

[2023] PBRA 124

## Application for Reconsideration by Ayers

### Application

1. This is an application by Ayers (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 16 May 2023 following an oral hearing held remotely by video on 10 May 2023. The Panel decided not to direct the Applicant's release.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in Rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are:
  - An application for reconsideration dated 6 June 2023 (the application) submitted by the Applicant's solicitors;
  - the Panel's decision dated 16 May 2023; and
  - a dossier of 594 numbered pages.

### Background

4. In February 2017, the Applicant was convicted of multiple sexual offences: three offences of making indecent images of children, one offence of distributing indecent images of children, one offence of possessing extreme pornographic images involving an animal, one offence of possessing prohibited images of children, and five offences of attempting to arrange, arranging, or facilitating the commission of a child sex offence.
5. The Applicant had been arrested at his home in July 2016 as part of a national investigation into a paedophile ring in the UK. A forensic examination of electronic devices seized when the Applicant was arrested revealed that they contained over 700 Category A images, over 300 Category B images, and over 500 Category C images. The images comprised stills and videos and a large proportion of the indecent images featured babies and toddlers being abused. The sentencing judge considered that it was necessary to describe some of the stills and moving images in the Applicant's possession to convey the extreme obscenity of the images, and he referred to the Applicant relishing the extreme distress of extremely young children and encouraging other paedophiles to engage in the same activity.



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6. The devices seized from the Applicant's home also contained records of conversations between the Applicant and others. Some conversations involved the Applicant encouraging or inciting others to sexually abuse, torture, and kill babies and young children. The sentencing judge said, "*I have firmly formed the view that the express desire to perform specific life-threatening and extremely abusive, horrendous, and deviant acts upon very young infants was not a fantasy which would not have been acted upon. I am sure that such abuse would have been carried out as a direct result of these communications*".
7. The Applicant pleaded guilty and was given an extended determinate sentence of twelve years and eight months, comprising a custodial term of seven years and eight months and an extended licence period of five years. The Applicant's parole eligibility date was in September 2021, his conditional release date is in April 2024, and his sentence expiry date is in April 2029. The Applicant had no previous convictions.

### Request for Reconsideration

8. The application for reconsideration is dated 6 June 2023. The application submits that the Panel's decision is irrational and procedurally unfair. In its conclusion, the application states that, "*the vast majority of other panels would not have reached it. It is based upon pre-conceived assessments of the case and not the evidence that the panel had before it.*"
9. The grounds for seeking a reconsideration can be summarised as follows:
  - (a) **Ground 1 - Irrationality:** it is submitted that the Panel's decision was irrational because the vast majority of panels would have followed the recommendations of the professional witnesses who considered that: (i) it was not necessary for the Applicant to complete further risk reduction work in the form of the Healthy Sex Programme (HSP), an intervention addressing sex offending, before being released; and (ii) the Applicant's risk of serious harm could be managed in the community with the plans that were in place.
  - (b) **Ground 2 - Irrationality:** it is submitted the Panel was irrational because it did not have the evidence to conclude that the Applicant still had sexual fantasies about children and that this would lead to likely sexual contact offences. It is submitted that this assessment was not made by any of the professional witnesses, including both psychologist witnesses.
  - (c) **Ground 3 - Irrationality:** it is submitted that the Panel was irrational because it appeared determined to convert all the positives that could be said about the Applicant to negatives and to take a negative view about the Applicant's decisions without possessing convincing evidence. In support of this submission, the application states that it was irrational of the Panel to: (i) dismiss the prison psychologist's (Prison Psychologist) reassessment that the Applicant no longer needed to complete HSP in prison; (ii) dismiss the prisoner-commissioned psychologist's (P-C Psychologist) assessment about the complexity of the Applicant's case and to regard it as a hypothesis; (iii) conclude negatively that the Applicant disassociated himself from and minimised his offending; (iv) interpret the Applicant's decision not to move

to another prison to undertake HSP and to return to a main prison wing negatively; (v) assert that the Applicant did not understand his risk factors and triggers; and (vi) view his enquiries of the proposed risk management plan and licence conditions negatively.

- (d) **Ground 4 - Procedural Unfairness:** it is submitted that the Panel was wrongly preoccupied with the Applicant's sentence plan and based its assessment on a preconceived idea of what it considered to be necessary for his sentence plan and not what the professionals had decided.

