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[2021] PBRA 158

Application for Reconsideration by Bailey

Application

1. This is an application by Bailey (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 17 October 2021 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have listened to the recordings of both hearings as the application makes specific reference to certain points relating to the conduct of the hearing. I have also asked the panel chair from the first hearing to clarify some of the arrangements made during that hearing.

Background

4. The Applicant is serving a sentence of life imprisonment imposed on 11 January 2008 following conviction for rape, buggery and indecent assault. His tariff is reported to have expired on 8 February 2012. The offences took place in 1991 but were not brought to trial until 2007 on the basis of DNA evidence. The Applicant was convicted while serving a 14-year sentence (now served) for three counts of rape imposed in 1994, committed as part of the same series of crimes.

5. The Applicant was aged 44 at the time of sentencing. He is now 58 years old.

Request for Reconsideration

6. The application for reconsideration is submitted by the Applicant. It is undated, but it was received by the Parole Board via his current establishment on 29 October 2021.

7. The application advances a number of grounds for reconsideration including both irrationality and procedural unfairness. Given that the application has not been drafted by a lawyer, I will, in fairness to the Applicant, deal with each point raised in the application by reference to the appropriate legal test(s) in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State in April 2020 to consider whether or not it would be appropriate to direct his release. If the Board did not consider it appropriate to direct release, it was invited to advise the Secretary of State whether the prisoner should be transferred to open conditions.

9. This was the Applicant's third parole review. His last parole review was held in July 2019 by way of oral hearing ("the 2019 hearing"). The options available to the panel were the same then as in the current review. The Applicant was in Category A closed conditions at the time.

10. The panel at the 2019 hearing concluded that the Applicant did not meet the test for release but did recommend progression to open conditions, concluding that the benefits outweighed the risks to the public. This decision did not accept the recommendations of professional witnesses at that time that the Applicant needed to remain in closed conditions (which, of course, it was perfectly at liberty to do). The Secretary of State considered the panel's recommendation and decided not to accept it, noting as follows:

> *'[The Applicant had] completed some work designed to address and reduce [his] risk of offending, but the Secretary of State [was] concerned that [he had] yet to provide clear evidence of a significant reduction in your risk of harm. While the Parole Board concluded that a transfer to open conditions would provide [him] with an opportunity to demonstrate a reduction in risk, it [was] the Secretary of State's view that [he was] suitably placed in the High Security Estate and [he] should complete a successful period in a [regime designed and supported by psychologists to help people recognise and deal with their feelings] following which a detailed assessment of [his] risks can be conducted to determine any further treatment needs before progression to lower security can be considered. This decision is consistent with the Secretary of State's overarching duty to protect the public from harm.'*

The Applicant therefore remained in Category A closed conditions.

11. The current review was directed to oral hearing by a Member Case Assessment (MCA) panel on 30 October 2021. The MCA panel took note of legal representations received at the time. It noted that the Applicant was seeking a move to open conditions, that he was significantly post-tariff, and that he had been positively engaged in a high security psychologically-informed regime since September 2019. Updated reports were directed (with these directions being updated in the light of further information on 26 November 2020).

12. The case was listed for oral hearing on 25 March 2021. On 23 February 2021, the Parole Board received a Stakeholder Response Form (SHRF) from the Applicant's legal representative seeking a deferral of the hearing. It noted that a review of the Applicant's Category A status by the Category A Review Team (CART) was due and that there was a realistic prospect of success. If downgraded, the Applicant wished to use this as further weight to his application for progression. The application was granted, and the case was deferred. It was relisted for 14 September 2021.

13. On 1 July 2021, a SHRF on behalf of the Secretary of State noted that the CART review took place on 24 May 2021, but decided it needed further information before

a decision could be made. It anticipated the outcome should be known by 30 August 2021. The Applicant's legal representatives noted concerns about the viability of the relisted hearing but did not seek a deferral at that stage.

