

[2021] PBRA 192

Application for Reconsideration by Hollerin

Application

1. This is an application by Hollerin (the Applicant) for reconsideration of a decision of a panel dated 15 November 2021 making no direction for his release and no recommendation for his progression to Open Conditions.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the Oral Hearing Decision, the Application for Reconsideration, the email dated 15 December 2021 from the Secretary of State stating that no representations will be made by the Secretary of State in relation to the Application for Reconsideration and the Applicant's dossier containing 527 pages.

Background

4. On 13 November 2015, the Applicant, who was then 35 years old, was sentenced to life imprisonment for attempted murder for which a tariff of 4 years less time previously served was stipulated. His tariff expired on 12 June 2019. He has not been previously released.

Request for Reconsideration

5. The application for reconsideration is dated 6 December 2021
6. The grounds for seeking a reconsideration are as follows:
 - (a) It was irrational to refuse to release the Applicant to designated accommodation on the grounds that he poses a risk of causing serious harm when he misuses drugs even though he has completed significant interventions to address his use of drugs during his sentence for the index offence, he has not used drugs for 4 years and there is no evidence to suggest that there was any core risk reduction work for him to complete before his release (Ground 1);



- (b) It was irrational to conclude that there was an inadequate Risk Management Plan (RMP) in place in the event of the Applicant's release and that the Applicant's rigidity of thinking and inflexibility when coupled with his forceful personality and his inflexibility and negative attitude towards the Probation Service would make the management of his risk in the community unfeasible and impractical (Ground 2);
- (c) It was irrational to refuse to recommend the Applicant's progression to Open conditions on the grounds that he posed a risk of causing serious harm when he misused drugs even though he had completed significant interventions to address his use of drugs, he had not used drugs for 4 years, and there was no evidence to suggest that there was any core risk reduction work for him to complete before his release (Ground 3);
- (d) It was irrational and/or procedurally unfair for the panel to fail to recall the two psychologists to comment on the contention that the Applicant would become non-compliant on release (Ground 4).

Current parole review

- 7. On 12 April 2019, the Secretary of State referred the Applicant's case to the Parole Board to consider whether or not it would be appropriate to direct the Applicant's release and if it did not so direct, the Board was invited to advise the Secretary of State on the Applicant's suitability for open conditions.
- 8. The panel was comprised of 3 independent members of the Parole Board one of whom was a psychologist. It held an oral hearing on 9 November 2021 at which a Victim Statement was provided and at which the panel heard oral evidence from:
 - (a) The Prison Offender Manager (POM);
 - (b) The Prison Psychologist (PP);
 - (c) An independent Psychologist (IP);
 - (d) The Community Offender Manager (COM); and from
 - (e) The Applicant.
- 9. The Applicant was represented at the oral hearing by the Applicant's solicitor.
- 10. The Applicant, who was then 35 years old, committed the index offence against a young adult female who was in her early 20s while he was in a hotel room on the night of 10 and 11 June 2015 with the female. The Applicant took amphetamines and became very agitated. When the Applicant asked the female for sex, she refused whereupon the Applicant raped her.
- 11. The Applicant proceeded to attack his victim by punching her, but was interrupted by the hotel owner who had heard the victim's screams.
- 12. The Applicant admitted that he wanted to kill the victim and he has explained that this was due to his psychotic state induced by his use of drugs. It was



a concern to the panel that the Applicant did not seem to appreciate the potential risk to him and others when he was having a psychotic episode.

