**[2022] PBRA 177**

**Application for Reconsideration by Sheppard**

## Application

1. This is an application by Sheppard (the Applicant) for reconsideration of a decision of a Panel dated 24 October 2022 (the Panel Decision) making no direction for 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 or (c) that it contains an error of law

3. I have considered the application on the papers. These are the Panel Decision, the Application for Reconsideration, the email dated 22 November 2022 from the Public Protection Casework Section on behalf of the Secretary of State stating that no representations will be made by the Secretary of State in response to the Application for Reconsideration and the Applicant's dossier containing 303 pages.

4. The grounds for seeking reconsideration are that:

(a) the Panel was irrational as there was evidence that that the requisite further risk reduction work could be completed by the Applicant in the community and the Panel failed to give adequate reasons for holding that the requisite further risk reduction work had to be completed in custody prior to the Applicant's release particularly in the light of the facts that there was *"a lack of specificity as when [he] could realistically commence the intervention programme and the accepted fact of [the Applicant's] previous approval to category D which was rescinded for reasons relating to an adjudication for sharing a photograph on social media in January 2021"* (Ground 1);

(b) there was procedural unfairness in rejecting the Applicant's claim for release in the light of the failure of the Government's public law duty to provide to the Applicant access to interventions and programmes to aid his sentence progression and rehabilitation (Ground 2).

## Background

5. On 19 September 2019, the Applicant, who was then 30 years old, received an extended determinate sentence of 7 years' imprisonment comprising of a custodial period of 5 years' imprisonment and an extension period of 2 years'

imprisonment for an offence of wounding with intent to do grievous bodily harm.

6. The Applicant committed the index offence of wounding with intent to do grievous bodily harm when he attacked a shop assistant by throwing a wine bottle at him but missing him. He then continued the attack by picking up another bottle and hit the victim to the back of his head knocking him to the floor. The Applicant and the woman who came in with him continued the attack. During this attack, the Applicant hit the victim again with the wine bottle causing it to break. The Judge described the attack as *"a shocking display of violence."* The index offence was committed while the Applicant was on licence for a previous section 18 offending.

7. The Panel considered that the Applicant's primary risk factors appeared to be "*alcohol misuse, poor anger management and poor thinking skills*". It noted that there were additional areas of concern regarding the Applicant which included *"[his] pro-criminal attitudes, [his] pro-criminal associates, finance and offending for financial gain and poor emotional management*."

8. The Applicant was initially assessed as unsuitable for any offence-related work because his OASys (Offender Assessment System) risk work was assessed as low even though he had completed the specified moderate intensity accredited programme and another accredited moderate intensity programme on previous sentences. In May 2021, it was realised that those assessments had been based on another person's criminal records and were therefore inaccurate. The Applicant was aggrieved by this error, but he agreed to be assessed by the Programmes Team.

9. The Programmes Team concluded that the Applicant should be assessed for the high intensity accredited programme because his new offending after completion of the specified moderate intensity accredited programme indicated that the specified higher level intensity programme was required. It was noted that the Applicant had undertaken some workbooks, which were not accredited, and that he had completed the Sycamore Tree Victim Awareness Course apparently successfully, but there were no reports available because volunteers delivered the programme.

10. Since the Applicant was sentenced, his conduct was regarded as having been "*generally positive"* although he had received adjudications in January 2020 for fighting and in January 2021 for sharing a photograph on social media although this adjudication had been inaccurately recorded as for failing to give a drugs test.

11. Before the Applicant's second adjudication, he had been approved for a move to a Category D open prison, but this was rescinded after his second adjudication for sharing a photograph on social media

12. In addition, there was an allegation that the Applicant had assaulted another prisoner in March 2021 and in consequence, the Applicant was placed in the Segregation Unit, but there was no adjudication as the matter was referred to the police. No action was taken by the police due to a lack of engagement by the complainant and the adjudication was "*timed out*." By the time when the police decided to close the matter, the prison was unable to pursue the complaint.

13. At the time of this allegation, the Applicant had applied again for his Cat. D status, but this approval was refused because of the allegation set out in the last paragraph. The Applicant reacted in an angry and verbally aggressive manner to this rejection.

14. The Applicant received a number of negative Incentives and Earned Privileges (IEP) entries for covering the observation panel in his cell and for disobeying orders from his staff. There have been a number of security entries but none since December 2021 except for two entries relating to "*associating with others".* He also received a number of positive entries relating to his engagement and attitude. He has become an enhanced prisoner on the IEP scheme in November 2021 and has retained that status since then.

**The Evidence of the Professionals**

15. A prison psychologist and a prisoner-commissioned psychologist had each provided psychological risk assessments of the Applicant.