14. A panel chair was appointed to this case on 19 August 2021. After reviewing the SHRF, Panel Chair Directions (PCDs) were issued on 20 August 2021, directing that the case should proceed to an oral hearing as listed with a view on any further deferral being taken on the day.

15. The case proceeded to an oral hearing on 14 September 2021 (the "first hearing"), before a three-member panel, including a psychologist specialist member and a judicial member. The hearing was held by video conference due to COVID-19 restrictions. The Applicant had chosen to represent himself at the hearing. The recording indicates that the Applicant was represented until "*two to three weeks before the hearing*". The panel checked with the Applicant that he was content to represent himself, that he understood the ramifications of that decision and that he made an informed choice not to have a legal representative. The Applicant replied that he was "*fully content"*. He said the reason he did not have legal representation was due to some form of "*conflict of interest"* with them, and, since he wanted to change solicitors, he was no longer entitled to Legal Aid. He reiterated he was "*fully content to represent [his] own case*". The panel chair reminded the Applicant of his right to stop the hearing (to seek representation) if he felt he was being treated unfairly but noted this would inevitably result in a deferral.

16. The Applicant confirmed that his dossier ran to 1,290 pages, as did the panel's and that of his POM. His COM did not have the full dossier, nor a copy of the report from the prison psychologist but did have copies of the most recent reports.

17. The Applicant told the panel that his application was for release, but, in the alternative, he sought a recommendation for open conditions.

18. Oral evidence was taken from the Applicant, his Prison Offender Manager (POM), and his Community Offender Manager (COM). The panel heard part evidence from the prison psychologist. Extensive oral evidence was taken. Due to time constraints, having taken over five hours of oral evidence, the panel was unable to conclude the hearing.

19. The panel chair noted that she was unavailable in October/November 2021 and the psychologist member would be on extended leave from November 2021. The only date all three panel members could make was not suitable for all witnesses. It was proposed that the continued hearing could potentially proceed with a two-member panel in October 2021 if acceptable to the Applicant. This would mean the current panel chair stepping down and one of the continuing panel members – both of whom are accredited to chair panels – chairing the reconvened hearing. The Applicant said he would "*rather just get it dealt with*". The Applicant was offered the opportunity to submit interim written representations prior to any adjournment PCDs being issued, which he did, amounting to some 20 pages.

20. At the outset of these representations, the Applicant noted that "*the panel was patient, and it was helpful that [it] interrupted at points to keep [him] on track".* He said, with regard to legal representation, that he "*probably bit off more than [he]*

could chew" but "*did not believe…this affected the fairness of the hearing".* He also noted that he had "*some reservation about just two panel members attending the next hearing"* and asked for "*reassurance that the person not available will be able and shall listen to the concluding part of the hearing and then a decision will be made"*.

21. Adjournment PCDs of 27 September 2021 acknowledged the Applicant's interim written representations and his concerns about proceeding with a two-member panel. They noted that, having sought guidance from the Parole Board legal department, a Parole Board member cannot be part of the decision-making process unless they are in attendance at the re-convened hearing to hear all the evidence, and that recordings cannot be used for this purpose. A reconvened hearing before the two continuing panel members was proposed on 13 October 2021. The PCDs clearly gave the Applicant the opportunity to submit his view on proceeding in this way. If the hearing was deferred, it would be likely to be relisted in "*early 2022"*.

22. The Applicant replied in writing. The reply is dated 30 August 2021 which must be incorrect as this predates the first hearing. The context shows that it is a clear response to the adjournment PCDs, stating "*I have considered carefully how to proceed on the understanding that just two panel members will reconvene the hearing…I have decided that I wish to continue with my hearing with trust that you will be sagacious, independent and objective in reaching your decision"*.