13. The Applicant has a long history of serious violent offending with 25 convictions for 42 offences with the majority of convictions being for violent and aggressive offences for which he has served a number of substantial custodial sentences.
14. The Applicant explained in relation to his past offending that he "*would attack people at random, [engage in] unprovoked attacks, punching people, the answer to any problem was violence as I was growing up.*" He told the panel that when he was released from prison in 2006, he had become a Christian. When the panel pointed out to the Applicant that he had subsequently been convicted in 2011 for Affray and again in October 2012 for Affray and Violent Disorder in a Police Station, the Applicant explained that these offences occurred after he had taken drugs and suffered a psychotic episode as occurred when he committed the index offence.
15. The panel concluded that the Applicant "*[had] a pattern of previous serious violent offending [and] that it is clear that if he were to relapse into his old criminal lifestyle and to take drugs in the future, he may again act violently and cause serious harm to others*".
16. The Applicant has undertaken offending behaviour work seeking to address his risks. Between 6 January 2016 and 21 December 2017, he was part of the Drug Therapeutic Community at a prison and reports indicate that he stayed there for further years and acted as a mentor to other prisoners. More recently, despite his reported reluctance to do so, he has successfully completed a training course addressing the use of violence and sex offending. The panel recorded that it was reported that the Applicant had also undertaken intensive work with the substance misuse team.
17. The POM gave evidence explaining that she had only had charge of the Applicant's case for a month, and she reported that he has "*enhanced status*" under the Incentives and Earned Privileges Scheme through good custodial conduct and that his general conduct and behaviour was good. The Applicant has not been drug-tested under the mandatory drug testing regime which has recently restarted at his prison, but that there was no intelligence or suspicions from staff that he is misusing drugs.
18. According to the POM, the Applicant has completed all the risk reduction work he is able to do in closed conditions and she recommended his transfer to open conditions, but she did not recommend his release as she considered that RMP needed "*further clarification and development particularly with regard to accommodation and resettlement plans.*"
19. The PP explained to the panel that in interview the Applicant was able to explain what he had learned from the training course which he had completed addressing the use of violence and sex offending about his 'Old



Me'. He concluded that the Applicant had acquired increased insight into his previous violence and substance misuse pointing out the Applicant's good behaviour in custody, his enhanced status and his current employment were all protective factors.

20. The PP expressed concern over the RMP which was not fully formed and the lack of support network in the community. Therefore, he did not recommend release but he did recommend a progressive move for the Applicant to Open Conditions.
21. The IP explained that there was much agreement between her assessment and that of the PP. She considered that a formal assessment of the Applicant's paranoid traits would be useful, although she did not believe that any such traits are currently driving or increasing his risk.
22. According to the IP, the Applicant will need to guard against complacency and the influence of negative peers. The IP considered that it was important for the Applicant to enjoy a good trusting relationship with his COM, but he did not seem to have that relationship at that time.
23. The IP therefore does not recommend release for the Applicant, but he does recommend a progressive move for the Applicant to Open Conditions.
24. The COM, who gave evidence, explained that he had taken over the Applicant's case the week before the hearing, but that he had previously co-worked with the Applicant's previous COM for a short while. According to the COM, he is an experienced Probation Officer who is not easily intimidated, but he nevertheless reported that there was a pattern of behaviour experienced by him, the Applicant's previous COM and the COM line manager of the Applicant being "*incessant and insistent*" in his attempts to get the Probation Service to change their recommendation for a progressive move for the Applicant to a recommendation for release.
25. The COM explained that his predecessor had felt "*browbeaten*" by the Applicant to the extent that the present COM was directed to take over the sole responsibility for the Applicant's case. The COM stated that his recent experience was of the Applicant "*talking over the top of him and refusing to listen.*" He described the Applicant as a "*forceful individual*" and in the COM's view this may demonstrate the Applicant had outstanding issues around power and control. According to the COM, the Applicant was "*overly assertive*" in seeking to get others to bend to his will. He suggested the Applicant was "*a work in progress*", who needs to be able to "*agree to disagree*" if they are to have a productive relationship.
26. The Applicant explained that his attitude was a result of his frustration that despite his urging for the previous 9 months, the Probation Service had not done its job of finalising his release plans.



27. The COM concluded that in his opinion the Applicant's resistance to a move to open conditions raised concerns about his level of insight and that although the Applicant was clearly an intelligent person, he cannot see the potential benefits of a gradual transition back into the community. The COM still recommended a progressive move for the Applicant to Open Conditions.
28. The Applicant, when giving evidence, spoke of his previous experience when he was able to build a pro-social life through the Church and establish his own removal business. When asked why he then reverted to his old life misusing substances and associating with negative peers, he explained that *"When I have material stuff, that wasn't enough. I wanted someone to share my life with, when I look back that is what happened every time"*.
29. The Applicant also explained that *"alcohol is not my problem amphetamine is"* and he added that *"it is a problem that if I have a drink, I am more likely to take drugs"*. The panel found the Applicant's evidence concerning his future intentions in relation to alcohol to be *"unclear"* when he observed that *"Yes I will abstain but I'm not making a proper decision to abstain, I can have, if at a wedding or family 'do'. I don't see a problem with one pint."* He also said that he would abide by any licence condition not to drink alcohol, but he stated that he had drunk a small bottle of vodka prior to committing his index offence.