16. The prison psychologist's report which dated from February 2022, sets out the Applicant's personal and criminal history as well as considering his time in custody for the index offence.

17. She noted that that the index offence was committed after the Applicant had completed the specified moderate intensity accredited programme which cast *"doubt on how much he had taken from [the programme]"*. She used the HCR-20 tool to provide a list of historical, clinical and risk management factors. Having identified some protective factors, she concluded that the Applicant met the criterion for the specified higher level intensity programme and that this should be completed prior to his release.

18. The prisoner-commissioned psychologist's report was dated 8 October 2022 and it follows a similar structure to the prison psychologist's report. She noted that prior to the time of her assessment, the Applicant had shown a sustained period of good behaviour. The prisoner-commissioned psychologist

considered that the Applicant presented a moderate risk of future violence with a low level of imminence. She also accepted that any further violence by the Applicant carries with it a high risk of serious harm.

19. The conclusion of the prisoner-commissioned psychologist was that the Applicant's risk could be managed in the community in the light of the proposed Risk Management Plan.

20. Both the prison psychologist and the prisoner-commissioned psychologist gave oral evidence to the Panel. There was agreement that he was required to undertake high risk reduction work in relation to violence, but the crucial issue was whether he was required to complete it before he could be released into the community.

21. In oral evidence, both psychologists adopted the same approach as they had set out in their written reports. The prison psychologist considered that the work had to be completed before the Applicant could be released and she referred to the Applicant's use of violence even after he had completed the specified moderate intensity accredited. She also considered that the Applicant's episodes of instability in custody further showed the need for him to develop and consolidate his skills in closed conditions.

22. The prisoner-commissioned psychologist approached the dispute differently noting that the risk reduction work that the Applicant had started on the specified moderate intensity accredited programme when considered with his recent good engagement and other non-accredited work has been sufficiently consolidated and internalised since then. In those circumstances, her conclusion was that she would recommend that the Applicant completes further work in the community, but she did not consider that the specified higher level intensity programme was core work that needed to be completed by the Applicant prior to release.

23. Evidence was also given by Applicant's Prison Offender Manager (POM) who had initially taken over that position on a caretaker basis from January 2022. She explained that she had been seeing the Applicant on a regular basis since then. Her assessment was that they had "*got on*" well and that he was able to build a good relationship with staff, but this took time.

24. The POM believed that the Applicant had appeared to have engaged well with the Sycamore Tree Victim Awareness Course and that he had appeared to have been engaging better recently. While the Applicant attributed this to his work with the Substance Misuse Team, the POM's view was that this was due to his work on the Sycamore Tree project and the fact that they knew each other well.

25. Her evidence was that there had been no recent security issues and she was not concerned about recent entries from June and July 2022 as they *"appeared to be general intelligence given about many other prisoners".*

26. The POM acknowledged that the Applicant is still assessed as eligible for the specified higher level intensity programme and other ongoing preventive work with the substance misuse team. She still believed that he should do further programme work especially as he had further offended since completing the specified moderate intensity accredited programme. The POM explained that the Applicant was motivated to do this further work but *"there was an element of frustration that he could not do this earlier"* perhaps because of the COVID-19 lockdown.

27. To the POM, this further work was core risk work that had to be completed notwithstanding the work the Applicant had done because *"he needs to look further at his use of, and triggers for violence"* especially as even though the RMP was *"a strong one, there was a gap at the heart of the plan in relation to the risk of violence".*

28. The Applicant's Community Offender Manager (COM), stated that he had worked with the Applicant for nearly a year and that he had spoken to him on several occasions. He considered that the Applicant had been open and honest with him so that he was able to conclude that the Applicant had been able to reflect on what he had learnt from the work he had done.

29. A significant conclusion of the COM was that the although the Applicant "*had been able to reflect on what he has learned from the courses that he has done ... he had not been able to internalise and embed the learning from the work that he has undertaken*". He considered that alcohol misuse was a core risk factor for the Applicant but believed that there were concerns whether the Applicant properly understood this and could manage his drinking. The COM added that although he had been able to do so recently, this was when he was in custody and not in the community.

30. The COM pointed out that in the RMP "*there was no provision for psychologists to work with [the Applicant] in the community*". He was concerned whether any form of managed drinking would be appropriate for the Applicant given his history. The opinion of the COM is that "*there was core risk reduction work outstanding [for the Applicant] which needed to be addressed in custody."*

31. The Applicant gave evidence to the Panel in which he explained the difficulties that he had growing up and the circumstances of his previous offending. He accepted that in the lead-up to the index offence, he had been drinking "*to excess*" and that this had been one of the triggers for the index offence.

