

**[2024] PBRA 136****Application for Reconsideration by Deakin****Application**

1. This is an application by Deakin (the Applicant) for reconsideration of a decision of a panel of the Parole Board (the Panel) dated 19 June 2024 not to direct his release. The decision was made following the review conducted by way of an oral hearing on 3 June 2024.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made within the prescribed time limit.
3. I have considered the application on the papers. These are: the application with written representations dated 2 July 2024; the written decision; the case dossier; and the email message by way of response dated 10 July 2024 from the Public Protection Casework Section (PPCS) of HM Prison and Probation Service on behalf of the Secretary of State (the Respondent).

**Request for Reconsideration**

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

The decision was irrational in that it rejected without justification the opinions of all the professional witnesses involved and failed to properly identify and take into account the indicators that the Applicant's risk of serious harm could be safely managed in the community.

**Background**

5. On 8 January 2020, having pleaded guilty to two counts of raping a child under 13, the Applicant received concurrent sentences for offenders of particular concern (SOPC) comprising a custodial term of 6 years and 9 months and an extended licence period of 12 months. At the same time, a Sexual Harm Prevention Order was imposed which will expire in January 2028. The Applicant will also be subject indefinitely to registration requirements as a registered sex offender.
6. The two offences were committed on 10 June 2019 and the victim was a 12 year old girl. Guilty pleas to both were entered on the basis that, whilst consent in itself cannot be a legal defence to an allegation of raping a child under 13, the sexual



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activity which took place was in fact consensual. The Applicant also maintained that, when he asked the victim's 15 year old companion to provide I/D, she produced fake identification.

7. Eight other charges arising out of other incidents on the same occasion were ordered to remain on the file. These were two further charges of raping a child under 13, four charges of engaging in sexual activity in the presence of a child and two of inciting a child under 13 to engage in sexual activity.
8. The index offences were committed after the Applicant paid for a taxi to bring the victim and the 15 year old girl to his home. Both were vulnerable and deemed to be at high risk of sexual exploitation. The Applicant had met the 12 year old victim via a social media website and they had been in communication for several weeks and had seen each other on a couple of occasions.
9. It is alleged that, when they were in the Applicant's home, he took them both to his bedroom where he first made the 12 year old perform oral sex on him and then moved her on top of him to engage in vaginal intercourse. The charges which remain on the file include allegations of sexual advances towards and oral sex performed by the 15 year old. The Applicant explained at the 3 June hearing that he and the two girls had been listening to music and chatting for a couple of hours before the sexual activity started.
10. The girls remained at the Applicant's address until the following morning when they were returned to the local town centre by taxi. The 15 year old then reported the incident to a Phoenix Project Family Worker who informed the police.
11. The Applicant was 22 at the time of the index offences and had no previous convictions, although he had received abduction warnings in 2015 and 2017 in respect of girls aged 16 and 14 respectively. He was brought up by his mother after his parents separated when he was young and has two children from previous relationships. His daughter was adopted and he has no contact with his son. He has described the relationship between him and the son's mother as toxic. He has referred to an incident between them when he pushed his partner after she poured beer over him. He was questioned by the police but no further action was taken.
12. The Applicant is reported to have been a cannabis user since the age of 13 and to have occasionally taken cocaine. He admitted smoking cannabis and drinking alcohol earlier during the day of the index offences but maintained that he was not under the influence of either when they took place.
13. The first review of the Applicant's case was concluded by a decision made on the papers on 10 June 2022. The panel on that occasion identified as factors likely to increase the Applicant's risk of reoffending and causing serious harm as a sexual interest in pubescent girls, thinking constantly about sex, targeting vulnerable victims, using force to gain sexual compliance, poor thinking skills, struggling to manage his emotions, drug and alcohol use, not coping with relationship breakdown and limited victim empathy.
14. At the time of the 2022 review the Applicant had yet to undertake any work to address areas linked to his risk. He was on the waiting list for the Horizon



Programme which the professionals involved in his case considered was core risk reduction work. The panel on that occasion noted that the Applicant did not fully accept responsibility for his offending and continued to put responsibility on the victims for initiating the sexual contact. Other risk areas around emotional management were highlighted. Whilst it was to the Applicant's credit that he had complied well with the prison regime and the proposed release plan was robust, it was too heavily dependent on external controls. The 2022 panel declined to direct release.

