[2021] PBRA 157

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**Application for Reconsideration by Farrell**

## Application

1. This is an application by Farrell ('the Applicant') for reconsideration of the decision of a panel of the Board ('the panel') which on 30 September 2021 issued a decision not to direct his release on licence and not to recommend that he should be transferred to an open prison.

2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.

## Background, and history of the case

3. The Applicant is aged 56 and has experienced significant trauma in his life, which has contributed to the development of problematic personality traits and behaviour. He is recognised to be a vulnerable adult with significant cognitive difficulties. He has spent most of his life in prison.

4. In February 1982, when the Applicant was aged 16, he murdered his girlfriend's two-year old daughter. He had been left in charge of the child and had been drinking. It appears that he was angry that his girlfriend had resumed a relationship with the child's father, and he was unable to cope with his emotions.

5. In June 1982, when the Applicant was still only 16, he received an indeterminate sentence (Detention at Her Majesty's Pleasure) for the murder. His tariff was set at 7 years, no doubt in recognition of his young age. The tariff expired more than 30 years ago.

6. His progress during his sentence has been difficult. On a number of occasions, helpfully summarised by the panel in its decision, he has spent periods in open prisons or on licence in the community, but these were not successful and he had to be returned on each occasion to closed prisons.

7. His last period on licence in the community was between July and November 2018 when he was housed in specialist accommodation for men with personality problems and complex needs.

8. Following his return to prison in November 2018, his case was referred by the Secretary of State to the Parole Board to decide whether to direct his re-release on licence and, if not, to advise the Secretary of State about his suitability for another period in open conditions.

9. This review of the Applicant's case by the Board has been long drawn out (largely due to the need for a face-to-face hearing and the suspension of such hearings as a result of the COVID-19 pandemic).

10. Eventually, however, the case was considered by the panel at an oral hearing in May 2021. The panel comprised two independent members of the Board and a specialist psychiatrist member. Present at the hearing, in addition to the Applicant and the three panel members, were:
    - The Applicant's legal representative;
    - A psychologist who had carried out a structured assessment of his risks;
    - The official responsible for supervising him in prison (A);
    - The official who would be responsible for supervising him on licence (B); and
    - A member of the prison staff.

11. There was evidence at the hearing of a considerable improvement in the Applicant's attitudes and behaviour since his latest recall. He had engaged well in sessions with A and with a prison psychologist.

12. It was the panel's task (a) to assess the Applicant's current risk of serious harm to the public and (b) to decide whether that risk could be managed safely on licence in the community or whether it required his continued confinement in prison.

13. Essential to the second of those exercises was the risk management plan proposed for the panel's consideration. There was general agreement that neither of the normal routes for progression (a further period in open conditions or release to designated probation accommodation) would be appropriate in the Applicant's case.

14. It was accepted by all the professionals (and by the Applicant himself) that he would require accommodation providing significant psychological and practical support if he was to resettle successfully into the community. The accommodation at which he had resided when last on licence had closed down but a new service had been established which offered a similar provision for offenders with personality problems.

15. Both A and B had made enquiries about the Applicant's suitability for this new service. They told the panel that the indications were that the Applicant would meet the criteria for admission: the professionals involved in the new service had known him from the previous one and appeared to be willing to work with

him again. However, regrettably, no formal assessments of his suitability for the new service had taken place.

16. In the circumstances, since there was no alternative release and risk management plan, it was agreed by the panel and all participants that the hearing would have to be adjourned for (a) the assessments to be carried out (b) the Board to be notified of the outcome (c) information about the new service to be provided and (c) an addendum report to be provided by B in the light of the information then available.

17. In pursuance of those directions a document explaining the new service was obtained and an addendum report was duly provided by B. A further report was also provided by A, and there was an updated security report. Although reference was made by A and B in their reports to the assessment by the new service, the actual record of that assessment was not produced until much later (see below).

18. Representations were then submitted by the legal representative. They were rather aggressive in tone, stating that: *'It is the Applicant's position that further delay to this process is likely unlawful. Post hearing issues which have been raised are inappropriate, unevidenced and blur what is a straightforward case.'* This was an entirely inaccurate description of the position which had been reached. The legal representative does not seem to have appreciated that the panel was simply investigating, in the interests of his client, the possibility of a direction for release (as opposed to the negative decision which would have been the inevitable outcome if the panel had had to make its decision on the evidence presented at the hearing in May). The case was anything but straightforward.

