[2022] PBRA 136

Application for Reconsideration by Drew

Application

1.This is an application by Drew (the Applicant) for reconsideration of a decision of a panel dated 23 August 2022 (the Panel Decision) making no direction for his release and no recommendation for his progression 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 Panel Decision, the Application for Reconsideration, the email dated 22 September 2022 from the Secretary of State stating that no representations will be made by the Secretary of State in relation to the Application for Reconsideration and the Applicant's dossier containing 222 pages.

Background

4. On 19 May 1980 the Applicant, who was then 24 years old, was sentenced to life imprisonment with a tariff of 15 years for the offence of murder. The Tariff Expiry Date for that sentence was 17 December 1994.

5. The Applicant was first released on life licence on 13 February 2004 but his licence was revoked on 22 August 2011 due to allegations that he had committed sexual offences. He denied those allegations which were subsequently discontinued by the Crown Prosecution Service. The Parole Board directed his release on life licence in April 2013.

6. On 25 August 2017, the Applicant's licence was revoked after he had spent a further period of 4 years on licence and after he had been arrested and charged with new offences, which were 3 counts of attempting to remove a child from the lawful control of their parent or guardian contrary to s.2(1) (a) of the Child Abduction Act 1984 and 3 counts of committing those offences with intent to commit a sexual offence, contrary to s.62 of the Sexual Offences Act 2003. These offences will hereinafter be referred to as "the recall offences".

7.The Applicant pleaded not guilty to the recall offences but he was convicted of them after a trial in Merthyr Tydfil Crown Court and on 24 August 2018 he was sentenced to an extended sentence comprising 5 years' imprisonment and an extended licence period of 3 years. His Parole Eligibility Date, which is the earliest date of release on the extended sentence, is 23 December 2021.

Request for Reconsideration

8. The application for reconsideration is dated 13 September 2022

9.The grounds for seeking a reconsideration are that it was irrational not to direct the Applicant's release or in the alternative it was irrational not to recommend his progression to Open Conditions was irrational. The specific grounds were that:

(a) the panel failed to give the Applicant any or any adequate credit for the lengthy periods he had previously spent on licence in relation to the index offences, which were a period of 7½ years before his first recall and a further period of 4 years before his second recall (Ground 1)

(b) the panel failed to give the Applicant any or any adequate credit for his good custodial conduct since his recall to Prison in 2018 as shown by:

> (i) the evidence at the oral hearing that there were no recent concerns about the Applicant's conduct and compliance in custody;
> (ii) the fact that the Applicant had obtained and had maintained his Enhanced IEP status; and
> (iii) the absence of any current evidence of sexual preoccupation or sexual liaisons with other prisoners or of him seeking such liaisons or of inappropriate conduct or of any sexually suggestive behaviour towards other prisoners, including younger prisoners (Ground 2);

(c) in determining the core risk reduction work remaining outstanding for the Applicant to complete before releasing him or recommending him for a progressive move to Open Conditions in relation to the risk of him causing sexual harm to children, the panel failed to give adequate regard to the fact that the Applicant had completed a moderate intensity accredited programme for men convicted of sexual offence, since being recalled, that it was unlikely that he would be regarded as suitable for an accredited high intensity 1:1 intervention as he had maintained his innocence and/or that the evidence suggested that he was not suitable for risk reduction work and did not meet the criterion for it (Ground 3);

(d) the Parole Board failed to give adequate regard to the strengths of the Applicant's Risk Management Plan("RMP") and the re-release plan and/or the Parole Board reached an irrational conclusion that the Applicant had little or no insight into the risk of sexual offending when there was little or no evidence of inappropriate sexual thinking or behaviour since his recall to prison (Ground 4):

(e) in refusing to accede to the Applicant's application for release and to make a recommendation that the Applicant should be moved to Open Conditions, the Parole Board failed to give regard to the evidence showing the reduction of his risk of violent offending and of causing serious harm to others through violent offending (Ground 5); and/or

(f) the Parole Board acted irrationally in rejecting the argument that the Applicant currently posed a low risk of absconding and its conclusion was "not based on cogent evidence or a sound analysis of the available evidence on this point" (Ground 6)

Current parole review

10. A three-member panel of the Board was due to consider the Applicant's case on 16 August 2022, but unfortunately one member of the panel became unavailable on the day before the hearing. The remaining two members of the panel were content to proceed in the absence of that colleague and the Applicant raised no objection to that arrangement. Thus, the panel, which heard and determined the Applicant's case, comprised 2 independent members of the Parole Board, one of whom was a psychologist.

