

[2022] PBRA 34

## Application for Reconsideration by Lamb

### Application

1. This is an application by Lamb (the Applicant) for reconsideration of a decision of a Panel dated 7 February 2022 who after considering the application for parole at a hearing on 1 February 2022 refused to direct the release the Applicant, but instead recommended to the Secretary of State that he should be transferred 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 referral of the Applicant's case to the Parole Board dated 13 January 2020, the decision of the Panel dated 7 February 2022, the application for reconsideration dated 24 February 2022, the notification from the Secretary of State dated 3 March 2022 that the Secretary of State did not intend to make any submissions in response to the Application for Reconsideration and the Applicant's dossier comprising 789 pages.

### Background

4. On 16 February 2007, the Applicant, who was then 30 years old, was sentenced to imprisonment for public protection with a minimum custodial period of 2 years less 81 days which he had already served in custody for an offence of wounding with intent to do him grievous bodily harm. His tariff expired on 27 November 2008. He is now aged 45 years.
5. He was released on 19 July 2017 and recalled on 10 December 2019. His recall was the result of further offending. The present application relates to the Applicant's second review since his recall.
6. On 13 January 2020, the Secretary of State referred the Applicant's case to the Parole Board to consider whether it would be appropriate to direct the Applicant's release and if it does so direct, it was asked to advise in relation to any conditions which should be included in the licence. If the Board did not consider it appropriate to direct the Applicant's release, it was asked to advise on the Applicant's suitability for open conditions.



7. The Panel comprising 3 independent members first met to consider the Applicant's case on 9 February 2021 and for the reasons set out in Panel Chair Directions (PCDs) dated 10 February 2021, the Panel adjourned the case for further reports, including an up-to-date psychological risk assessment.
8. On 22 July 2021, the Panel reconvened and took evidence from the Applicant and the Prison Offender Manager (POM). Due to new allegations of misconduct in custody, the cause of which was disputed by the Applicant, the Panel readjoined the case for further directions which were set out in the PCDs dated 22 July 2021.
9. The Panel reconvened on 8 October 2021 and took evidence from the Prison Custody Officer (PCO) and the Senior Prison Custody Officer (SPCO), but the Panel concluded for reasons explained in PCDs dated 8 October 2021 that the hearing had to be adjourned.
10. The hearing then took place on 1 February 2022 at which the Secretary of State was not represented. No view has been expressed by them. The dossier does not contain either a Victim Personal Statement or a Victim Liaison Report. The Panel did not hear any evidence that had not been disclosed to the Applicant.
11. The Panel was comprised of three independent members of the Parole Board. It heard oral evidence from:
  - (a) The Applicant's POM;
  - (b) The Applicant's Community Offender Manager (COM);
  - (c) The PCO;
  - (d) The SPCO;
  - (e) The Prison Psychologist (PP); and
  - (f) The Applicant himself.

## **Request for Reconsideration**

12. The application for reconsideration is dated 24 February 2022.

13. The grounds for seeking a reconsideration are as follows:

### *a. Irrationality*

- i. The Panel acted irrationally in refusing release when all witnesses recommended release (Ground 1);
- ii. The Panel acted irrationally in recommending the Applicant's transfer to open conditions when all witnesses recommended release (Ground 2);
- iii. The Panel was irrational in placing too much weight on the recall matters in determining not to release the Applicant and to recommend a move to open conditions (Ground 3);
- iv. The Panel erroneously claimed that the Applicant saw some benefits in a transfer to open conditions (Ground 4).

### *b. Procedural Unfairness*



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- i. The Panel acted in a procedurally unfair manner in that when considering the allegation that the Applicant had consumed 'hooch' (alcohol), it should not have done so because the correct procedure had not been followed by the prison (Ground 5);
- ii. The Panel acted in a procedurally unfair manner as it was provided with a video which was not provided to the Applicant or his representative (Ground 6).