### **The reply on behalf of the Secretary of State (The Respondent)**

10. The Respondent did not make any submissions.

### **Current parole review**

11. On 1 February 2021, the Respondent referred the Applicant's case to the Parole Board. On 23 July 2021, the Applicant's case was directed to an oral hearing. A remote hearing was due to take place to review the Applicant's case on 20 January 2022. A series of adjournments and deferrals took place due to witnesses such as the P-C Psychologist and Applicant's community offender manager (COM) not being available at hearings, or essential information such as an updated and comprehensive risk management plan (RMP) not having been provided.
12. Eventually, a full hearing to review the Applicant's case was conducted by the Panel on 10 May 2023 remotely by video. The Panel was comprised of two independent members and a specialist psychologist member. The Panel had considered a dossier of 594 numbered pages which included a post-programme review from the Horizon Programme (an intervention which addresses sex offending), a suitability decision making screening assessment for HSP dated 5 April 2018 (HSP Assessment), a psychological risk assessment (PRA) dated 6 December 2021 written by the Prison Psychologist, an addendum dated 19 April 2023 (Addendum) to the Prison Psychologist's PRA, and a PRA dated 28 December 2021 written by the P-C Psychologist.
13. At the hearing, evidence was taken from the Applicant's prison offender manager (POM), the Prison Psychologist, the P-C Psychologist, and the COM. The Applicant also gave evidence to the Panel.

### **The Relevant Law**

14. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.
15. The Panel correctly sets out the test for release in its decision letter dated 16 May 2023. The test is automatically set out in the Parole Board's template for oral hearing decisions.

**Parole Board Rules 2019 (as amended)**

16. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A)).
17. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (Rule 28(2)(a)), extended sentences (Rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (Rule 28(2)(c)), and serious terrorism sentences (Rule 28(2)(d)).

**Irrationality**

18. 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 paragraph 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."*

19. 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 Parole 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.
20. 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**

21. 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 focuses on the actual decision.
22. 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.

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

### ***Duty to give reasons***

24. The giving of reasons by a decision maker is "*one of the fundamentals of good administration*" see **Breen v Amalgamated Engineering Union [1971] 2 QB 175**. When reasons are provided they may indicate that a decision maker has made an error or failed to take a relevant factor sufficiently into account, hence their importance. An absence of reasons does not give rise to an inference that the decision maker has no good reason for a decision. Neither can it be necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law.

25. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in cases such as **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board [2020] EWHC 1885 (Admin)**.

26. It is suggested that a panel's conclusions are best tested by asking whether the conclusions reached can be justified on the basis of the evidence placed before it, while giving due deference to a panel's experience and expertise.

27. In **Oyston [2000] PLR 45**, at paragraph 47 Lord Bingham said, "*It seems to me generally desirable that the Board should identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending and the Board's reasons for striking the balance that it does. Needless to say, the letter should summarise the considerations which have in fact led to the final decision. It would be wrong to prescribe any standard form of Decision Letter and it would be wrong to require elaborate or impeccable standards of draftsmanship.*"

28. Panels of the Parole Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. If a panel intends to reject the evidence of a witness, then detailed reasons will be required. This is implicitly recognised in the case of **Wells** at paragraph 40:

*"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the Panel appears, implicitly at least, to be rejecting."*

### **Discussion**

29. Before addressing the grounds for reconsideration in detail, it is important to highlight the following matters:

- (a) The reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be interfered with lightly. Is it also not a means by which the member carrying out the reconsideration is entitled to substitute his or her view of the facts for the view of 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 contributed directly to the conclusion arrived at by the Panel.
- (b) When deciding whether the Panel's decision was irrational, due deference has to be given to the expertise of the Panel in making decisions relating to parole.
- (c) Where the Panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that it 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.
- (d) 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.

30. It is submitted in the application that the Panel's decision is irrational and procedurally unfair. I will deal with each of the grounds outlined in the application separately.

31. **Ground 1 - Irrationality:** it is submitted that the Panel's decision was irrational because the vast majority of panels would have followed the recommendations of the professional witnesses who considered that: (i) it was not necessary for the Applicant to complete further risk reduction work in the form of HSP before being released; and (ii) the Applicant's risk of serious harm could be managed in the community with the plans that were in place.

32. A panel must make an independent assessment of the Applicant's risk. It will explore and challenge the views, assessments, and recommendations of professional witnesses before using its experience and expertise to reach its own conclusions. Where a panel rejects the evidence or recommendations of a witness, it should explain why giving detailed reasons.

33. The Panel's decision demonstrates that it took detailed evidence from all the witnesses including both psychologists on the issue of whether the Applicant should complete HSP in custody. The issue was certainly not as clear cut as is implied by the Applicant's submissions. The complexity of the case and the tentative, qualified, and sometimes conflicting views of the professional witnesses are captured by the Panel's decision. The Panel then makes its own assessment based on the oral and written evidence before it.