19. On 15 July 2021 the panel chair issued directions requiring the production of the record of the assessment and a further report by B, and directing a case management conference to be attended by A, B and the Clinical Lead of the new service. A case management conference is a relatively new procedure for the Board, as will be explained below.

20. The record of the assessment, dated 8 June 2021, was then produced. It was written by two assessors from the new service (Ms X and Ms Y). In its original form the assessment report stated without qualification that the service would meet the Applicant's needs, but 6 days later it was amended to state that the service would meet his needs *'after a period in a medium secure setting'.* The circumstances in which that amendment came about will be discussed below.

21. The case management conference took place on 24 August 2021. The participants were the panel chair, the psychiatrist member of the panel, the Applicant's legal representative, A, B's supervisor and the Service Manager of the new service. As is usually the case with case management conferences, the Applicant himself was not invited to participate.

22. There was an unfortunate falling out at the case management hearing between the panel chair and the legal representative. To understand how that

came about it is necessary to say something about the case management conference procedure. That procedure is not specifically provided for in the Parole Board Rules but was developed by the Board itself as a useful way of clarifying and if possible narrowing the issues in the case, thereby achieving a saving of time and resources.

23. The procedure was explained in a document entitled 'Parole Board Stakeholder Information on Case Conferences' which was issued by the Board in October 2020 after the successful outcome of a pilot scheme.

24. As that document explained:

*"Case Conferences were piloted as a way for the parties and the panel chair to come together for a short and less formal discussion, usually by teleconference, in advance of the scheduled oral hearing to try to resolve identified issues. The aim is to avoid an adjournment or deferral of the review, by identifying and resolving, for example, shortfalls in information, non-compliance with directions or developments in the case since the MCA review.*

*A Case Conference will bring together only the relevant people needed to find a way forward swiftly and effectively to avoid the potential for delay. It can be a quick and focussed tool and, at times, can just involve the panel chair, the prisoner's representative and a Secretary of State's representative, although other attendees might be identified as needing to attend.*

*A Case Conference should not be used to discuss evidence: if evidence needs to be included as part of a discussion then a Directions Hearing will most likely be needed. A record of the submissions made by those involved in a Case Conference is not taken (but see Case Conference Outcome below).*

*In summary, at a Case Conference:*
*- The panel chair usually sits alone;*
*- The prisoner's representative and Secretary of State's representative must be invited;*
*- Only the relevant witnesses are required to attend;*
*- Evidence should not be discussed or taken;*
*- Directions may be issued, where considered necessary; and*
*- A formal record of proceedings is not taken but often Panel Chair Directions will be issued as a result of the conference."*

25. It follows from the above that normally a case conference will take place before rather than after the oral hearing, but an Annex to the Stakeholder Information document lists examples of situations when a case conference might assist, one of which is:

• *To follow up on an oral hearing by clarifying a small point or issue, without the need to hold a further oral hearing.*

26. In this case the reasons for holding a case conference were explained as follows in the Panel Chair Directions issued by the panel chair on 15 July 2021:

*"The panel had an updated dossier which totals 686 pages but does not include the report of the [assessment by the new service]. It is not entirely clear from the information seen by the panel whether [the Applicant] has been accepted for a place or whether they require him to do further interventions before being offered a place. It is stated that he was to be assessed for [two] alternative pathways. The Representations state that [the Applicant] has been accepted for a place at [the new service] and ask the panel to direct his release. The panel considers that a case conference is required to discuss the outcome of the assessments and the proposals for release/further interventions (in the knowledge that the Parole Board has no jurisdiction to recommend any specific treatment pathway in custody)."*

27. The directions, while stating that A, B and the Clinical Lead Psychologist of the new service should attend the case conference, added that if the Clinical Lead considered that it would be helpful for another member of the team to attend the case conference in addition to her, she could submit a request for the Chair's consideration.

28. There is no reference in the dossier to such a request having been made but in fact, as related above, it was the Service Manager of the new service who attended the case conference and the Clinical Lead did not. No objection seems to have been raised to that change of plan.

29. Because this was a case management conference (and not an oral hearing or directions hearing) there was no audio recording. However, there are four useful sources of information which have enabled me to piece together a reasonably clear picture of what happened: (1) the account contained in the panel's decision letter (2) a statement by the legal representative in support of this application (3) the panel chair's handwritten notes which she has helpfully provided and (4) an e-mail from the panel chair to the Board's Reconsideration Case Manager.