## Current Parole Review

14. The Applicant was first known to have offended at the age of 18 years. He has a record of 20 convictions for a wide variety of offences relating to dishonesty and an intermittent pattern of offending involving the use of violence, and potentially linked to alcohol and substance misuse. There was also some evidence of his failure to comply with court orders and with licence conditions which together with his offending while on bail and overall pattern of offending behaviour caused the Panel to conclude that these matters "*give rise to concerns about future compliance with community-based supervision*".
15. He had many convictions until 1999 but he had no convictions recorded against him in 2000, 2001 and 2002, but in 2003 he was convicted of offences of criminal damage, affray and resisting or obstructing a constable. These matters were dealt with by non-custodial sentence as were further convictions in 2005 and 2006 for domestic violence incidents.
16. In January 2006 and March 2006, the Applicant committed offences of violence against his erstwhile partner DN. The latter offence involved the Applicant grabbing DN by the neck and putting a kitchen knife to her throat before threatening to kill her and burn the house down. A further attack occurred in November 2006 when without any apparent significant provocation, he stabbed DN in the stomach with an 8" bladed knife causing a serious injury.
17. The index offence was committed when the Applicant, DN and her 15-year-old brother had been drinking alcohol at his mother's house when they ordered a takeaway meal and then all three of them travelled to DN's house in a taxi. On arrival, they ate the meal and watched a DVD. After the Applicant had left the room, he shouted to DN who went to speak to him. The Applicant is reported to have asked DN "*Why do you love me?*" to which she replied, "*I sometimes wonder*". The Applicant reportedly then became angry and verbally abusive toward her before taking hold of the kitchen knife and threatening to stab her which he did shortly afterward before leaving the house. The assault caused a serious injury for DN, and it resulted in surgery and treatment for her in an intensive care Unit.
18. The Applicant told the author of the Pre-Sentence Report that he could not explain his actions as he had not intended to use the knife on DN, but he expressed "*regret and disgust*" at his actions.

19. The Applicant's early years in custody were described by the Panel as "*problematic*", but his behaviour improved as his sentence progressed, but he has not been able to sustain unproblematic behaviour over the longer term. A Parole Panel recommended the Applicant's progression to open conditions. On 15 May 2013, he was transferred to Prison A where he completed community work and successful periods of home leave.
20. On the Applicant's third period of home leave, he was tested positive for alcohol cocaine and heroin. A confirmatory test was positive for cocaine but negative for opiates. On his return to prison, having tested positive for Subutex, he admitted to its use but denied the use of cocaine. In May 2014, he was discovered to have in his possession a sample of urine before Mandatory Drug Test. The Applicant admitted misuse of Subutex and fabrication of tests he had been taking. He was then returned to closed conditions.
21. On 24 March 2015, he was transferred to open conditions after a Parole Panel had heard very positive reports of his engagement with the substance misuse team. He was returned to closed conditions on 25 January 2016 after he had tested positive for Subutex.
22. He was next returned to open conditions on 17 May 2016, but he was returned to closed conditions on 22 September 2016 after he had admitted using Ibuprofen that had been prescribed for another prisoner. In May 2017, a Parole Panel directed the Applicant's release.
23. On 19 July 2017, the Applicant was released to reside in Designated accommodation after which he went to live with his mother, but she subsequently asked him to leave her home because of his consumption of alcohol.
24. On 17 May 2018, the Applicant's mother had reported to the police that the Applicant had been drinking heavily at her home and had taken a knife threatening to harm himself. When she approached him and told him to put the knife down, he raised it above his head. The Applicant's mother called the police and when they arrived, the Applicant was found with a knife pressed against his stomach. As the Applicant would not negotiate with the police, a Taser was used to recover the knife from him. He was not recalled but this episode showed the danger pose by the Applicant in the community.
25. On 9 December 2019, the police were called to the address of a female NJ who told them that in April 2019, she had ended a relationship with the Applicant after he had been verbally and physically abusive to her. She told the police that the Applicant had appeared at her house "*out of the blue*" and had knocked on the door before appearing at the window where he became threatening stating that he would "*slit her throat*". NJ stated that the Applicant had spat on the window and thrown something at it before riding off on a pedal cycle.