34. As noted by the Panel, the Prison Psychologist changed her view between her PRA and the Addendum. Moreover, in the Addendum, the Prison Psychologist made a series of qualifications and assumptions before concluding that it was not essential

for the Applicant to undertake HSP before his release. I have set out the details below.

35. The Prison Psychologist completed her PRA in early December 2021 and considered at that time that the Applicant had not had the opportunity to engage in interventions targeting sexual preoccupation and a sexual interest in the abuse of children. Her view was that while the Applicant had gained valuable skills from undertaking Horizon and other non-accredited work, he could not be expected to have learnt specific skills for managing his sexual interests from the work he had completed to date. The Prison Psychologist recommended that the Applicant should complete HSP prior to release to target outstanding risk factors and increase his risk management strategies.
36. In the Addendum, the Prison Psychologist revises her recommendation following consideration of certain factors including the P-C Psychologist's PRA, the Applicant's self-report that he was experiencing low levels of unhealthy sexual arousal which he said he was able to manage using distraction, and consultation with the HSP Treatment Manager. The Prison Psychologist concluded that completing HSP was not fundamental to the management of the Applicant's future risk however, when considering the Applicant's risk on an indefinite basis (which she was required to do) her view was that completion of HSP or an equivalent intervention would provide the best protection against longer term risk by helping to provide the Applicant with internal risk management strategies. In the conclusion section of the Addendum, the Prison Psychologist noted that if the Applicant's unhealthy interests, which she described as currently appearing to be latent, became more prominent, it was not clear if he would have the skills or resources to manage them and risk might well become elevated as a result. The Prison Psychologist expressed the hope that the Applicant would be motivated to seek professional support. While the Prison Psychologist was also concerned about the Applicant's ability to adapt to and cope with change, she was not convinced it would lead to risk becoming imminent and believed there would be warning signs which the professionals were likely to detect, although this view was inconsistent with the view she has expressed in the PRA.
37. The P-C Psychologist said that work on the Applicant's wider risks would be sufficient to manage his sexually deviant risks. He said that the Applicant's sexual interests were not stable and that HSP worked best with individuals with stable sexual interests.
38. One of the Applicant's submissions under Ground 3, which I believe is most usefully addressed here, is that the Panel: (i) dismissed the Prison Psychologist's reassessment that the Applicant no longer needed to complete HSP in prison; and (ii) dismissed the P-C Psychologist's assessment about the complexity of the Applicant's case and regarded his assessment as a hypothesis. This is not an accurate reflection of the detailed and considered way in which the Panel addresses these issues. The Panel's decision outlines the Prison Psychologist's recommendations in her PRA and in the Addendum before recording the evidence she gave at the hearing when she expressed the view that determining whether HSP should be undertaken in custody was a "*difficult decision*". The Prison Psychologist agreed with the Panel that Horizon had not fully met the Applicant's treatment needs and that the options available in the community would not address his needs as effectively as HSP, which was only available in custody. The Panel

highlighted the Prison Psychologist's contradictory views about the emergence of warning signs which she considered would be a mitigating factor and concluded that it lacked confidence in the Prison Psychologist's explanation for her significant change of view.

39. The Panel does not dismiss the P-C Psychologist's assessment as is suggested by the Applicant's submission, but notes in its decision that he acknowledged that as this was a complex case, many of his conclusions were based on hypotheses. In his PRA, the P-C Psychologist outlined his hypothesis that the Applicant's unhealthy interests would be latent with the management of wider risk factors but pointed out that his hypothesis relied to a "*fairly significant degree*" on the self-report of the Applicant.
40. The Panel sets out the factors it took into account in reaching its assessment that the Applicant's risks were not manageable in the community and makes it clear why it does not agree with the views and assessments of the psychologists and the other professional witnesses. The factors considered by the Panel include: its concern that there are significant gaps in the professionals' understanding of the Applicant's risks and triggers; the acknowledgement by all professionals, save for the P-C Psychologist, that the Applicant's sexual preoccupation and unhealthy sexual risks and fantasies have not been addressed (irrespective of how and where any offending behaviour work is delivered); the Applicant's denial of his sexual attraction to children and his unconvincing explanation about why he chose to use extreme child pornography and images of the abuse and torture of babies and very young children to achieve sexual gratification; and recent evidence of the Applicant's difficulties in maintaining mental and emotional stability when faced with changes, giving the Panel significant doubts about his ability to manage a transition from the closed estate to the community. It was the Panel's view that core risk reduction work remained outstanding and that that work should be completed while the Applicant was in custody.
41. The Panel's arguments are reasoned and evidence-based, and I can see no element of irrationality in its decision-making.
42. **Ground 2 - Irrationality:** it is submitted that it was irrational of the Panel to conclude that the Applicant still had sexual fantasies about children which was likely to lead to sexual contact offences. It is further submitted that there was no evidence for the Panel to reach this conclusion and that this assessment was not made by any of the professional witnesses, including both psychologist witnesses.
43. The Applicant's submissions do not accurately reflect the Panel's assessment of the Applicant's sexual thinking and the likelihood of sexual offending against children. The Panel does not make any definitive statements about the Applicant's current sexual thinking. The Panel records that during the HSP Assessment in 2018, the Applicant disclosed that he continued to have sexual thoughts about male children under the age of two years old, and that the Applicant told the Panel during the hearing that currently he hardly had any unhealthy sexual thoughts or fantasies and was not preoccupied with sex. In its conclusion the Panel considers that there are significant gaps in the professionals' understanding of the Applicant's risks and