30. The panel's decision letter contains a detailed account of information provided by the Service Manager. That account is, with one exception, accepted by the legal representative as being accurate. The one exception is that the legal representative has no note or recollection of part of one sentence. I have checked the panel chair's notes and see that that part of that sentence does not appear there. That does not necessarily mean that the words were not spoken but in the interests of fairness I have disregarded them and omitted them from the following quotation of the relevant part of the decision letter:

*"[The Service Manager] explained at the case conference that following the assessment, [Ms X] expressed concern about whether [the Applicant] was ready for a move to [the new service], given his previous history, including the speed with which he failed at [the previous service]. Discussions were held with [B] and the former manager of [the previous service] and then at a formal multi-disciplinary Referral Panel.*

*It was concluded that [the Applicant] needed a further period of containment and to demonstrate consistent settled behaviour. They also considered that he needs to complete further psychological or therapeutic work on his*

*behavioural issues, substance misuse and managing his triggers so as to prevent a repeat of what happened on release to [the previous service]. [They suggested two possible locations for this work to take place] as they were concerned about taking him direct from closed conditions.*

*In response to questions from [the legal representative], [the Service Manager] stressed that the decision had been taken by the multi-disciplinary team that included staff who knew [the Applicant] from his time at [the previous service]. She confirmed that it was the decision of the Referral Panel that [the Applicant] was not yet ready for a move to [the new service] and that a period of stability and consolidation in a setting such as [was suggested] was necessary. She confirmed that [the Applicant] would not be accepted at [the new service] even were the Parole Board to direct his release, without this further work taking place."*

31. Examination of the legal representative's statement and the panel chair's notes and e-mail reveals how the falling out between them arose, as I will explain in the 'Discussion' section below.

## The Relevant Law

### *The test for re-release on licence*

32. The test for re-release on licence was of course whether the Applicant's continued confinement in prison was necessary for the protection of the public. This test was, as one would expect, correctly set out by the panel at the start of its.

### *The rules relating to reconsideration of decisions*

33. Under Rule 28(1) of the Parole Board Rules 2019 a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence.

34. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by
- a paper panel (Rule 19(1)(a) or (b)) or
- an oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
- an oral hearing panel which makes the decision on the papers (Rule 21(7)).

35. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases on either or both of two grounds: (a) that the decision is irrational or (b) that it is procedurally unfair.

36. The decision of the panel in this case not to direct release on licence is thus eligible for reconsideration. The decision not to recommend a move to an open prison is not.

### *The test for irrationality*

37. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin) (the "Worboys case")**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It stated at para. 116:

> *"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

38. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review.

39. 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.

40. The Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see **Preston [2019] PBRA 1** and other cases.

***Procedural unfairness***

41. 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 from the issue of irrationality which focusses on the actual decision.

42. It has been established that the things which might amount to procedural unfairness include:
    (a) A failure to follow established procedures;
    (b) A failure to conduct the hearing fairly;
    (c) A failure to allow one party to put its case properly;
    (d) A failure properly to inform the prisoner of the case against him or her; and/or
    (e) Lack of impartiality.

    This is not an exhaustive list. The fundamental question on any complaint of procedural unfairness is whether, viewed objectively, the case was dealt with fairly.

43. It is important to distinguish between procedural unfairness and a procedural irregularity. Procedural irregularities of one kind or another are not uncommon. A procedural irregularity may or may not result in procedural unfairness. It will not do so if it is insignificant or if the panel's decision would clearly have been the same if the irregularity had not occurred.

**Request for Reconsideration**

44. The Applicant's solicitors advance four grounds for reconsideration of the panel's decision:

Ground 1 (irrationality): The panel's decision irrationally ascribed weight to the recommendations of the psychologist who gave evidence at the hearing in May.

Ground 2 (procedural unfairness): The report of the psychologist was conducted in such a way that ascribing weight to it rendered the case procedurally unfair.

Ground 3 (procedural unfairness): The hearing in August was conducted in a manner which deprived the Applicant of the opportunity to test evidence.

Ground 4 (procedural unfairness): The Panel Chair's conduct of the hearing in August would give a fair-minded reasonable observer to conclude that she was biased against the Applicant.