26. An independent witness saw a male outside NJ's house who *"appeared really angry and aggressive shouting phrases such as," call the police, I don't care" and "slag"* and this was supported by CCTV evidence which showed that the Applicant appeared aggressive. NJ reported to the police a few previously undisclosed incidents during which the Applicant had damaged the windows of her house and had threatened her with 2 knives which had been held to her neck. On 10 December 2019, the Applicant was recalled to custody and on 5 August 2020, he was convicted of a public order offence in respect of the incident which led to his recall.
27. Enquires showed that he had entered an intimate relationship with NJ within 4 months of his release from custody and that the relationship had ended in April 2019 after a period of 17 months. Despite being asked repeatedly about his relationships during supervision, the Applicant failed to disclose his relationship with her throughout the period of 17 months maintaining that he remained single. Information available to probation indicated that the Applicant had spent around 4 nights per week at NJ's home during their relationship. This was a breach of the Applicant's licence conditions but the Applicant denied staying overnight at NJ's home.
28. The Applicant's conduct since recall had been generally satisfactory with good levels of compliance and some sporadic examples of poor behaviour being a continuation of custodial behaviour he previously exhibited. This included receiving an adjudication for failing in February 2020 to provide a sample for a Mandatory Drug Test as well as for smashing the observation glass in the cell door and flooding his cell also causing flooding onto the landing in May 2021. He received an adjudication having been found guilty of this behaviour. The Applicant states that his behaviour had been caused by a change in his medication.
29. The Panel considered the evidence including a report by a pharmacist before concluding that *"it was unlikely that [the Applicant's] behaviour was caused by the medication" he was taking, but that "it did not have a satisfactory explanation for [the Applicant's] proven use of aggressive behaviour"*.
30. There was evidence that all the professionals recommended that the Applicant could be safely released. The Panel concluded that the Applicant's recall was *"appropriate"* as *"there were clear and well-evidenced breaches of licence conditions which the Panel concluded were intentional"*.
31. The Panel had seen and heard the Applicant give evidence and were aware that all the Professional witnesses had supported the release of the Applicant, but the Panel concluded that it *"could not be satisfied that it was no longer necessary for him to be confined for the protection of the public and, accordingly, made no direction for [the Applicant's] release"*.
32. The reasons why notwithstanding the unanimous views of the professional, the Panel stated it could not be satisfied that it was no longer necessary for the Applicant

to be confined were what I will hereinafter refer to as "the Panel's findings". Those findings are that:

- (a) He poses a high level of risk of serious harm to known adults.
- (b) He had "*significant risk factors [including]... management of relationships and domestic violence; lifestyle; associates; use of alcohol and drugs which appear to be established means of 'self-medication' at times of stress; attitudes including a poor attitude towards authority and supervision; a problematic attitude to female partners; willingness to use weapons; use of violence to resolve conflicts and/or to control others including intimate partners, and poor temper control*".
- (c) "*Concerningly, [the Applicant] has demonstrated the potential to use extreme and potentially fatal violence with apparently little warning and has concealed behaviour that might provide some warning of increased levels of risk.*"
- (d) He "*had been consistently dishonest with his previous Community Offender Manager.*"
- (e) Despite being asked repeatedly about his relationship [ with partner B] during supervision, he failed to disclose his relationship with her throughout the period of 17 months maintaining he remained single. The panel "*could not be satisfied that the Applicant was being fully open and honest about his relationship with her*".
- (f) In relation to the events leading to his recall the Applicant had committed "*clear and well evidenced breaches of the licence conditions which the Panel concluded were intentional.*"
- (g) These "intentional" breaches [of the Applicant's licence conditions] "*included concealing a lengthy intimate relationship from Probation and using threatening behaviour towards his ex-partner were serious. They indicated an unwillingness to be closely supervised and removed the possibility of support and supervision being provided by Probation during a relationship which remains a key risk area for [the Applicant]. The Panel could identify no factors that might mitigate his actions*".
- (h) "*Taking all the information put before into account, the Panel could not be satisfied that [the Applicant] would be likely to comply with the terms of his licence*"
- (i) The Applicant's good custodial behaviour was not necessarily proof that he could apply the same skills in the community and "*the Panel was not fully reassured by [the Applicant's] custodial conduct*".
- (j) The Panel noted that "*the picture [of the Applicant] currently being presented both by [the Applicant] and by Professionals was similar to that presented prior to [the Applicant's] prior release*" which led to his further offending and his recall.
- (k) "*The Panel had significant concerns about whether the warning signs of increasing risk would be visible to those supervising [the Applicant] given the pattern of his previous offending and his propensity to conceal information from those supervising him.*"



- (l) The previous Panel which had released the Applicant and those supervising him considered he had insight into his offending behaviour *"the current panel was less convinced that [his] apparent insight was more than superficial"*.
- (m) *The Panel considered that the circumstances of [the Applicant's] proposed release in some ways echoed his previous release. Professionals again credited him with an understanding of his risk factors and with motivations to succeed as indicated above.... on his last release [the Applicant] quickly returned to the use of alcohol...and refused to comply with conditions. The Panel saw no reason to be reassured that [the Applicant's] understanding, or motivation, was significantly different to the time of his previous release."*
- (n) The Panel stated in relation to the attitude of the Applicant to the conditions for release imposed on him that *"whilst [the Applicant] maintained that he was motivated to engage and comply [the Panel] was not confident that the expressed motivation was genuine."*
- (o) *"Taking all the information put before it into account, the panel could not be satisfied that [the Applicant] would be likely to comply with the terms of his licence"*.
- (p) *"The Panel could not be satisfied that it is no longer necessary for him to be confined for the protection of the public and, accordingly made no direction for his release"*.