11. The panel held an oral hearing by video link at HMP Rye Hill on 16 August 2022 at which the panel heard oral evidence from:

(a) The Prison Offender Manager (POM);
(b) The Prison Commissioned Psychologist
(c) The Community Offender Manager (COM); and from
(d) The Applicant.

12. The Applicant was represented at the oral hearing by his solicitor. No victim impact statement was provided. There was no evidence which could not be disclosed to the Applicant.

13. The Applicant committed the index offence when he murdered the woman whose house he had broken into with the intention of committing burglary. When she disturbed the Applicant, he hit her on the head and stamped on her face and head with the consequence that she died from those injuries

14. The Applicant was 23 years of age when he committed the index offence and he was not heavily convicted.

15. He was first recalled from his life licence when it was alleged that he had raped a 23-year-old man, that he had made sexually inappropriate comments to men who were 18 years of age and finally that he made inappropriate sexual remarks to a 16-year-old boy. The prosecutions were discontinued and the Parole Board re-released the Applicant in early April 2013.

16. The Applicant was recalled in 2017 after he had approached a group of young males aged under 11 years of age and he spoke to them making hand gestures inferring masturbating and intercourse. He asked these boys to accompany him to the woods but they walked off and reported the incident to a passing motorist.

17. The Applicant contends that he is innocent of the allegations and that he knows nothing about what he was supposed to have done. His explanation was that he liked to go for walks and when walking, he was looking for a short cut to get to where he wanted to be and he saw 3 young boys. He said he spoke to them but only to ask directions before he continued on his way. The Applicant says he was unsure what then happened but the police turned up and arrested him.

18. The Applicant was convicted of the recall offences specified in paragraph 6 above and as explained in paragraph 7 above, he received the 8-year sentence comprising a custodial term of 5 years' imprisonment with an extended licence of 3 years.

19. The panel at the hearing in August 2022 noted that the Applicant had received positive custodial conduct achieving and sustaining Enhanced IEP status. He had

also engaged in and completed a moderate intensity accredited programme for men convicted of sexual offence. The panel noted that the Applicant had engaged in and completed that programme although *"he continues to maintain his innocence of the recall offences and disputes being sexually attracted to children".*

20. After the Applicant had completed that programme, the Prison Commissioned Psychologist carried out a psychological risk assessment on him in June 2022, in which she concluded that there was core risk reduction work which were outstanding for the Applicant to address. These topics which will hereinafter be referred to as "the Prison Commissioned Psychologist's List of Outstanding Core Risk Reduction Work" related to:

- *"Attitudes that support or condone sexual violence*
- *Problems with self-awareness*
- *Problems with stress or coping*
- *Problems resulting from child abuse*
- *Sexual interest*
- *Problems with substance use*
- *Problems with intimate relationships*
- *Problems with non-intimate relationships*
- *Problems with planning"*

21. The Prison Commissioned Psychologist also raised "*a concern about the Applicant's cognitive functioning and his capacity to take on learning from interventions*".

22. The evidence of the POM was also that there had been no recent concerns about the Applicant's conduct and compliance.

23. There was evidence that the Applicant had not completed any further offending behaviour work and he could potentially have accessed some "Becoming New Me" sessions if he wanted to, but he had not done so at the time of the panel hearing.

24. The evidence of the POM was also that there had been no recent concerns about the Applicant's conduct and compliance
as he had shown a high level of compliance in custody. She explained that there was no evidence of him engaging in sexual behaviour with other prisoners or of him seeking out young prisoners within his current placement or any evidence linking him to alcohol or substance misuse. The POM reported that no security entries have been logged against the Applicant since September 2018.

25. Although the Applicant had failed to return to open prison after a period of temporary release, he was not assessed to pose an elevated risk of absconding at the time of the hearing in August 2022, but the panel considered "*there may still be a degree of residual risk given his past behaviour*".