**Documents considered**

45. I have considered the following documents for the purpose of this application:

- The dossier provided by the Secretary of State for the Applicant's case, which now runs to page 718 and includes a copy of the panel's decision letter;
- The representations submitted by the Applicant's solicitors in support of this application;
- The witness statement made by the Applicant's legal representative which is attached to those representations;
- The following authorities which are also attached to those representations:
  - **Bushell v Secretary of State for the Environment (1980) UKHL 1**
  - **Balajigari and others v Home Secretary (2019) EWCA Civil 673**
  - **Bubbles & Wine Ltd v Lusha (2018) EWCA Civil 468**
  - **R (Mordecai) v Parole Board (2016) EWHC 2601 (Admin)**
- The Panel Chair's notes of the case management conference;
- The Panel Chair's e-mail to the Board's Reconsideration Case Manager; and
- An e-mail from PPCS stating that on behalf of the Secretary of State they offer no representations in response to this application.

**Discussion**

46. Before I embark on a discussion of the grounds advanced by the solicitors in support of this application, I need to make some general observations about this case.

47. The panel could only have directed the Applicant's release on licence if it had been able to conclude that there was a release and risk management plan likely to be effective to enable his risk of serious harm to the public to be managed safely on licence in the community.

48. There was no such plan. The panel had adjourned the hearing in May to enable the possibility of such a plan to be investigated. It is clear that the panel would have been prepared to consider release on licence if such a plan could be put together. Unfortunately it could not, so it was inevitable that unless the panel was prepared to adjourn the case again - it would have to issue a negative decision.

49. The panel's decision not to adjourn the hearing again, which is criticised by the solicitors, cannot by any stretch of the imagination be regarded as irrational. On the contrary it was entirely justified. This review had already dragged on for an unusually long time. In his representations following the hearing in May 2021 the legal representative had not suggested an adjournment and indeed had objected strenuously to any further delay in the Board's review of his client's case.

50. In his representations of 6 September 2021, after the case management conference, the legal representative submitted for the first time that the hearing should be adjourned: the ground on which that suggestion was made was that it would enable a fresh psychological risk assessment (addressing the Applicant's risk of harm) to be carried out and consequential reports to be submitted by A and B.

51. It would of course have been open to the Applicant's solicitors to commission an independent psychological risk assessment at a much earlier stage of the proceedings, but it seems that they had not done so (or, if they had, they had chosen not to rely on it).

52. In rejecting the belated application for an adjournment the panel took the entirely justifiable view that a further psychological risk assessment would not assist it in its decision-making. There was no dispute that the Applicant poses a significant risk of serious harm and, as indicated above, the panel's decision was going to depend on whether there was a risk management plan likely to be effective to enable his risk to be managed safely on licence in the community. A further psychological risk assessment would have been of no assistance in that connection.

53. I can now turn to consider the four grounds advanced in support of this application. In considering each of them I must decide (1) whether the complaint being made has been substantiated and (2) if it has, whether the panel's decision not to direct re-release on licence might have been different if the matter complained of had not occurred.

***Ground 1 (irrationality): The panel's decision irrationally ascribed weight to the recommendations of the psychologist who gave evidence at the hearing in May 2021***

54. The psychologist carried out a detailed risk assessment in January 2018, when she interviewed the Applicant as part of the assessment process. Her

conclusion was that the Applicant's risk was such that he should not be released on licence. She made some suggestions for the future management of his case.

55. She then gave evidence in March 2018 at the oral hearing which resulted in a direction for release to the specialist accommodation: at that hearing she accepted that the Applicant's risk could be managed in that accommodation with additional psychological support: the consequence of that, if correct (as the then panel found to be the case), was that his continued confinement in prison was no longer necessary.

56. Subsequently (after the Applicant had failed, yet again, at the specialist accommodation) the psychologist prepared addendum reports in October 2019 and March 2021 but on neither of those occasions did she interview the Applicant before writing her report.

57. In her evidence to the panel in May the psychologist expressed the view that the Applicant needed to remain in custody to undertake further intervention. She offered a number of suggestions including transfer to a special unit in an open prison. She gave her evidence, of course, before any detailed information was available about the possibility of a place with the new service, and it seems fairly clear that she was not asked to comment on its likely effectiveness to manage the Applicant's risk. She was not asked for any further report and was not present at the case management conference.