32. In his evidence, the Applicant accepted that "*although he had no immediate plans to drink, he stated he would not be abstinent over the long-term on release*" and he considered that "t*his would be unrealistic to commit [to be abstinent]".* The Applicant confirmed that he would have been happy to do the specified higher level intensity programme but he *"was frustrated at the fact that mistakes had been made that had meant that he had not been able to do so."*

33. When the Applicant was asked about the two alleged instances of violence in custody since his recall, he explained that in one instance, he had not assaulted anyone and in the other case, he only fought as he was being attacked.

34. The Applicant's evidence was that he had built a good relationship with his COM and spoke to him regularly. He also explained that he was open to engaging with programme work and with the relevant drug and alcohol misuse team. His evidence was that if released he would comply with any conditions imposed for his release.

**The Approach of the Panel**

35. A three-member panel of the Board held an oral hearing by video link on 18 October 2022 at which the panel heard oral evidence from:
    (a) the Applicant's POM.
    (b) The Applicant's COM.
    (c) the Prison Psychologist.
    (d) the Prisoner-Commissioned Psychologist; and from
    (e) the Applicant.

36. The Applicant was represented at the oral hearing by his solicitor. The Secretary of State was not represented by an advocate. No victim impact statement was provided. There was no evidence which could not be disclosed to the Applicant.

37. The Panel had to determine the significant question of whether the outstanding core risk reduction work needed to be addressed in custody so that the Applicant could not be safely released until it had been completed in custody or whether the Applicant could then be safely released so that the work could be dealt with in the community.

38. The Panel noted that the Applicant's previous approval of a move to category D had been rescinded for reasons relating to an adjudication for sharing a photograph on social media in January 2021 and concluded in the light of the evidence that it had heard and read much of which post-dated the granting of the approval for a move to category D that:

(a) the Applicant was assessed as posing a high risk of serious harm to the public and known adults and it was noted that the Judge who sentenced the Applicant for the index offence *"came to the clear conclusion that the Applicant presented 'a significant risk of serious harm' to the public*;*"*

(b) he was also assessed as posing a high risk of violent offending.

(c) both psychologists agreed that if the Applicant was to commit acts of violence, "*harm to victims could be high*."

(d) the index offence was committed after the Applicant had completed the specified moderate intensity accredited and that *"indicates that, at that point at least, he had not internalised the learning from that programme."*

(e) "*there has been instability on the Applicant's part since [he was sentenced] although this has improved of late*."

(f) it "*remained concerned that there were outstanding treatment needs in the Applicant's case [and] until these are addressed whether through [the specified high level intensity programme] (or something else) the Panel did not consider that the proposed [RMP] would manage the risk he presents*."

(g) *"there is a clear link between [the Applicant's] violent offending and alcohol use in [the Applicant's] history" and "this is significant risk [factor] which remains largely untested in custody." The Panel "did place a significant amount of weight on this due to to the relevance of alcohol as a risk factor in [the Applicant's] case."*

(h) the Applicant had explained that he had been drinking to excess in the lead up to the index offence, and that had been one of the triggers for the index offence.

(i) the Applicant had stated that "*although he had no immediate plans to drink, he stated he would not be abstinent over the long-term on release as he felt this was unrealistic to commit to [abstinence]."*

(j) "a *higher level of intensity of intervention was required than [was provided in the specified moderate intensity accredited programme] and that until this was undertaken it could not be said that [the Applicant] had in place the necessary internal motivation and control to refrain from alcohol use and from violent offending."* Until the Applicant did such work, "*the Panel did not consider that the proposed plan would manage the risk that he presents."*

(k) "*until this further work is undertaken, or possibly until [the Applicant] can show a sustained further period of good behaviour and compliance, the risk of further offending is too high to be managed in the community."*

(l) "*it is clear from [the Applicant's] index offence that he is capable of causing serious harm to others, and the Panel considered it clear that any repetition of such offending is likely to again lead to serious harm being caused."*

(m) therefore *"it is necessary for the Applicant to remain in custody, and no direction for release could be made"* because "*until [the Applicant's treatment*

*needs] are addressed (whether through the specified higher level intensity programme or something else) the Panel did not consider that the proposed [RMP] would manage the risk that he presents."*

(n) For the purpose of completeness, it should be explained that the contrary case for concluding that the Applicant could be safely released and permitted to do the specified higher level intensity programme or risk reduction work in the community as advocated by the prisoner-commissioned psychologist "*was placing too much reliance on a period of good behaviour and stability [on the Applicant's part] when set against the history of his offending and poor conduct*]."