23. The Applicant did not seek a longer deferral to take the outcome of the CART into account.

24. The hearing duly reconvened on 13 October 2021 (the "second hearing") with the two continuing panel members: the judicial member and the psychologist specialist member. The hearing was held by video conference. The judicial member chaired the reconvened hearing. The Applicant was not legally represented. He affirmed that he was "*happy to continue*" with a two-member panel. The oral evidence was completed. The Applicant presented an oral closing statement in which he reiterated his application for release, or, if release was not directed, to "*give [him] what was given to [him] before*" (at the 2019 hearing; that is, a recommendation for open conditions).

25. No professional witness was supporting release or a move to open conditions. The panel agreed and did not direct release or recommend open conditions.

The Relevant Law

26. The panel correctly sets out the test for release in its decision letter dated 17 October 2021.

Parole Board Rules 2019

27. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made

by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).

28. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Procedural unfairness

29. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore, producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

30. 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.

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

Irrationality

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

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

33. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

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

The reply on behalf of the Secretary of State

35. The Secretary of State has submitted no representations in response to the application.

Discussion

36. The first point raised by the Applicant is that he was placed at an unfair disadvantage: since two members of the first hearing panel knew they had limited short-to-medium-term availability thereafter, it followed that if the Applicant requested a further deferral to seek fresh legal representation, then his case "*was threatened to be put back some considerable months"*. He says he represented himself "*by default"*.

37. Withdrawing his instructions from the firm representing him relatively close to the hearing was the Applicant's choice. It was always open to the Applicant to seek alternative legal representation. I accept that this put the Applicant in a difficult situation in which he had to choose between proceeding unrepresented or suffering delay. However, any resulting delay would not have been exacerbated by the first panel's availability or lack thereof. The matter would have been relisted in line with the Parole Board's listing prioritisation framework and would have almost inevitably gone to an entirely fresh panel: in all likelihood, the deferred hearing would have been listed sooner with a fresh panel than would have been the case if the first panel decided to retain it.

38. The first panel chair reminded the Applicant of his right to stop the hearing to seek representation if he felt he was being treated unfairly. While it was put to him that this would inevitably result in a deferral, I do not find, having listened to the audio recording, that this was done in a threatening way. In any event, the Applicant twice stated that he was "*fully content*" to proceed unrepresented and he had made an informed choice to do so. The Applicant reaffirmed this position at the start of the second hearing. This was not a 'default' situation.

39. I do not find that these circumstances meant the Applicant was prevented from putting his case properly. There is no procedural unfairness on this point. Irrationality does not arise.

40. The second point raised by the Applicant notes that the first hearing was adjourned and continued with only two panel members present. Although this point is not further developed, it could relate to potential procedural unfairness resulting from:

    a) The panel chair not being present throughout the entirety of the first hearing; and/or

    b) The arrangements for the second hearing.

41. In listening to the recording from the first hearing, it became apparent that the panel chair needed to leave for a short-notice urgent medical appointment. The panel chair explained the situation to the Applicant, and it was agreed that the hearing would break at 3pm. The chair expected to be back, and the hearing resume, by 3.40pm. It also appeared from the recording that a second panel member acted as chair

before handing back to the original panel chair. I asked the panel chair to explain the circumstances surrounding this.

42. The panel chair states as follows:

> *'I explained at the start of the [oral hearing] that I would have to leave for an urgent doctor's appointment, which [the Applicant] understood. I left at 3pm part-way through the COM's evidence and we agreed to break until I came back, which I expected to be by 3.40pm. At the point I left, the panel had concluded its questioning of the COM and [the Applicant] (who was unrepresented) was questioning her.*
>
> *Unfortunately, the doctor was running very late and as we knew that we were up against a time deadline from the prison and both the other panel members are accredited chairs, I messaged one at 3.35 and suggested that they proceeded without me, subject to [the Applicant's] consent.*
>
> *At 3.49 she responded to say "we're carrying on, [the Applicant] is fine". The hearing was recorded and full notes were taken. I returned shortly afterwards but decided that it would be fairer to [the Applicant] for me to not take back chairing until the end of his questioning of the COM. I was sent a note of what I had missed, which was just one question from [the Applicant] and the COM's response, which probably took about 10 minutes.'*

43. Notwithstanding the Applicant's consent, the guidance from the Parole Board legal department is that a Parole Board member cannot be part of the decision-making process unless they hear all the evidence, and that recordings cannot be used for this purpose. On this basis the panel chair should not have taken part in the decision-making if the matter had been concluded that day.