Assessment of Risk

30. According to the latest probation service assessment report dated 15 October 2021, the Applicant posed a high risk of causing serious harm in the form of extreme and prolonged physical violence causing serious emotional and psychological harm to known adults (being previous and future or potential partners even at a very early stage of the relationship) and members of the public with whom the Applicant gets into conflict or who he feels have wronged him.
31. The risk of conviction for a further violent offence is assessed as being high as is the Spousal Assault Risk Assessment indicating a high risk of spousal assault. The Risk of Serious Recidivism is assessed as medium.
32. His risk of committing other offences when both his static and dynamic risks are taken into account is assessed as being a medium to high risk within a 2-year period.
33. The IP assessed the Applicant's risk of violence to be low to moderate in custody and in the community if he remains drug-free and his mental health



is stable. Her assessment of the Applicant's risk of violence increases to high if he relapses into drug misuse.

34. The panel agreed that the Applicant posed a high risk of causing serious harm in the community whether on release or on temporary licence from open conditions.

The Imminence of the Risk

35. The panel considered that the imminence of the Applicant's risk if he is at large in the community is an important factor. The POM considered that the imminence of risk was medium to long term, but she added that serious offending "*could happen quite quickly if he relapsed into drug misuse*". The PP's opinion was that the Applicant's risk in the community was not imminent but that it would become "*more imminent if there was substance misuse*".

36. The IP explained that if there was a "*one-off*" lapse by the Applicant who misused drugs on one occasion, the imminence of reoffending would be moderate. If, however, there was a return by the Applicant to regular substance misuse, the likelihood of another psychotic episode might become imminent.

37. The COM's evidence was that "*a lapse could be disastrous, one lapse on one night could lead to further offending*" and he explained that under the probation service assessment report, the Applicant is assessed as posing a high risk of causing serious harm which means that "*there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious*".

38. The panel noted that there was unanimity among the professionals that if the Applicant should misuse substances, the imminence of risk would increase.

39. The panel agreed with the COM that a single lapse by the Applicant into substance misuse could result in serious harm to others. The panel regarded this as "*the logical conclusion from [the Applicant's] account that on previous occasions when he has misused substances, he has suffered psychotic episodes without warning as such episodes render him detached from reality and out of control of his actions, and therefore likely to cause serious harm to himself or others*".

The Likelihood of the Applicant Misusing Substances in the Future

40. The next issue considered by the panel was the extent to which the Applicant is likely to misuse substances in future. The starting point for the panel was that the Applicant had undertaken significant interventions over 2 years in



a drug Therapeutic Community and that he had worked subsequently with the substance misuse team in prison. There was no evidence that he was at the time of the panel's deliberations then misusing drugs and he states that he last misused substances in 2017.

41. According to the panel, there were several matters that had to be balanced against those factors. First, the Applicant has misused substances since he was 13 years old. Second, he had been misusing drugs for most of his life. Third, he admits that he misused drugs in the past because he enjoyed the feeling of euphoria and the confidence that drugs give him. Fourth, there has been a pattern of the Applicant repeatedly relapsing into drug misuse and associating with others involved in the drug sub-culture even when he has moved to areas where he was unknown. Fifth, reports indicate that the Applicant slipped into drug use quickly after his release from custody even after moving to new areas such as in January 2014 when he began using drugs again after just 2 weeks. Sixth, he told the panel that he was misusing substances up to and beyond the time he was last released from prison in March 2014 and finally, he stated that he has misused substances earlier in his present sentence.
42. The panel concluded that it lacked confidence to predict that the Applicant would be able to refrain from taking drugs in the community. It considered a scenario in which the Applicant was in the community (whether on a temporary release at designated accommodation or after release) where he once again misused substances, had a psychotic episode and in consequence would cause serious harm to others. The panel considered this to be "a highly plausible and foreseeable risk".
43. The COM presented an RMP which in the event of the Applicant's release envisaged accommodation at a designated accommodation. The Applicant, sensibly in the panel's view, did not wish to return to the area where he stated that there would be negative peer influences. Instead, the Applicant wished to relocate to the area where he had previously run his business and conducted a pro-social life. The difficulty was that in order to facilitate a transfer to the Probation area, the COM would need to have identified move-on accommodation for the Applicant before he would be accepted but that such accommodation had not been identified.
44. The COM reported that there had been a referral of the Applicant's application to Designated Accommodation to other Probation areas in England to try to identify accommodation in the area but in the words of the panel "[it] acknowledge[s] that the proposed [RMP] is incomplete in the sense that specific release accommodation has not yet been identified although it is clear that release would be to a [designated accommodation]".
45. According to the COM, there was not yet sufficient evidence of the Applicant using the skills he has learned from the offending behaviour work aiming to