33. The Panel then proceeded to consider if it could recommend the Applicant as being suitable for open conditions and explained that he had made sufficient progress in addressing his risks and that *"they have been reduced to a level where he may be safely in the community, unsupervised, under licensed temporary release."*

34. The Panel saw *"no evidence to suggest that the Applicant would not now comply with the conditions of any form of temporary release but considered there would be benefits in testing his compliance further in circumstances of lower security"*. The Panel agreed with the professionals, who worked with the Applicant and who thought that there would be no risk of him absconding. Furthermore, the Panel believed that the Applicant *"would be likely to derive benefit from being able to address remaining areas of concern and to be tested in open conditions environment and concluded that a transfer to open conditions would be worthwhile at the current stage in his sentence"*.

35. It therefore concluded that the level of supervision and support available in open conditions would be adequate to manage his current levels of risk. Therefore, the Panel recommended to the Secretary of State that the Applicant was suitable for transfer to open conditions.

## The Relevant Law

36. The Panel correctly sets out in its decision letter dated 23 November 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*

37. 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)).

38. 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 a decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

#### *Irrationality*

39. 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."*

40. 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.

41. 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*

42. 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.

43. 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.

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

#### Other

45. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin)**, **R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must consider when applying the test are:

- (a) the progress of the prisoner in addressing and reducing their risk;
- (b) the likeliness of the prisoner to comply with conditions of temporary release;
- (c) the likeliness of the prisoner absconding; and
- (d) the benefit the prisoner is likely to derive from open conditions.

46. 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 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.

47. 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.*"

48. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application

in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

### The reply on behalf of the Secretary of State

49. The Secretary of State stated that he did not wish to make any representations in response to the application for reconsideration.

### Discussion

50. In dealing with the grounds for reconsideration, it is necessary to stress four matters of basic importance. First, the Reconsideration Mechanism is not a process by which the judgment of the Panel can be *lightly* interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his own views 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.

51. 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 Board in making decisions relating to parole.

52. 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.

53. Fourth, in many cases there can be more than one acceptable decision that a Panel can be entitled to arrive at depending on its view of the facts.

### Ground 1

54. As for the contention in that it was irrational to *refuse to release* the Applicant when all the professional witnesses recommended release, this ground fails to take account of the fundamental principle that the Panel was not obliged to follow the recommendations of the professional witnesses but was required to scrutinise the evidence thoroughly including the recommendations of the professional witnesses and to give reasons for its conclusions.

55. In this case, this is what the Panel did, and it set out clearly its reasons explaining why it was entitled to reach its decision to refuse to release the Applicant and then explained in the Panel's findings set out in paragraph 32 above.

56. Further or alternative reasons why this challenge to the decision to refuse to release the Applicant must be rejected are that due deference must be given to the expertise of the Panel and the Board especially when dealing with issues of risk and/or that no error of fact of an egregious nature which directly contributed to the conclusion to refuse to release the Applicant has been identified let alone established.

## Ground 2

57. As for the contention that it was irrational for the Panel to recommend a transfer to open conditions when all witnesses recommended release, a decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 **Re Barclay [2019] PBRA 6**. Accordingly, the challenges to this recommendation must be refused.

58. Further and alternative reasons why this ground must fail are that the panel set out clearly why it was entitled to make the recommendation that the Applicant should be transferred to open conditions as explained in paragraphs 33 to 35 above and/or that due deference must be given to the expertise of the Board in reaching that conclusion and/or that no error of fact of an egregious nature which directly contributed to the conclusion to recommend his transfer to open conditions has been identified, let alone established.

## Ground 3

59. As for the contention that the Panel irrationally placed too much weight on the recall matters in determining not to release the Applicant and to recommend a move to open conditions, this ground must be rejected in respect of the recommendation to move the Applicant to open conditions because a decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 **Re Barclay [2019] PBRA 6**.