44. However, the matter was not concluded that day and, for reasons already explained, the panel chair from the first hearing did not attend the second hearing, nor took part in the decision-making. The two panellists that made the final decision had heard all the evidence from both hearings first-hand. There is therefore no procedural unfairness resulting from the first panel chair's temporary absence from the first hearing.

45. Alternatively, if the Applicant was referring to the fact that the hearing reconvened with only two panel members present, then this was a course of action that the first panel chair was permitted to make for effective case management in the interests of justice under rule 6(2) of the Parole Board Rules 2019. The Applicant did not object to it; he assented in writing prior to the second hearing and verbally at the start of it. The second hearing was run by an accredited panel chair. Both panellists had been present throughout the entire first hearing and had heard all the evidence. There is no procedural unfairness here. Again, irrationality does not arise.

46. The third point raised by the Applicant refers to "*continuous disruption with technical issues*". Although technical issues are an unfortunate fact of life when dealing with remote hearings and have the possibility to impact on the continuity of evidence. The Applicant did not raise this as an issue either in his written submissions after the first hearing, nor his oral submissions at the end of the second hearing. I have

listened to the recordings of both hearings and do not find that any such technical issues impacted on the Applicant's ability to put his case properly or ask questions of witnesses to the extent that it amounted to procedural unfairness.

47. The Applicant also claims that "*continuous sighing from a panel member whilst delivering [his] questions was intimidating"*. Having listened to the recordings, I have not heard audible sighing, or anything from the panel that I would consider to be intimidating, nor that would detract from the overall fairness of proceedings. The Applicant appeared to be perfectly comfortable in asking questions of all witnesses at length and did not present as noticeably flustered.

48. The fourth point raised by the Applicant argues that he was prevented from asking questions of his COM as he was "*interrupted and informed the line of questioning was not relevant*". However, his written submissions after the first hearing noted that "*the panel was patient…and it was helpful that [the panel] interrupted at points to keep [him] on track".* These submissions were written after the Applicant had the opportunity to question his COM. He cannot argue that the panel's interventions were simultaneously helpful and unfair. The Applicant was not legally represented and would not have had the experience of a qualified legal representative in asking questions that were pertinent and relevant to the panel's risk assessment. In response to this, the panel gave him guidance throughout the hearing and signposted instances when he was deviating from what the panel needed. The Applicant also had the opportunity to question his COM for over an hour. There is no procedural unfairness here.

49. His fourth and fifth points also draw reference to evidence of which he says the panel was unaware (but which the 2019 hearing panel knew). While he does not elaborate on this, I presume it refers to the point that he undertook some periods of leave without incident from a medium secure unit prior to absconding in 2015. The fact of the Applicant's leave from a medium secure unit is referenced throughout the dossier; it is also referenced within the 2019 decision letter. The panel would have read the dossier and been aware of this. The panel's decision refers to its awareness of *significant* periods of unsupervised time (my emphasis) in the community and the fact that it does not explicitly mention the leave from a hospital setting does not mean that the panel did not consider it, nor undermine its risk assessment in any way that was fatal to the fairness of its decision.

50. The sixth point raised by the Applicant is that his COM attended the hearing without her dossier which made it impossible for him to refer to any matter in the dossier. While I accept this would have made it impossible for the Applicant to point to a specific page number while making his points, I do not find that this precluded him from referring to any matter in the dossier. He questioned the COM at length for over an hour and his questions referred to the content of the dossier. Having listened to the recording, I do not find that the Applicant was sufficiently disadvantaged by his COM not having the entire dossier to hand to amount to procedural unfairness.