address his risks, which he undertook, and which is referred to in paragraph 16 above.

46. The panel concluded that it did not consider that there was any RMP before them that would be sufficient to manage the Applicant's risk in the community.
47. The panel found having considered all the evidence that they had heard and read as well as the representations made on the Applicant's behalf by his legal representative that:
- (a) The Applicant posed a High Risk of causing serious harm in the community whether on release or on temporary licence from open conditions.
 - (b) If the Applicant should misuse substances in future, the risk would then become imminent.
 - (c) Even one lapse into substance misuse in future by the Applicant could result in serious harm to others.
 - (d) The proposed RMP is currently incapable of managing his risk in the community for reasons set out in the panel's decision.
 - (e) The panel were not satisfied that it is no longer necessary for the protection of the public that the Applicant remains confined and so they would not direct release.
 - (f) The Applicant's negativity towards a progressive move may, if he has any negative experiences with others in open, result in him absconding and the panel assesses that there was currently a moderate risk of him absconding.
 - (g) The panel did not recommend a progressive move for the Applicant to Category D Open Conditions

The Relevant Law

48. The panel correctly sets out in its decision letter dated 15 November 2021 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to Open Conditions.

Parole Board Rules 2019

49. 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)).
50. 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**.



Irrationality

51. 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."

52. 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.

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

Procedural unfairness

54. 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.

55. 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.

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

Other

57. It is possible to argue that mistakes in findings of fact made by a decision maker result in the final decision being irrational, but the mistake of fact must be fundamental. The case of **E v Secretary of State for the Home**



Department [2004] QB 1044 sets out the preconditions for such a conclusion: *"there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter; the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable; the appellant (or his advisors) must not have been responsible for the mistake; and the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning."* See also **R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] AC 295**, which said that in order to establish that there was a demonstrable mistake of fact in the decision of the panel, an Applicant will have to provide *"objectively verifiable evidence"* of what is asserted to be the true picture.

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

59. Omitting to put information before a panel is not a ground for procedural unfairness, as has been confirmed in the decision on the previous reconsideration application in **Williams [2019] PBRA 7**. This is the case even where the information, had it been before the panel, would have been capable of altering its decision, or prompting the panel to take other steps such as putting the case off for an oral hearing where the new information and its effect on any risk assessment could be examined. This is because procedural unfairness under the Rules relates to the making of the decision by the Parole Board, and when making the decision the panel considered all the evidence that was before them. There was nothing to indicate that further evidence was available or necessary, and so there was nothing to indicate that there was any procedural unfairness.

The reply on behalf of the Secretary of State

60. The Secretary of State has stated that he does not wish to reply to the grounds for reconsideration.

Discussion

61. In dealing with the grounds for reconsideration, it is necessary to stress four matters of basic importance. First, the Reconsideration Mechanism is not a process by which the judgment of the panel can be *lightly* interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his own views of the facts in place of those found by the panel, unless, of course, it is *manifestly obvious* that there was an

error of fact of an egregious nature which can be shown to have *directly contributed* to the conclusion arrived at by the panel.

62. The second matter of material importance is that when deciding whether a decision of the Parole Board was irrational, *due deference* must be given to the *expertise* of the Board in making decisions relating to parole.

63. Third, where a panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact they saw and heard the witnesses, it would be inappropriate to direct that the decision be reconsidered unless it is *manifestly obvious* that there are *compelling* reasons for interfering with the decision of the panel.