60. Further or alternatively, this challenge to both the decision not to release the Applicant and to recommend a move to open conditions must also be rejected because:

- (i) The Panel as the designated fact finder was entitled to decide the weight to be attached to the evidence relating to the events leading to the Applicant's recall; and/or
- (ii) Due deference was due to the decision of the Panel especially on the weight to be attached to different items of evidence relating to the risk posed by the Applicant on release; and/or

- (iii) The Panel cannot be regarded as acting irrationally when it regarded evidence of how the Applicant behaved on a very recent release as important and material evidence in determining how he would behave on a proposed release; and/or
- (iv) The Panel was entitled to refuse to release the Applicant for the reasons set out in the Panel's findings; and/or
- (v) No error of fact of an egregious nature which directly contributed to the conclusion to refuse to release the Applicant or to recommend his transfer to open conditions has been identified let alone established.

#### Ground 4

61. As for the contention that the Panel irrationally claimed that the Applicant saw some benefits in a transfer to open conditions, if that assertion was made by the Applicant and was erroneous, this ground must be rejected as:

- (a) No claim can be made in respect of the recommendation to move to open conditions, a decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 **Re Barclay [2019] PBRA 6**; and /or
- (b) The alleged claim that the Applicant saw some benefit in a transfer to open conditions was not a factor taken into account by the Panel in deciding not to direct his release or to recommend that he should be moved to open conditions as is apparent from the reasoning of the Panel as explained in respectively the Panel's findings in paragraph 32 and in paragraphs 33 to 35 above; and/or
- (c) it did not constitute an error of an egregious nature and/or an error which contributed to the decisions under challenge as the panel explained carefully and clearly why it refused to release the Applicant and recommended his move to open conditions.

#### Ground 5

62. As for the contention that the panel acted in a procedurally unfair manner in that when considering the matter of the Applicant allegedly consuming hooch, the Panel should not be precluded from reaching a conclusion on this issue, even if the correct procedure was not followed by the prison. There is no reason why the Panel as the designated fact finder was not entitled to reach its conclusion on what the Applicant drank.

63. Further or alternatively, this ground must be rejected as:

- (a) The Panel, as the designated fact finder, was obliged and indeed entitled to reach its own decisions on whether the Applicant had actually consumed hooch and was not required to regard the correct prison procedure as being relevant to, let alone as being decisive, on reaching its conclusions; and /or

- (b) Deference is due to the decision of the Panel who had heard and seen the evidence on the allegation that the Applicant had consumed hooch and reached a decision open to it that he had consumed hooch
- (c) It has not been asserted, let alone established, that the Panel reached incorrect conclusions on the allegation that the Applicant had consumed hooch; and/or
- (d) In any event, if the Panel in reaching its decision on the Applicant's consumption of hooch made an error of an egregious nature and/or an error which contributed to the decisions under challenge, the Panel explained carefully and clearly why it refused to release the Applicant and recommended his move to open conditions as explained respectively in the Panel's findings in paragraph 32 above and the reasoning in paragraph 35 above. Those findings entitled the Panel to refuse to release the Applicant and to recommend that he should be moved to open conditions.

### **Ground 6**

64. As for the contention that the Panel acted in a procedurally unfair manner in that it was provided with a video which was not provided to the Applicant or his representative, which is not accepted that this is correct, this ground must be rejected as the images on the video did not materially contribute to the decisions under challenge to refuse to release the prisoner and to recommend that he should be moved to open conditions bearing in mind:

- (i) the Panel's other findings set out in paragraph 32 above explain why it was entitled not to direct the Applicant's release and the conclusions in paragraphs 33 to 35 above explain why it was not entitled to recommend that the Applicant should be transferred to open conditions;
- (ii) the fact that there was also evidence from an independent live witness as explained in paragraph 26 above and accepted by the Panel about the prisoner's conduct on the occasion covered by the video;
- (iii) the Applicant was convicted of a public order offence in relation to his conduct on that occasion; and
- (iv) It has not been contended let alone proved that if the prisoner and/or his legal representative had seen the video, they would have been able to challenge or undermine any of the findings made by the Panel.

### **DECISION**

65. Having considered all the Grounds for Reconsideration relied on by the Applicant in his claim for Reconsideration, I have concluded for the reasons I have given that the decision of the Panel was neither irrational nor procedurally unfair.

66. Accordingly, the application for reconsideration is refused.

Sir Stephen Silber  
14 March 202