The observations set out above will hereinafter be referred to as "the paragraph 38 considerations".

**The Relevant Law**

*Parole Board Rules 2019*

*Irrationality*

39. 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."*

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

*Other*

41. 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.

42. 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 craftsmanship."*

*Procedural Unfairness*

43. Procedural Unfairness means that there was some procedural impropriety. In summary, an Applicant seeking to complain of procedural unfairness under Rule 28 has to establish 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 fairly; and/or
    (e) the panel was not impartial.

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

**The reply on behalf of the Secretary of State**

45. PPCS stated in an email dated 22 November 2022 that the Secretary of State was not making any representations in response to the Applicant's reconsideration application.

**Discussion**

46. In dealing with the grounds for reconsideration, it is necessary to stress five matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view 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.

47. The second matter of material importance is that when deciding whether a decision of the panel was irrational, due deference has to be given to the expertise of the panel in making decisions relating to parole.

48. 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.

49. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

50. Fifth, 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**

51. This ground is that the decision of the Panel was irrational as there was evidence that the requisite further risk reduction work could be completed by the Applicant in the community and the Panel failed to give adequate reasons for holding that the requisite further risk reduction work had to be completed in custody prior to the Applicant's release, particularly in the light of the facts that there was "*a lack of specificity as when [he] could realistically commence the intervention programme and the accepted fact of [the Applicant's] previous approval to category D which was rescinded for reasons relating to an adjudication for sharing a photograph on social media in January 2021*".

52. The Panel explained that it had considered and had rejected the contention that the Applicant could be released and then complete the requisite further risk reduction work in the community. This had been advocated by the prisoner-commissioned psychologist in her evidence, but it had been rejected by the Panel as that contention was placing too much reliance on a recent period of good behaviour and stability on the Applicant's part when set against the history of his offending and poor conduct.

53. Indeed, there was much material to justify this conclusion by the Panel and that the risk reduction work had to be completed before the Applicant can be released and its decision to reject the the contention that the Applicant could

then be released and then complete the requisite further risk reduction work in the community as:

(a) the judge sentencing the Applicant for the index offence recorded that the Applicant had an "*unenviable record*" of criminal convictions going back to 2002.

(b) in sentencing the Applicant for the index offence, the judge described the Applicant's "*shocking display of violence"* in committing that offence*.*

(c) the Applicant had committed the index offence after he had completed the specified moderate intensity accredited programme, and this showed the risk he posed if released without having completed the requisite further risk reduction work.

(d) The prison psychologist referred to the Applicant's use of violence even after he had completed the specified moderate intensity accredited programme. She also considered that the Applicant's "*episodes of instability in custody further showed the need for him to develop and consolidate his skills in closed conditions*" i.e., before release.

(e) The Applicant's COM had considered that the Applicant's outstanding risk reduction had to be completed by him in custody prior to release. He noted that the Applicant "*had not been able to internalise and embed the learning from the work he has undertaken."* The Applicant's COM considered that "*alcohol misuse was a core risk factor for the Applicant and there were concerns whether the Applicant properly understood this and could manage his drinking*" in the community. Although he had been able to do so recently, this was when he was in custody and not in the community. He "w*as concerned whether any form of managed drinking would be appropriate for the Applicant given his history."* The opinion of the Applicant's COM was that "*there was core risk reduction work outstanding [for the Applicant] which needed to be addressed in custody*."

(f) the paragraph 38 considerations showed that the Applicant could not be safely released until he had completed the core risk reduction work

54. Thus, the Panel was entitled to conclude that there were outstanding treatment needs in the Applicant's case [and] until these are addressed (whether through the specified higher level intensity programme or something else) the Panel did not consider that the proposed [RMP] would manage the risk he presents. So, reconsideration cannot be ordered on Ground 1. Those conclusions were open to the Panel in October 2002 even though the Applicant's previous approval for a move to category D had been rescinded for reasons relating to an adjudication for sharing a photograph on social media in January 2021. After all, the Panel had heard and read much evidence at the oral hearing which was not available or considered when the decision had been made to permit the Applicant's move to Category D.

55. As to the Applicant's submissions,

(a) there is no merit in the Applicant's contention that a crucial criticism of the Panel's decision is that there is *"a lack of specificity as when [he] could realistically commence the intervention programme"* as this criticism fails to appreciate that the Panel's duty was to ascertain if at the time of the Panel's decision "i*t is no longer necessary for the protection of the public that the prisoner should be confined*". That test did not require any consideration of when appropriate intervention plans could commence. For the purpose of completeness, it should be added that when the purpose of oral hearings was being considered in the leading case of **Osborn, Booth and Reilly v Parole Board** [2013] UKSC 61, there was no suggestion in the Court's reasoning that one of the requirements of the oral hearing was to consider when intervention work could take place.