58. The legal representative, in the closing submissions which he made in writing on 5 July 2021, made a number of reasonable points challenging the reliability of the psychologist's evidence. Further points are made in the solicitors' representations in support of the current application.

59. It is a fair point that the psychologist's original and very detailed assessment was well out of date, and her more recent assessments were open to a number of criticisms. Those criticisms are conveniently summarised in the solicitors' representations as follows:
    (a) The psychologist's 2021 report was not based on meaningful clinical contact;
    (b) The Applicant has expressive difficulties and was only offered the opportunity to comment on the substance of the 2021 report after the psychologist had reached her conclusions;
    (c) The Applicant does not seem to have commented on the 2019 report at all; and
    (d) There is no record of the psychologist affording the Applicant any reasonable adjustments, having regard to his cognitive abilities, in compiling the 2019 and 2021 reports.

60. Whilst these points certainly carry a good deal of weight, I do not believe that they show that the psychologist's opinions should have been disregarded altogether; and I do not believe, having carefully examined the panel's decision letter, that the panel attached undue weight to her evidence or that

its decision would have been any different if that evidence had been disregarded altogether.

61. There was little dispute at the hearing about the risk which the Applicant presented. In fact the psychologist's assessment of his risk to children as moderate was more favourable to him than B's assessment of it as high. The panel preferred the psychologist's assessment to B's.

62. The real issue, as indicated above, was whether there was an effective risk management plan. The key part of the panel's decision reads as follows: *'All the witnesses and [the Applicant himself] agreed that he needs a structured and supportive release plan within specialist accommodation for those with complex personality disorder. He has been accepted in principle for a placement with [the new service] however they do not consider that he is ready for the transition into the community until he has completed further therapy or psychological work around his personality disorder. Nor is a place currently available for him.'*

63. That being the case it is inconceivable that the panel's decision not to direct re-release would have been any different if the psychologist's evidence had been excluded or disregarded. I cannot, therefore, accept this ground as justifying a direction for reconsideration of the decision.

***Ground 2 (procedural unfairness): The report of the psychologist was conducted in such a way that ascribing weight to it rendered the case procedurally unfair.***

64. Procedural errors or omissions on the part of a professional witness in preparing his or her report do not in themselves afford a ground for saying that a hearing was procedurally unfair. Rule 28(1)(b) is concerned with procedural unfairness on the Board's part: it is the Board's decision which must be shown to be procedurally unfair if a complaint under Rule 28(1)(b) is to be upheld.

65. If there is to be criticism based on procedural errors or omissions on the part of a professional witness, that criticism should therefore be directed at the panel for the way in which it dealt with the witness's evidence.

66. In summarising the psychologist's evidence in its decision, the panel referred (without comment) to the fact that she did not interview the Applicant for her addendum reports but that she had held a lengthy telephone conversation with him to discuss her recommendations and conclusion in her 2021 report.

67. It might perhaps have been better if the panel in its decision had made some reference to the matters relied upon by the legal representative in questioning the value of the psychologist's evidence. However, for the reasons explained in paragraphs 60-63 above I am not persuaded that the panel attached undue weight to the psychologist's evidence, and I am satisfied that the panel's decision would inevitably have been the same if it

had adopted a more critical approach to the psychologist's evidence. I cannot, therefore, accept this ground as justifying a direction for reconsideration of the decision.

***Ground 3 (procedural unfairness): The hearing in August 2021 was conducted in a manner which deprived the Applicant of the opportunity to test evidence.***

*The documents added to the dossier after the hearing in May 2021*

68. The first complaint made under Ground 3 is that more than 90 pages of material were added to the dossier after the May hearing. I cannot accept that there is any force in this complaint. It ignores, I am afraid, (a) the unsatisfactory situation in which the panel, the Applicant and his solicitor were all placed at the May hearing as a result of the lack of a viable release and risk management plan, and (b) the need for the panel to take steps (in the Applicant's interests) to see whether such a plan could be put together so as to enable release on licence to be directed.

69. The responsibility for formulating a risk management plan for a prisoner and making the enquiries necessary to obtain the necessary information rests with the official who will be responsible for supervising him in the community if he is released on licence. In this case that official (B) was not supporting the Applicant's release on licence but was nevertheless under a duty - in case the panel disagreed with him - to make the necessary enquiries and produce a release and risk management plan (with a proposed release address) in good time before the oral hearing. Although he did make contact with the new service, he seems to have done so too late to enable an assessment of the Applicant's suitability for the service to be made.