### Current parole review

15. The Respondent referred the Applicant's case to the Parole Board by Notice dated 2 March 2023 for the Board to consider whether to direct his release. It was not invited to advise whether the Applicant should be transferred to open conditions in the event that release was not directed.
16. The review was conducted by a Panel of the Board (the Panel), comprising an Independent Member as Chair and two other Independent Members, on 3 June 2024 at an oral hearing conducted by way of video-link. The Applicant, now aged 28, attended and was represented by his legal advocate.
17. The case dossier of 267 pages included a recent Psychological Risk Assessment Report (PRA) by a Prison Psychologist and reports from the Applicant's Community Offender Manager (COM) and Prison Offender Manager (POM).
18. Oral evidence was given by the Psychologist, by the COM, by the POM and by the Applicant himself. Written submissions were subsequently provided by the legal representative..
19. By the time of the oral hearing, the Applicant had successfully completed the Horizon Programme and had also undertaken eight sessions of New Me MOT Programme (non-accredited follow-up to Horizon). The latter included work covering sexual attraction towards children. The Applicant acknowledged at the hearing that his drug and alcohol use in the community had become excessive. In custody he completed in-cell packs on alcohol, cocaine and cannabis use.
20. The Applicant's one MDT (Mandatory Drug Test) in custody proved negative. An adjudication procedure for refusing to provide a sample for a suspicion led drug test was dismissed for procedural reasons. An allegation of fermenting liquid was found proved in November 2022 but the Applicant explained that he was storing it but not drinking it. Security intelligence suggesting that the Applicant had been otherwise involved with drugs and alcohol in prison was explained by the Applicant as simply due to his associations at the time.
21. The Applicant has accepted that his drug and alcohol use before the index offences had become excessive and that he would drink and take drugs "*all day long*". If he was bored he would watch videos, take drugs, go gambling, and "*ask girls round*", looking for "*someone, anyone or whoever.*" At the hearing, he told the Panel that he would "*probably*" use cannabis again, although less than before, although he recognised that it was not good for him as it distorts his thinking. He said that he "*would probably not*" take cocaine. He would "*go out and have a couple of pints*" at



a party or gathering but "*can leave it if he wants to*". He did not need a relapse prevention plan as his will power was great enough to stop him if he wanted. In her written final submissions, The Applicants legal representative said that the Applicant had reflected on the use of cannabis and states that he is motivated to abstain in the community.

22. The only evidence of violent behaviour by the Applicant in custody is the adjudication in May 2023 for fighting another prisoner as a response to the prisoner repeatedly '*having a dig at him*'. He has expressed remorse for his reaction. The POM confirmed in his latest report that the Applicant had demonstrated a positive attitude to working with professionals and had improved his coping and self-control skills. There has been no evidence of sexual preoccupation. The POM considered that the Applicant would comply with his licence conditions.
23. The Applicant assured the Panel that, whilst he now understands the triggers to his offending, he accepts that he still needs to work on consolidating and maintaining the skills to manage his risks. He would take any support or advice on board. However, he did not have a relapse prevention plan in respect of drugs or alcohol and would stop if he wanted to.
24. According to the latest Offender Assessment System (OASys) Report the Applicant's static risk factors place him in the group of offenders whose risk of re-offending generally is low. His OGP and OVP indicate a low risk of both specific violent and non-violent offending. The dynamic risk of serious recidivism was assessed as low. The static risk of sexually motivated and indecent image offending to be low. The SARA score put the applicant at a high risk of intimate partner violence. The risk of serious harm in the event of any reoffending by the Applicant in the community was assessed as high to children and low to all other groups. The Psychologist witness considered that the risk of future sexual violence in the community was moderate.
25. The Risk Management Plan (RMP) involved release in the first instance to designated premises with probation service monitoring and support. There were to be licence conditions in force to manage the Applicant's risks, including restrictions on unsupervised contact with children, the use of mobile phones/internet devices, contact with the victims, an exclusion zone and testing for drugs and alcohol. He would be required to undertake one to one programmes in the community to consolidate and maintain the learning undertaken in custody. Supervision and licence conditions would continue after he moved on to suitable accommodation.
26. The POM, COM and Prison Psychologist all agreed that core risk reduction work had been completed and all supported the Applicant's release. The COM told the Panel that warning signs of escalating risk would be visible in the community. The Psychologist considered that there was no evidence to suggest that the Applicant was devious or manipulative.
27. The Panel did not accept that visible warning signs would indicate increased risk before serious harm occurred. It concluded that there was a material risk of the Applicant returning to drug and/or alcohol misuse, a precipitating factor, most likely between the period in designated premises and the SED.