26. The Applicant gave evidence in which he continued to maintain his innocence of the recall offences which he had been convicted and "*he asserted that he was asking three 'young lads' for some directions and there was no sexual element or motive to his behaviour".* The Applicant "*could not understand why he was arrested*" and he "*insisted that he made no inappropriate gestures towards the boys and made no inappropriate sexual comments".* The Applicant admitted having

condoms and Vaseline with him, but said that he carried those items for consensual sexual activities and "*for treating a sore foot*".

27. There was evidence that the Applicant had been warned prior to his second recall for making an inappropriate comment to a 16-year-old boy as he was reported to have said *"fuck off"* to a young male, but he said that he was passing a comment on the traffic and he was not asking for sexual acts with the boy. He said he would never allow himself to talk to children again so as to avoid any further recalls or offending, but he knew he could not avoid children altogether although he asserted that he would never approach them or ask them questions.

28. The Applicant considered that a moderate intensity accredited programme for men convicted of sexual offence was a useful refresher but as he was not sexually attracted to children, he was not sure what it did to change his attitude to sexual offending. He asserted that he had an attraction to young adults but he denied this was a sexual attraction. He considered older people to be inevitably interested in young adults and children. He denied that he engaged in sexual activity with any prisoners with whom he had shared cells during his sentence.

29. The evidence of the Applicant was that he felt that he had made positive advances in his extended periods in the community. He no longer regarded alcohol to be problem and he *"considered that he had everything under control".* He was reported to the panel that he had had no active sexual interests since recall and that he "*did not consider himself to be driven by sex*". He was not sure if he would become more interested in the future if released.

30. He considered that as far as contact with his family was concerned, "*there was nothing really to talk about on a regular basis*". He accepted that "*he had little to look forward to if released currently***".**

The Evidence of the Experts

31. The Prison Commissioned Psychologist explained in her oral evidence to the panel that she had not changed her analysis of the case in the light of the evidence at the hearing and crucially that she had not felt able to support the Applicant's progression or release at the time of her report or at the time of the oral hearing. Indeed, it followed that she still considered that the Applicant was required to complete her List of Outstanding Core Risk Reduction Work set out in paragraph 20 above and that she still had *"a concern about the Applicant's cognitive functioning and his capacity to take on learning from interventions".*

32. The COM explained in her evidence that she had then not been the Applicant's COM for long but she also considered that core risk reduction work still remained outstanding.

33. Crucially, she concluded that the Applicant *"was not believed to have developed his risk to be manageable outside of custody currently"* and that the Applicant *"continues to fail to understand the nature of the risk he poses."*

34. The evidence of the COM was that she remained concerned about the Applicant's sexual attraction to children which *"remains an effectively untreated risk*

and [he] remains an effectively untreated risk and [he] can show no insight into the harm he has caused to date".

35. The COM accepted that there had been no evidence of sexually inappropriate behaviour in custody, but she was not confident that this was evidence of change in terms of the index offences.

36. The Prison Commissioned Psychologist *"accepted that there was no evidence of offence paralleling behaviour in custody but was not satisfied that this was evidence of change'. The Applicant appears to cope positively with the structure and routine in custody and does not perhaps experience the same levels of stimuli or the same sense of isolation that he experiences in the community".*

37. The panel appreciated and stated that the index offence was committed a very long time ago, that there has been no evidence of sexually inappropriate behaviour by the Applicant in custody and that he has avoided physical violence for a long time now, but it concluded that

(a) notwithstanding that the index offence *"was now committed a very long time ago and at a very different stage of [the Applicant's] life"* and was *"reassured by the fact that he had at the time of the Panel Decision had avoided physical violence for a long time now"*, the panel was concerned about the sexual risk that the Applicant posed and that he posed a high risk of serious harm to children as shown by the recent risk assessment;

(b) the Applicant's history raises concerns about his capacity to cause serious harm to young males through sexual abuse;

(c) there was no evidence of the Applicant addressing and reducing his sexual risk to children since his latest conviction for the recall offences;

(d) although the Applicant does not accept that he committed the recall offences, which were serious sex offences, the panel accept that he committed those offences as he was convicted of those offences after a trial in the Crown Court;