70. It was in those circumstances that the panel adjourned the hearing so that the necessary assessment could be made by the new service. Although the assessment was made on 8 June 2021 there was a considerable delay in the assessment report being provided to the panel. When the assessment report was finally produced it did not make it entirely clear what the new service's position was and whether it might be possible for the panel to direct release on licence to that service. Further information was therefore needed.

71. All of that explains why the further documents were added to the dossier. It should be noted, incidentally, that 67 of the additional pages contained an updated version of the standard probation risk assessment document which (as is normal practice) was attached to B's report. Only a few bits of the material contained in that document were new.

*The conduct of the case management conference*

72. The panel chair had a number of options to obtain the information which the panel needed: (a) to direct that the panel should reconvene for a further oral hearing; (b) to direct further information in writing from the new service; (c)

to direct a directions hearing (at which evidence could be taken); or (d) to direct a case management conference.

73. The panel chair opted for this last course, and her decision cannot be criticised. A case conference after the oral hearing is unusual, but permitted where the purpose is to 'to clarify a small point or issue'. As the panel chair must have seen it, obtaining clarification of the new service's position and one or two other points fell within that purpose. She clearly anticipated that it would be a fairly straightforward matter to find out from the new service what exactly its position was and to obtain clarification of other points.

74. It is a moot point, with all the benefit of hindsight, whether it might have been preferable to choose one of the other options, which would have ensured that there was a recording of the precise information obtained. However, the panel chair was not to know what problems might arise at the case conference, and it was certainly not unreasonable for her to make the choice which she did.

75. I have explained in paragraph 29 above the sources of evidence which have enabled me to have a reasonably clear picture of what happened at the case management conference. It is clear that each side (the panel chair and the legal representative) felt that the other was behaving inappropriately.

76. In the absence of an audio recording, I asked the Board's Reconsideration Case Manager to obtain the notes which I was sure would have been made by the panel chair at the case management conference.

77. The panel chair duly provided those notes. In her e-mail to the Case Manager she commented that the legal representative was not approaching the case management conference in the manner appropriate for such a conference and was becoming increasingly combative, so much so that she and her psychiatric colleague were quite shocked by his attitude. There was, in addition to this e-mail, a reference in the panel's notes to the legal representative's combative attitude.

78. I did not seek to obtain any further information from the panel chair. It is unusual for a Reconsideration Assessment Panel (which is what I am) to seek to obtain information from the panel whose decision is the subject of a reconsideration application, though there are of course circumstances in which that is necessary. I did not consider it to be necessary in this case. I already had sufficient information to be able to make a decision, as will be apparent from what follows.

79. The principal bone of contention between the legal representative and the panel chair arose out a number of occasions on which she intervened to discourage him from pursuing lines of questioning which he considered to be appropriate.

80. As anticipated by the panel chair, it was a reasonably straightforward matter to find out from the Service Manager what the new service's position was, and to obtain a few other pieces of information from A and from B's superior. The

legal representative was invited to question the witnesses and did so. Problems began when he started to pursue certain lines of questioning which the panel chair regarded as being irrelevant and which were certainly outside the scope of a case management conference.

81. In an oral hearing it is part of the panel chair's task to ensure that questioning of witnesses is confined to matters relevant to the panel's decision, and in a case management conference the panel chair must have a similar responsibility to ensure that questioning remains relevant to the object of the conference.

82. It is clear from the panel chair's contemporaneous note and her subsequent e-mail that in this instance the legal representative wished to stray outside the limits of a case management conference and that some of his questions were irrelevant to the exercise in which the panel was engaged. The panel chair was therefore quite right to intervene when she did. Unfortunately the legal representative's reaction to her interventions appears to have been inappropriate and, to use the panel chair's word, 'combative'. This no doubt led to a diminution in the courtesy which normally exists between panel members and legal representatives.

83. A specific matter of dispute between the legal representative and the panel chair was whether the panel was or was not 'taking evidence', which the Information for Stakeholders says should not happen (no doubt because it is desirable for all the evidence considered by a panel to be recorded).

84. The question whether a panel is 'taking evidence' is not as straightforward as it might at first sight appear to be. There is a distinction between taking evidence and seeking clarification of matters already in evidence, but the dividing line may not always be easy to see.