(b) in addition, there was much material in the Paragraph 38 considerations explaining why release should not be ordered in spite of the previous decision that the Applicant could be moved to Category D conditions which was rescinded after the Applicant received an adjudication for sharing a photograph on social media in January 2021. Before giving its Decision, the Panel conducted a full inquiry with much oral and written evidence as explained above.

56. There are further or alternative reasons why the Panel's conclusion on this issue should not be reconsidered and those reasons are that:

(a) as explained in paragraphs 41 above, reconsideration should not be ordered unless there has *"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.** In this case, no such error has been identified and /or in any event.

(b) due deference has to be given to the expertise of the Panel in making its decisions under challenge (including in deciding what weight if any should be given to the paragraph 38 considerations) and/or in any event

(c) in the light of the paragraph 38 considerations the decision under challenge to refuse to order the release of the Applicant did not meet the test for being irrational, namely that it 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."*

**Ground 2**

57. This Ground is that there was procedural unfairness in rejecting the Applicant's claim for release in the light of the failure of the Government's

public law duty to provide to the Applicant access to interventions and programmes to aid his sentence progression and rehabilitation

58. It is contended that there are three public law duties engaged and they are the duty:

(a) "*to provide systems and resources necessary to afford prisoners a reasonable opportunity to demonstrate they are no longer dangerous"* serving indeterminate sentences for public protection ("IPP's") need to demonstrate to the Parole Board, by the time of expiry of their tariff periods, or reasonably soon thereafter, that it is no longer necessary for the protection of the public that they remain in detention. **(R (Fletcher, Young and Bentley v Secretary of State for Justice** [2014] EWHC 3586 (Admin);

(b) to comply with the Secretary of State's own policies to enable and facilitate rehabilitation (see, for example R **(Kaiyam) v Secretary of State for Justice** [2014] 1 WLR 1208 (CA); and

(c) to rationally provide work that has been set as a requirement to be achieved before progression can occur, and/or not to create an impasse in requiring completion of work for progression that the prisoner is denied access to (**R (Cawser v Secretary of State for the Home Department** [2003] EWCA Civ 1252; **R(Gill) v Secretary of State for Justice** [2010] EWHC 364 (Admin); (2010) 13 CCL Rep 193).

59. It is contended by the Applicant that the Secretary of State is not entitled to overlook his public duty by pointing to inadequate resources available to him.

60. The MCA directions letter of 11 March 2022 states that "A *recent psychological risk assessment concludes that [the Applicant] should remain in closed conditions to complete the [*the specified higher level intensity programme*], but there is no information in the dossier as to whether, when and where the program could be delivered".*

61. It is contended that this outstanding information was not presented during the evidence with the consequence that the decision of the Panel to refuse to release the Applicant was procedurally unfair because it *"failed to give a fair reason as to why it elected the recommendations of an earlier prison psychological approach [of February 2022] which provided no specific details or foreseeable time frame for the delivery of the [*specified higher level intensity programme] *above the 'thorough and well-reasoned report of [the Prison Psychologist] which encompassed the progress made by the Applicant in custody since February 2022 (some 8 months hence) and the RMP which stipulated that the Applicant would 'engage with any offence related work (including but not limited to TSP) as directed by his com. This would include work on his alcohol misuse issues, which would be monitored by the use of an alcohol tag'"*

62. This ground fails to appreciate that the duty of the Panel was to determine whether or not to direct release a*t the time of its decision* and the test to be applied was, as set out in the Decision Letter, that:

"*The Parole Board will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined*"

63. The role of the Panel in the Applicant's case was solely to determine if *at the time of its decision* it was "no longer necessary for the protection of the public that [the Applicant] should be confined" and it was obliged to reach its conclusion by focussing solely on whether the protection of the public at that time required that the Applicant should continue to be confined.

64. The Panel was therefore not concerned with considering why the Applicant was not or had not been provided with access to interventions and programmes to aid sentence progression and rehabilitation. This was not relevant to the crucial and sole question for the Panel which was whether *at the time of its decision* the protection of the public required that the Applicant should continue to be confined. In other words, the Panel was not concerned with the question of why any of the higher-level intensity programmes had not been delivered.

65. If the Applicant has grounds for contending that he was not provided with access to interventions and programmes to aid sentence progression and rehabilitation so that he has not been released, he should consider bringing a separate claim for it. I must stress that I am not giving him any advice on this.

**Conclusion**

66. For all these reasons, this application for reconsideration must be refused.

**Sir Stephen Silber**

**20 December 2022**