(e) by the time, the Applicant committed the recall offences, he had already faced recall because of allegations of sexual misconduct and he had received a warning a week before recall regarding a sexualised comment to a youth. None of these events appeared to assist the Applicant in avoiding further sexualised contact with children or deterred the Applicant from committing the recall offences and that the probation warning had been ignored by the Applicant;

(f) the Applicant was not able to show insight into his risk factors nor could he show an understanding of the harm he caused;

(g) it accepted the evidence of professional witnesses that the Applicant needed to engage in some form of intervention to address his sexual risks, ideally after an assessment of his cognitive functioning and a behavioural assessment to clarify if there are barriers to the Applicant learning from interventions;

(h) the evidence of the professional witnesses which the panel accepted was that of:

(i) The Prison Commissioned Psychologist who explained that she had not changed her analysis of the case in the light of the evidence at the hearing and crucially she had not felt able to support progression or release at the time of her report or at the time of the hearing as the Applicant still had to complete the Prison Commissioned Psychologist's List of Outstanding Core Risk Reduction Work (which is set out in paragraph 20 above) before the Applicant could be safely released; and of

(ii) the Applicant's COM who concluded that the Applicant had not developed his risk to be manageable outside of custody;

(i) the task for the panel was as described in the panel decision that *"the Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined"*;

(j) the panel concluded that the risk the Applicant posed to children could not be managed by his internal controls or by external controls. That risk posed by the Applicant to children was a high risk of serious harm to children as shown by the recent risk assessment;

(k) in consequence , the panel could not direct the Applicant's release as it could not be satisfied that it was no longer necessary for the protection of the public that he should be confined;

(l) the panel was entitled to conclude that the conditions for recommending that the Applicant should be moved to Open Conditions have not been met as the panel was not satisfied that the Applicant posed only a low risk of absconding and because core risk reduction work remained outstanding.

These reasons will hereinafter be referred to as " paragraph 37 reasons".

The Relevant Law

Parole Board Rules 2019

Irrationality

38. 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."*

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

Other

39. 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 uncontentious 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.

40. 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 craftsmanship."*

The reply on behalf of the Secretary of State

41. The Secretary of State has made no representations in response to this application.

Discussion

42. In dealing with the grounds for reconsideration, it is necessary to stress five 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 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.

43. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

44. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel.

45. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

46. Fifth, in many cases, there can be more than one decision that a panel can be entitled to arrive at depending on its view of the facts.

Ground 1

47. It is contended that the panel failed to give the Applicant any or any adequate credit for the lengthy periods he had previously spent on licence in relation to the index offence. These periods comprised 7½ years before the first recall and a further period of 4 years prior to the second recall.

48. The legal representative of the Applicant stressed in his representations to the panel the fact that the Applicant had *"sustained lengthy periods in the community since his initial release and shown that he can manage himself appropriately"* and so that was well known to the panel who accepted and recorded this fact in the Panel Decision The crucial issue for the panel to determine on this application for the Applicant's release was not what inferences can be drawn from the length of time that the Applicant had previously spent in the community, but instead the different and crucial question of *w*hether at the time of the hearing it was no longer necessary for the protection of the public for the Applicant to be confined. That is precisely what the panel did before concluding that it was necessary for the protection of the public for the Applicant to be confined which was a decision open to the panel for the reasons set out in the paragraph 37 reasons. So there is no merit in the challenge under Ground 1 to the panel's decision to refuse to release the Applicant.

49. In determining whether to recommend that the Applicant should be moved to Open Conditions, the panel was obliged to consider a number of issues including whether the risk of the Applicant absconding was "low". The panel was entitled to accept the COM's evidence that the Applicant posed a medium risk of absconding from Open Conditions and in consequence it was entitled to conclude that it was not appropriate to make a recommendation for the Applicant's transfer to Open Conditions. There is no merit in the challenge under Ground 1 to the panel's decision to refuse to recommend the transfer of the Applicant to Open Conditions.

50. Further or alternatively, these challenges under Ground 1 to the decisions not to direct the Applicant's release or in the alternative not to recommend his progression to Open Conditions on grounds of irrationality must also be rejected because:
(a) due deference has to be given to the expertise of the panel in making its decisions under challenge (including in deciding what weight, if any, should be given to the Applicant's lengthy period spent on licence) and/or in any event
(b) each of the decisions under challenge did not meet the test for being irrational, namely that that they are "*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."*

Ground 2

51. The ground is that the panel failed to give the Applicant any or any adequate credit for his good custodial conduct since being recalled to Prison in 2018.