85. It is not, therefore, altogether surprising that there was a difference of opinion between the panel chair and the legal representative about which side of the dividing line the exercise being carried out by the panel fell. The panel chair insisted that the panel was not 'taking evidence', while the legal representative insisted that it was. Both views were defensible.

86. The panel chair's perspective on this issue was no doubt that her intention had been merely to clarify matters already in evidence, whereas the legal representative's perspective was that the panel's questioning went beyond that.

87. Differences of opinion do sometimes occur, and I am not persuaded that there was any procedural irregularity on the part of the panel chair in the conduct of the case conference. She was adopting the position which she genuinely and reasonably believed was the correct one.

88. Even if there was any procedural irregularity on the part of the panel chair, which I do not believe there was, it cannot have resulted in any unfairness to the Applicant or affected the panel's decision in any way. Once the Service

Manager had made it clear (as I am satisfied she did) that there was no way in which the new service was going to accept the Applicant at this stage, it was inevitable that the panel could not direct the Applicant's release on licence.

89. The legal representative appears to have wished to question whether the service's decision was unreasonable and inappropriately influenced by probation. However that may be, the fact remains that it was their decision. The Service Manager specifically said (in answer to a question from the legal representative) that their view would not change if the Board decided to direct the Applicant's release on licence. The Board, of course, has no power to require a service provider to accept a prisoner if it does not wish to do so. The panel was therefore obliged to proceed on the basis of the service's decision.

90. Furthermore even if, which I do not believe was the case, it was a procedural irregularity for the panel chair to direct a case management conference instead of using one of the other procedures to obtain the information which the panel needed, that irregularity could not have resulted in any unfairness to the Applicant. It is perfectly clear that the Service Manager's account of the service's position would have been the same if it had been given in an adjourned oral hearing or in a directions hearing or in writing in a report directed by the panel chair.

91. For all of these reasons I cannot accept this ground as justifying a direction for reconsideration of the panel's decision.

***Ground 4 (procedural unfairness): The Panel Chair's conduct of the hearing in August would give a fair-minded reasonable observer to conclude that she was biased against the Applicant.***

92. This is the correct test for deciding whether an allegation of actual or perceived bias has been made out. However, the notional fair-minded observer is somebody with a full understanding of the Board's remit and procedures and the responsibilities of a panel chair. I do not believe for one moment that such a person would have concluded that the panel chair was biased against the Applicant in this case.

93. As pointed out above, so far from being biased against the Applicant the panel members had been anxious to explore the possibility of finding a release and risk management plan which would have justified a direction for re-release on licence. The door was firmly closed on that possibility by the new service's decision not to accept the Applicant at this stage.

94. As regards what happened at the hearing, the solicitors rely on three matters in support of their contention that the fair-minded reasonable observer would have concluded that the panel chair was biased.

95. The first matter relied on is 'the tone of the panel chair and her raised speech'. I believe that the fair-minded and properly informed observer would have understood that this (if it was a fair description) was a result of the legal

representative's combative response to the panel chair's entirely proper attempt to confine his questioning to relevant matters. It had nothing to do with bias against the Applicant.

96. The second matter relied on is *'the insistence of the panel chair that the 24 August hearing was not for the purpose of taking evidence, when this was clearly not the case'.* I have explained above why there was an understandable difference of opinion on this difficult point, and the panel chair's position was certainly not unreasonable. It was not an indication of bias against the Applicant, as the fair-minded and properly informed observer would certainly have realised.

97. The third matter relied on is *'the actions taken by the panel chair to interrupt the legal representative's questioning of witnesses'*. I have explained above why the panel chair's interruptions were fully justified and part of her responsibility to confine the questioning to relevant matters. They were not indications of bias against the Applicant, as the fair-minded and properly informed observer would have realised.

98. There is, therefore, no basis for the serious allegation made against the panel chair in the solicitors' representations, and there is no substance in this ground for seeking reconsideration of the panel's decision.

**Decision**

99. For the reasons set out above I must refuse this application. I share the panel's hope, expressed at the end of its decision, that the Applicant *'will continue with his positive progress and that the professionals working with him will identify an appropriate pathway to enable him to be accepted for a place at [the new service] in time for his next review.'* In the light of what the Service Manager stated at the case management conference there was no way in which the panel could have directed his release on licence at this stage. The panel's decision was entirely rational and indeed inevitable, and there was no procedural unfairness.

**Jeremy Roberts**
**10 November 2021**