triggers and that addressing the risk factors of sexual preoccupation and unhealthy sexual interests represents core risk reduction work.

44. In my view, the Applicant overstates in his submissions the certainty with which the psychologists make their assessments of risk. Both psychologists qualified their assessments by noting that many of their conclusions were based on hypotheses and there was an acknowledgment that standard risk assessment tools might not accurately estimate the Applicant's risks because of the nature of his offending in which fantasy played a significant role.
45. In conclusion, the Applicant's submissions do not accurately and fully reflect the assessments of the Panel or the psychologists and I can find no evidence of irrationality.
46. **Ground 3 - Irrationality:** it is submitted that the Panel was irrational because it appeared determined to convert all the positives that could be said about the Applicant into negatives and to take a negative view about the Applicant's decisions without possessing convincing evidence. The submission sets out what it considers to be illustrations of the Panel's '*negative approach*'.
47. In my view, the Applicant's submission is not supported by the evidence. When the examples given by the Applicant are analysed, they do not indicate a negative or biased mindset on the Panel's part. One example given by the Applicant is that his enquiries of the proposed risk management plan and licence conditions were viewed negatively by the Panel. Representations were made on the Applicant's behalf objecting to a proposed licence condition restricting his access to computers to those in public places, and in his evidence, the Applicant said that he feared being isolated from the world if he did not have internet access at home. The Panel considers this to be illustrative of the Applicant's "*tendency to prioritise his own needs over those of public protection*" and of his limited understanding of the impact of his offending. I find the Panel's opinion to be reasoned and balanced, highlighted by the way the Panel's comment is framed.
48. The Applicant's submission also ignores the Panel's positive comments about: (i) his custodial conduct; (ii) the "*considerable reflection*" undertaken by the Applicant on his offending, exemplified by his workbooks; and (iii) his protective factors including his improved self-awareness.
49. In conclusion, I do not consider that there is any evidence to support the Applicant's submission that the Panel was unfair or disproportionately negative in the way it discussed the Applicant's views and decisions or in the way it viewed any statements or conclusions which were supportive of or favourable to the Applicant. On that basis, I reject the argument that the Panel was irrational in its decision-making.
50. **Ground 4 – Procedural Unfairness:** it is submitted that the Panel was wrongly preoccupied with the Applicant's sentence plan and based its assessment on a preconceived idea of what it considered to be necessary for his sentence plan.
51. I do not agree that the Panel was "*wrongly preoccupied*" with the Applicant's sentence plan. The Panel's brief discussion of the sentence plan is set out in paragraph 2.5 of its decision and shows that it was one aspect of the Panel's

consideration of the relevance of HSP in addressing the Applicant's risk. In that context, it was proper for the Panel to explore the sentence plan with the POM and the COM and the Panel was entitled to express its opinion about the sentence plan. I consider this to be part of what the Panel has referred to as the "*extremely rigorous approach*" it adopted in light of the serious nature of the Applicant's sexual offending. The Panel's view was that HSP formed part of the Applicant's sentence plan because it was considered to be important core risk reduction work following the Applicant's completion of Horizon. Since the Panel provides a clear explanation of why it took a different view to the POM and the COM, I do not agree that the Panel's view was preconceived.

52. There is no indication that the Panel's assessment of risk was based on its determination of what his sentence plan should comprise, as has been suggested by the Applicant. This is evident from the Panel's conclusion which provides its assessment of the nature and understanding of the Applicant's risk, its assessment of the current level of the Applicant's risk and how that risk might be addressed, and its assessment of the manageability of the Applicant's risks in the community. There is in my view no evidence of procedural unfairness.

## Decision

53. 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.

**H Emrys**  
**12 July 2023**