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

Ground 1

65. It is contended that it was irrational for the panel to refuse to release the Applicant to designated accommodation on the grounds that he posed a risk of causing serious harm when he misused drugs even though he had completed significant interventions to address his use of drugs during his sentence for the index offence, he had not used drugs for 4 years and there was no evidence to suggest that there was any core risk reduction work for him to complete before his release.

66. The panel considered and took into account the intervention work completed by the Applicant during his sentence for the index offence, his contention that he had not used drugs for 4 years and the absence of any suggestion that there was core risk reduction work for him to complete before release.

67. The panel was entitled to conclude that it lacked confidence that the Applicant would be able to refrain from taking drugs in the community as he had:

- (a) A history of misusing substances since the age of 13 and had used drugs for most of his life because on his own evidence he had misused drugs in the past because he enjoyed the feelings of euphoria and the confidence they gave him;
- (b) Slipped into drug use quickly in the past after release from custody such as within 2 weeks of his release from prison in January 2014;
- (c) Told the panel that he was misusing drugs up to and beyond the time he was last released from prison in March 2014 and that he had misused substances earlier in his present sentence;
- (d) A poor history of compliance with court orders as he had been recalled to custody for breaching his licence conditions as well as receiving convictions for breaching a conditional discharge order, a suspended sentence order and bail conditions; and



- (e) Been unable to persuade any of the professional witnesses that he would be able to refrain from taking drugs in the community so that they would be able to recommend his release.

68. The panel also concluded having considered all the evidence (including having seen and heard the Applicant's evidence) concluded that even one lapse into substance misuse on one occasion could result in serious harm to others.

69. It was entitled to reach that conclusion because:

- (a) The Applicant had explained that on previous occasions when he had misused substances, he had suffered psychotic episodes without warning and that in consequence, he had become detached from reality and out of control of his actions which made him likely to cause serious harm to himself and/or others;
- (b) The circumstances in which the index offence occurred showed the way in which the Applicant's lapse into substance misuse could and would cause serious harm;
- (c) The Applicant's POM concluded that serious offending by the Applicant "*could happen quite quickly if he relapsed into drug misuse*";
- (d) The IP concluded that if the Applicant relapsed into drug misuse, his risk of violence would increase to a high risk;
- (e) The latest probation service assessment report of 15 October 2021 indicated that the Applicant posed a High Risk of causing serious harm to known adults (who were previous and future female partners) as well as any member of the public with whom the Applicant got into conflict and who he felt had wronged him; and
- (f) No cogent matters had been put forward to show that these conclusions were incorrect or should not have been adopted by the panel.

70. This ground cannot be accepted not merely because the panel was entitled to reach the conclusions set out in paragraphs 67 to 69 above but also because:

- (a) due deference is owed to the panel for its expertise in making decisions relating to the risk posed by the Applicant in the community;
- (b) the grounds for finding that the panel had acted irrationally are not met as it is not "*manifestly obvious that there was an error of fact of an egregious nature made by the panel which can be shown to have directly contributed*" to the conclusions in paragraphs 67 and 68 above arrived at by the panel; and also because



(c) the panel had the advantage of hearing the witnesses and so its findings of fact should be respected.

Ground 2

71. It is contended that it was irrational for the panel to conclude that there was an inadequate RMP in place in the event of the Applicant's release and in consequence, this would be a barrier to his release.
72. I am unable to accept that there is any merit in this complaint for four separate reasons.
73. First, the proposed RMP was incomplete as no specific release accommodation had been identified at the time of the Parole Board's decision although it was clear that release would be to designated accommodation.
74. The selection of the precise designated accommodation where the Applicant would be required to stay at the start of his period of release was an extremely important matter as it was necessary that the Designated Accommodation was not in a place where, for example, the Applicant had negative peers but preferably in a place where he might have positive support. As the RMP failed to deal with an extremely important matter, it was incomplete and not an effective RMP.
75. Second, a further or alternative reason why this complaint fails is that the panel who had seen and heard the Applicant give evidence recorded that he *"exhibits a rigidity of thinking and an inflexibility, when coupled with his forceful personality, would make effective supervision and risk management in the community difficult"*.
76. The panel added in relation to that finding that *"when this is considered alongside his current antipathy and negative attitude towards the Probation Service this, in the panel's view makes the management of his risk in the community unfeasible and impractical"*.
77. It must be stressed that the panel had seen and had heard the Applicant and others give evidence. So, the panel was able to **observe** the Applicant's *"rigidity of thinking"* and his *"inflexibility when coupled with his forceful personality would make effective management and risk management in the community difficult"* and *"the management of his risk in the community unfeasible and impractical"*.
78. A third and further alternative reason why this ground fails is that it is not shown that this reasoning reaches the high threshold of being irrational.
79. A fourth and another alternative reason for rejecting this ground is that due deference is due to the expertise of the panel and this expertise includes