51. The Applicant also notes that that paginated dossiers at the hearing "*did not match up*". I do not have the purportedly different dossiers to which the Applicant refers before me, but I note that prior to the hearing the Applicant confirmed that his dossier ran to 1,290 pages, as did the panel's and that of his POM. While it may be

possible that the specific page number references did not match up for some administrative reason relating to the compilation of the dossiers, it is reasonable for me to conclude that the Applicant had access to the same written evidence as the panel and his POM, and the extracts accessible to the COM at the hearing. I cannot see anything in this that would amount to procedural unfairness.

52. The seventh and eighth points raised by the Applicant argue that it was irrational for the panel to depart from the decision of the 2019 hearing that recommended open conditions. Panels of the Parole Board do not bind later panels. To do so would be to undermine the independent nature of each Parole Board panel as a separate decision-making body, reviewing the evidence before it as it is at the time of that hearing. In any event, the 2019 panel did not recommend release and neither did the present panel. It is only the decision not to direct release that is subject to the reconsideration mechanism under rule 28 and therefore any arguments relating to a panel's decision not to recommend open conditions are not justiciable and must fail.

53. The ninth point raised by the Applicant argues that the panel was not objective and irrational in its analysis of the relationship between him and his COM. It is possible that a lack of objectivity on the part of a decision-maker could amount to procedural unfairness, and I will therefore treat this point as a submission of both grounds.

54. This point relates to an incident in August 2019 involving the Applicant and a female volunteer in the psychology-supported regime within which the Applicant was participating at the time. Probation service reports refer to the volunteer being "*upset*" and "*unsettled*" as a result. The Applicant takes issue with these words being used when he says the correct adjective was "*uncomfortable*". He describes the COM's reporting as "*grossly subjective, deleterious and mendacious*". He raised the same points in oral evidence and questioning. The panel's decision records the COM's evidence that the choice of words was not hers, as she was not the Applicant's COM at the time, but the words of a predecessor.

55. On this point, the panel concluded that, while the reported incident was not serious of itself, the Applicant's reaction towards his COM demonstrated rumination, grievance thinking and a lack of awareness of how his behaviour might affect others. The Applicant's submissions state that it is "*irrational to believe that [he] should not be aggrieved*". As the Applicant admits he remains aggrieved with his current COM over the wording of an incident which took place over two years ago and which was recorded by a former COM, it is difficult for the panel to conclude – objectively and rationally – that this did not amount to grievance thinking.

56. The tenth point raised by the Applicant is that the panel has given a non-objective and biased account of the history of his case by failing to note that his COM interviewed him for 35 minutes by telephone before writing her report for the parole hearing. This was a matter that was raised in oral evidence. The panel would have been aware of the Applicant's concerns and the COM's evidence that her report was not only informed by her conversation with the Applicant but also by discussions with other professionals involved in the management of his case. The decision letter is also not the vehicle by which every item of evidence is recorded; it would be unmanageable and unwieldy if it was, particularly in a case like this where over

seven hours of oral evidence was taken across two hearings. The history of the Applicant's case put forward by the panel appears to me to be a sound reflection of the evidence before it and therefore I do not find that the panel's account or analysis was biased against the Applicant. There is no procedural unfairness on this point.

57. The eleventh point raised by the Applicant is that the panel deferred his case for the outcome of his recategorisation review (by the CART) and then said the outcome of that review would not affect its decision. He submits that this amounts to a lack of independence and objectivity (which, if made out, would amount to procedural unfairness).

58. The application to defer the hearing for the outcome of the CART was made by the Applicant's legal representative at the time on the basis that, if downgraded, the Applicant wished to use this as further weight to his application for progression. In its decision, the panel notes that the outcome of the CART was expected on 22 October 2021. The Applicant did not seek a further adjournment for the outcome to be known. The panel noted that its decision would be unaffected by the outcome of the CART.