52. The panel was well aware of the Applicant's good custodial conduct since recall and that the POM had explained that *"there were no recent concerns about [the Applicant's] conduct and compliance".* This undisputed fact was recorded in the Panel Decision and the Applicant was given credit for it. The different and crucial issue for the panel to determine on the application for the Applicant's release was whether at the time of the hearing it was no longer necessary for the protection of the public for the Applicant to be confined. That is what the panel did as explained in paragraph 37 above before refusing to release the Applicant.

53. In determining whether to recommend that the Applicant should be moved to Open Conditions, the panel was obliged to consider whether the risk of the Applicant absconding was low and various other matters and that is what the panel did. The panel was entitled to accept the evidence of the COM and to conclude that it was not appropriate to make a recommendation for the Applicant's transfer to Open Conditions as his risk of absconding was higher than "low". Therefore, there is no merit in the challenge under Ground 2 to the panel's decision to refuse to recommend the transfer of the Applicant to Open Conditions.

54. These challenges to the decisions not to direct the Applicant's release or in the alternative not to recommend his progression to Open Conditions must also be rejected for the further or alternative reasons that even if the Board did not give adequate weight to the lengthy period spent by the Applicant on licence,
(a) then due deference has to be given to the expertise of the Board in making its decisions (including in deciding what weight if any should be given to the Applicant's recent good conduct) and/or
(b) each of the decisions under challenge does not meet the test for being irrational, set out in paragraph 38 above namely that that they are "*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."*

Ground 3

55. It is contended that it was irrational for the panel to determine in refusing the Applicant's release and in refusing to recommend a progressive move for him, that core risk reduction work remained outstanding in relation to sexual harm against

children when the evidence suggested that he was not suitable for or did not meet the criteria for being accepted for such work.

56. The crucial issue for the panel on the application for parole was to decide whether it was no longer necessary for the protection of the public that the Applicant be confined. That is precisely what the panel did and was entitled to decide that it was not satisfied that it was no longer necessary for the protection of the public that he should be confined on account of the paragraph 37 reasons. In making that decision, it was not relevant that the Applicant was not suitable for or meet the criterion for such core risk reduction work as what was important and relevant was that this work was outstanding and was required to be completed for the protection of the public before the Applicant could be safely released.

57. When considering whether to recommend the transfer of the Applicant to Open Conditions, the first issue for the panel to consider was whether the risk of the Applicant absconding was low and various other matters and that is what the panel did. Again, the fact that the Applicant was not suitable for core risk reduction was not relevant to that crucial issue on the risk of the Applicant absconding.

58. This ground is based on the assumption that if prisoner was required to complete core risk reduction work but was not suitable for the available core risk reduction work and did not meet the criterion for it, he should still be released or recommended for transfer to Open Conditions. This is illogical as it ignores the test of considering whether the detention of the prisoner was necessary for the protection of the public.

59. For the purpose of completeness, I add that I reject the contention that the panel's decision to rely on the fact that core risk reduction work remained outstanding as justifying the decision to refuse to release the Applicant or to recommend a progressive move when the evidence was that he could not access this work was irrational as it falls well short of meeting the irrationality test set out in paragraph 38 above that it is "*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.*"

Ground 4

60. This ground is that the panel failed to give adequate regard to the strengths of the Risk Management Plan and the re-release plan and in addition came to the irrational conclusion that the Applicant had little or no insight into the risk of sexual offending when there was no evidence of inappropriate sexual thinking or behaviour since his recall to prison.

61. Starting with the contention that the Applicant had little or no insight into the risk of sexual offending was "*irrational*", there was evidence before the Board from the COM in relation to the Applicant' s insight into his risk of sexual offending referred to in the Panel Decision that

- she remained concerned about the Applicant's sexual attraction to children, which remains an effectively untreated risk;
- she concluded that the Applicant can show no insight into the harm his sexual offending has caused to date;

- it was a cause of concern that the Applicant continues to fail to understand the nature of the risk of sexual offending he poses; and that
- she accepted that there had been no evidence of sexually inappropriate behaviour in custody but she was not confident that this was evidence of change in terms of the index offence.