determining what is an acceptable and effective RMP. In this case, the deference due to the panel supports the conclusion that the RMP in this case was inadequate.

Ground 3

80. Ground 3 is that it was irrational to refuse to recommend the Applicant's progression to Open Conditions on the grounds that he posed a risk of causing serious harm when he misused drugs even though he had completed significant interventions to address his use of drugs, he had not used drugs for 4 years, and there was no evidence to suggest that there was any core risk reduction work for him to complete before his release.

81. The first issue to be considered is whether the reconsideration mechanism introduced in the Parole Board Rules 2019 (the Rules) applied to failure to recommend progression to Open Conditions. In the case of an Application for Reconsideration by **Barclay [2019] PBRA 6**, it was explained by Jeremy Roberts QC [5] that: "*under Rule 28(1) of the [Rules] 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 by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes a decision on the papers (Rule 21(7)). A decision to recommend or not to recommend open conditions is not eligible for reconsideration under Rule 28*".

82. I respectfully agree with that reasoning and am not aware of any decision criticising or not following the decision in Barclay's case. In consequence, the application under Ground 3 fails.

83. I should add that in any event the test for irrationality is not met essentially for the same reasons as are set out in paragraphs 67 to 69 above.

Ground 4

84. It is contended that it was irrational and/or procedurally unfair for the panel to fail to recall the two psychologists to comment on the contention that the Applicant would become non-compliant on release.

85. As has been explained, the Applicant's COM explained that his predecessor had felt "browbeaten" by the Applicant to the extent that the present COM was directed to take over the sole responsibility for the Applicant's case. The COM stated that his recent experience was of the Applicant "*talking over the top of him and refusing to listen*." He described the Applicant as "a forceful individual" and in the COM's view this may demonstrate the Applicant had outstanding issues around power and control. According to the COM, the Applicant was "overly assertive" in seeking to get others to bend to his will.



86. The Application for Reconsideration records that only the Applicant's COM dealt with this issue and none of the other witnesses dealt with this. It is said that the panel's decision is *"irrational and procedurally unfair as it would have been appropriate to return to the two psychologists particularly regarding the comment of power and control"*.
87. The suggestion appears to be that the panel should have required the two psychologists to give evidence as there was inadequate information before the panel. In so far as this ground is concerned with the decision to refuse to recommend that the Applicant moves to Open conditions, it must fail for the reasons explained in paragraphs 80 and 81 above.
88. In any event, even if that conclusion is incorrect, this ground cannot be accepted for four reasons.
89. First, the Applicant was represented by a competent legal representative in front of the panel and the panel would have been entitled to assume that the legal representative would have been able to decide if it was necessary to apply for the recall of any witnesses and then as she did not apply for the recall of the psychologists, it would have been unnecessary for the panel to call them.
90. Second, the panel had been able to question the COM and the Applicant on the attitude of the Applicant to his COM and so there was adequate material for the panel on this issue. This shows that this complaint falls a long way short of reaching the high threshold of being "irrational" which as I explained in paragraph 51 above requires the conduct complained of to be "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".
91. Third, in any event deference must be owed to the panel to decide what evidence they needed.
92. Fourth, in any event the case a claim for procedural unfairness can only succeed if it can be shown that the Applicant's case was not dealt with justly. It is striking that the Applicant's legal representative did not seek the recall of the psychologists.

Decision

93. For the reasons I have given, I do not consider that the decision was irrational/procedurally unfair and accordingly the application for reconsideration is refused.

Sir Stephen Silber
30 December 2021