59. The panel's risk assessment was independent of the CART review: as it should be. The panel decided that, even if the Applicant had been granted Category B conditions, his risks were such that he would not meet the test for release. On the evidence before it, this was not a biased (or indeed) irrational conclusion. There was no support for release from the professional witnesses at this, or at the previous hearing.

60. The twelfth point raised by the Applicant is that it was unfair to compare the style of his questioning of the COM at the first hearing to the style of his questioning of the prison psychologist at the second hearing and conclude that this questioning of the COM demonstrated rigid thinking and an unwillingness to compromise. He argues that any change in attitude was a result of having had experience of asking questions in a parole hearing and being better prepared.

61. Having listened to the recordings of the hearings, I accept that the Applicant's approach towards the prison psychologist at the second hearing demonstrated a marked improvement over that towards his COM at the first hearing. This may, at least in part, be a result of experience and thorough planning. However, I cannot disagree with the panel's description of his style of questioning towards his COM to have been "*aggressive, confrontational and adversarial*". The resulting conclusion that this showed rigid thinking and an unwillingness to compromise (as well as being indicative of a breakdown in the professional working relationship) was not unreasonable, unfair or irrational.

62. The thirteenth point raised by the Applicant is that it was irrational of the panel to conclude that he had not been tested in less supportive environments when the Applicant gave evidence of his positive behaviour in Category B conditions. While the Applicant may well have given such evidence, he was asking for release or open conditions, and it was not irrational for the panel to conclude that he had not been sufficiently tested in the less supportive environment of Category D conditions or the community.

63. The fourteenth point raised by the Applicant is that it was irrational of the panel to state "*[the Applicant] did not explain why [he] happened to have [a significant amount of money] with [him] while [he was] taking part in escorted ground leave*" prior to his absconding in 2015 and not to ask further questions of the Applicant in relation to any concerns it may have had on this point. It may be that the panel did not find it particularly material to its overall assessment of the Applicant's risk to warrant further explanation. Alternatively, the panel may have meant that the Applicant did not offer any explanation in 2015. Either way, the panel's conclusion that the Applicant absconded while in possession – for whatever reason – of a significant sum of money was not indicative of it being a spontaneous decision and is not an irrational one.

64. The fifteenth point raised by the Applicant is that it was irrational for the panel to conclude that "*whatever the reason for [his] offending, it is plain that the last time [he] spent a significant time in the community [he] was a serial offender of the gravest kind"*. Given the Applicant's offending history (which I need not repeat here) it is difficult to see how the panel could have reached any other conclusion. Even if the reason for his offending were known, it would not change any of the offences he committed. There is no irrationality here.

65. The sixteenth point raised by the Applicant notes that the decision failed to record comments made by a consultant forensic psychiatrist in 2019 regarding the amelioration of features of his personality disorder. The passage noted by the Applicant is a quotation from the 2019 panel and it is not for the present panel to interfere with its wording. The report in question was in the dossier and the panel would have read the psychiatrist's views as they were at that time. This is neither a matter of irrationality nor procedural unfairness.

66. The final point raised by the Applicant is that it was irrational for the panel to conclude that his reactions to difficulties remained "*unpredictable"*. The panel clearly sets out its reasons for reaching that conclusion which are sound and evidence-based. There is no irrationality.

67. In closing, I find that this review, albeit complicated by a number of factors, was conducted in a procedurally fair manner. The panel's decision is comprehensive, clear, reasoned, logical, carefully written and constructed, and supported by evidence. I also find that none of the points raised by the Applicant amount to irrationality. Put simply, the legal test is not 'would another panel have reached a different conclusion?' but 'would *every* other panel have reached a different conclusion?'. Disagreeing with a decision, or a part of it, does not amount to irrationality unless that decision is outrageously illogical. The legal test for irrationality therefore sets a high bar, which the points raised by the Applicant in his submissions do not meet.

Decision

68. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
16 November 2021

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