62. The panel had seen and heard the COM, the Applicant and the other professional witnesses give evidence and in the light of that evidence was entitled to conclude that the Applicant had little or no insight into his risk of sexual offending.

63. On the question of the significance of the absence of evidence of inappropriate sexual thinking or behaviour since the Applicant's recall to Prison. there was evidence from the Prison Commissioned Psychologist, that she was not satisfied that the absence of such behaviour since recall was evidence of change of risk of sexual offending in the community. Her reasoning was that the Applicant appears to cope collectively with the structure and routine in custody, but that he perhaps does not experience the same level of stimuli or the same sense of isolation that he experiences in the community. The panel was entitled to conclude that the absence of evidence of inappropriate sexual behaviour since recall does not show that the Applicant could be safely released into the community as there were other factors which showed that he could not be safely released as set out in the paragraph 37 reasons.

64. The panel concluded that it was not satisfied that the Risk Management Plan could be effective in managing the level and nature of the risk posed by the Applicant. This was a conclusion arrived at by the Board having regard to the fact that they saw and heard the witnesses and which it was entitled to reach. Further or alternatively, and as explained above, deference is owed to the panel and that is another reason why this ground must be rejected. A further or alternative reason why this ground must be rejected is that there are no compelling or other reasons for interfering with the decision of the panel.

Ground 5

65. It is contended that in refusing the Applicant's application for release and failing to recommend a move for him to Open Conditions, the panel acted irrationally in failing to give adequate regard to the Applicant's reduction of his risk of violent offending or of causing serious harm to others through violent offending.

66. The important background to this ground includes the undisputed facts that not only was the index offence *"committed a very long time ago"* but that also that the Applicant has avoided physical violence *"for a long time now".*

67. As with many of the other grounds, this ground fails to appreciate the test which had to be applied by the panel as explained in paragraph 37 (i) above and which were apparently applied by the panel in arriving at conclusions which it was entitled to arrive at. Those conclusions were that the panel could not direct the Applicant's release as it could not be satisfied that it was no longer necessary for the protection of the public that he should be confined. This was a conclusion open to the panel especially in the light of the paragraph 37 reasons.

68. In determining whether to recommend that the Applicant should be moved to Open Conditions, the panel was obliged to consider whether the risk of the Applicant absconding was low and various other matters and that is what the panel did. The panel was entitled to conclude that it was not appropriate to make a recommendation for the Applicant's transfer to Open Conditions as his risk of absconding was higher than "low". Therefore, there is no merit in the challenge under Ground 5 to the panel's decision to refuse to recommend the transfer of the Applicant to Open Conditions.

69. Further or alternatively, and as explained above, deference is owed to the panel and that is another reason why this ground must be rejected in relation to the decisions to refuse to direct the release of the Applicant and to refuse to recommend his transfer to Open Conditions. A further or alternative reason why this ground must be rejected is that there are no compelling or other reasons for interfering with the decision of the panel.

Ground 6

70. This ground is that the panel was irrational in rejecting the contention that the Applicant currently posed a low risk of absconding from Open Conditions in the light of the fact that he succeeded in Open Conditions from 2002 until his initial release on life licence in 2004 and in the absence of cogent evidence on this point.

71. The COM gave evidence that she considered that the Applicant posed a medium risk of absconding from Open Conditions. It is said that there was no current or recent evidence of problematic or concerning alcohol use or behaviour which could lead to a repeat of his failure in Open Conditions in 1994. The panel had to decide whether to accept the oral evidence of the COM having seen and heard her give evidence and being questioned; the panel decided that it should accept that evidence of the COM.

72. As has been explained in paragraph 44 above, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. No compelling reasons have been put forward for interfering with the decision of the panel on the level of risk of the Applicant absconding.

73. In any event a further or alternative reason for rejecting this challenge is that due deference has to be given to the expertise of the panel in making decisions relating to parole, such as that on the risk of absconding from Open Conditions. This ground must be rejected.

Conclusion

74. For all these reasons, this application for reconsideration must be refused.

Sir Stephen Silber
10 October 2022