is an additional or an alternative reason why Ground 2 must be rejected.

Ground 3

80. This Ground is that the hearing and/or the decision was procedurally unfair for 3 reasons.

Failing to properly explain why professional assessments of the Applicant's risk were not followed.

81. It is common ground that the panel was obliged to give proper reasons why they departed from professional assessments which in this case related to the risk posed by the Applicant in the community, but it is said that the panel did not do so. It is clear that the main reason why it did not accept the recommendation from the professionals that the Applicant should be released was that "*without further evidence of [the Applicant's] ability to manage [his] risks in conditions beyond the closed estate, it was not confident the current risk management plan was sufficient to manage [his] risks if it directed [his] release into the community*". Similar clear wording appears elsewhere in the decision letter, and it constitutes a powerful and cogent reason especially but not solely because the Applicant's previous record shows that he failed on 3 occasions in recent years when released into the open estate "*because of [his] inability to manage his risks beyond the closed estate*". The Applicant accepted in his evidence to the panel full responsibility for his conduct in the open estate adding that the environment made him feel nervous and anxious as there was insufficient support for his needs. This evidence fortified the fears about what would have occurred if the panel had released the Applicant.

Failure to explain why further testing is required.

81. The Grounds for Reconsideration contend that the professionals considered that the Applicant had shown sufficient internal controls so that he could be safely released. The panel had to make its own assessment and it was not bound to accept the opinions of the professionals. It concluded that it required further evidence of the Applicant's ability to manage his risks in conditions beyond the closed estate.

82. Nothing has been put forward to show that the panel was not entitled to require further evidence that the Applicant could manage his risk beyond the closed estate for the reasons set out above and which include his three previous recent unsuccessful releases which failed because of substance misuse and some offence paralleling behaviour. This fact in itself would justify the decision to require further evidence to show that the Applicant could manage his risks on release even after considering the opinion of the professionals that it was safe to release the Applicant without further evidence. A further or additional reason why such further evidence was required was that the Applicant accepted full responsibility for his conduct in the open estate adding that the environment made him feel nervous and anxious as there was insufficient support for his needs.

Failure to adjourn to secure designated accommodation

83. It is said that once the panel had decided that the Applicant's risk was "high" and not "medium", it should have adjourned the case for further representations as to whether the Applicant would be manageable in a designated accommodation should one be found and whether a longer adjournment would be required for a COM to attempt to



secure designated accommodation or designated accommodation designed and run by psychologists or otherwise.

84. It has not been contended that the Applicant's legal representative had indicated at the hearing or at any time before the decision letter was sent that an adjournment would be or might be required, depending on the finding of the panel on the level of risk posed. In those circumstances, the panel did not have the duty to think of what further evidence the legally represented party might possibly wish to adduce in the light of its findings and then grant an adjournment while that party considers whether it wants to do so.

85. A further reason why this complaint must be rejected is that there is no evidence in the Reconsideration application to suggest that such an adjournment would have led to the production of any relevant evidence on this issue. The decision of the panel was made on 17 May 2021 and the Grounds for Reconsideration were dated more than a month later 18 June 2021, but it was not suggested, let alone shown, in the Grounds that there was then any relevant evidence on this point or that any would become available. So, this complaint must be rejected.

Decision

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

Sir Stephen Silber
26 July 2021