28. The Panel expressly took into account and shared the COM's opinion that the explanation given by the Applicant for meeting the two girls who were the subject of the abduction notices was unconvincing. He said in relation to the first that he had met a 16 year old girl online and when they met up she brought a 14 year old with her. In respect of the second notice, he explained that he met a girl who was younger than he had been led to believe. The Panel concluded that the meetings were further evidence of a sexual interest in under-age girls and noted that the Horizon Programme does not specifically address the issue of sexual interest in children.
29. In the circumstances outlined the Panel concluded that the risk of future harm that the Applicant presents is more than a mere possibility and amounted to something of real significance. It concluded that it was still necessary for the Applicant to remain confined for the protection of the public and made no direction for release.

### The Relevant Law

30. The Panel correctly sets out in its decision dated 19 June 2024 the test for release.

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

31. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
32. 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*

33. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd -v- Wednesbury Corporation* 1948 1 KB 223 by Lord Greene in these words "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.
34. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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.*"



35. In *R(on the application of Wells) -v- Parole Board 2019 EWHC 2710 (Admin)* Saini J set out what he described as a more nuanced approach in modern public law which was *"to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied"*. This test was adopted by a Divisional Court in the case of *R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin)*.
36. As was made clear by Saini J this is not a different test from the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in Parole hearings as explained in *DSD* was binding on Saini J.
37. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
38. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.
39. Reconsideration is a discretionary remedy. That means that, even if an error of law, irrationality, or procedural unfairness is established, the Reconsideration Member considering the case is not obliged to direct reconsideration of the panel's decision. The Reconsideration Member can decline to make such a direction having taken into account the particular circumstances of the case, the potential for a different decision to be reached by a new panel, and any delay caused by a grant of reconsideration. That discretion must of course be exercised in a way which is fair to both parties.

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

40. PPCS has confirmed that no representations are offered by the Respondent.

### **Discussion**

41. In admirably succinct written representations, the Applicant's legal representative points out that the Applicant's risk was not considered by the professional witnesses to be imminent, that there would be warning signs before it reached that stage, that the RMP was robust and would manage any escalation, and that the Applicant now has insight into his offending behaviour, with internal factors to evidence a reduction in risk.
42. It is further submitted that the Applicant has evidenced a willingness and motivation to comply with the requirements of his licence, that he has evidenced openness and honesty and has built up a relationship with the professionals who would be managing him in the community.



43. Essentially these representations mirror those put forward in the post hearing submissions. They were acknowledged and taken into account by the Panel before making its decision. It is not argued that the Panel failed to apply the correct test for release. The test is clearly set out at the beginning of the decision document and there is nothing in the reasons to suggest that the Panel lost sight of it.
44. The Panel adopted an entirely objective approach in its analysis of the Applicant's risks, the protective factors in place and the effectiveness of risk management in the community.
45. The Panel concluded that the risk of serious harm posed by the Applicant had decreased but that it remained at a medium level. This implies that there is still a potential to cause serious harm and that this may be triggered by a change in circumstances. In the Applicant's case this could be a relapse into drug or alcohol or problems within an intimate relationship. The Panel also referred to the risk of isolation and boredom which all professional witnesses agreed could lead to disinhibited behaviour.
46. The Panel acknowledged that there had been no evidence of sexual pre-occupation in custody such as looking at pornography involving young looking females. However, it pointed out that he will experience a marked increase in exposure to young girls on release.
47. The risk of non-compliance and further offending is linked to the risk of serious harm. The need for the Applicant to remain confined has to be read in the context of the type of harm from which the public needs to be protected, in this case to young girls with whom contact would not be difficult. The fact that the Applicant's risk of serious harm has moderated and lacks imminence at the point of release does not mean that a risk does not exist.
48. In any event, the Panel concluded that if the Applicant relapsed into drug or alcohol use there would be a material risk that he would be able to access under-age girls in a very short period of time particularly in the period following his stay in probation designated premises. In my opinion, the Panel addressed the crucial issue of imminence with objective reasoning.
49. In its decision, the Panel carefully considered all the points raised in the Applicant's submissions and dealt with all of them in a logical manner. The fact that any or all professional witnesses have expressed an opinion about the imminence of a prisoner's risk and their suitability for release does not mean that a Panel has to accept it. Having read the written case material and heard all the oral evidence, the Panel was in the best position to apply its own independent judgment. It has done so in this case consistently, objectively and logically.

## Decision

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



**HH Judge Graham White**  
**23 July 2024**