[2022] PBRA 4

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Application for Reconsideration by Jones

Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision of a panel dated 23 November 2021 made after an oral hearing held on 16 November 2021 refusing to release the Applicant or to recommend his transfer 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 decision of the panel dated 23 November 2021, the application for reconsideration, the notification from the PPCS that the Secretary of State did not intend to make any submissions in response to the Application for Reconsideration and the Applicant's dossier comprising of 575 pages.

Background

4. On 6 July 2006, the Applicant, who was then 28 years old, was sentenced to imprisonment for public protection with a minimum term of 42 months, less time already served for an offence of attempted rape and a concurrent sentence of 2 years' imprisonment for the false imprisonment of the same victim.

5. He was transferred to open conditions on two occasions in 2015 and 2017 but in each case, he was returned to closed conditions on account of his threatening conduct.

6. He was released on licence on 16 November 2018 after the Parole Board had directed his release to Designated Accommodation (DA), but he was recalled on 26 January 2019. He did not return to custody until 14 February 2019. On 17 April 2019, he was sentenced to 7 days imprisonment for failing to notify the police of his change of address under the terms of the Sex Offender Register.

7. The Applicant was released to a DA on a second occasion on 21 July 2020 before being recalled on 29 July 2020 and returned to custody on 1 August 2020.

Request for Reconsideration

8. The application for reconsideration is dated 10 December 2021.

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

   (a) It was irrational or procedurally unfair for the panel to make a finding of fact against the Applicant with regard to the allegation which led to his recall which was the allegation he had made a threat to kill (Ground 1);

   (b) It was irrational for the panel to go against the decision of the professionals which was to give their clear support for the Applicant's release (Ground 2); and

   (c) It was irrational and procedurally unfair that the panel failed to give consideration to providing a recommendation for Open Conditions as per the referral from the Secretary of State (Ground 3).

Current parole review

10. After the Applicant's licence was revoked by the Secretary of State on 29 July 2020, the Secretary of State referred the Applicant's case to the Parole Board on 20 August 2020 to consider whether to direct the Applicant's release and, if not, to decide whether to recommend that the Applicant is ready to be moved to open prison conditions. The Applicant was then 42 years old.

11. The Applicant's case was heard by a panel consisting of one judicial member of the Parole Board and two independent members of the Parole Board on 16 November 2021.

12. Evidence was given by the Applicant's Prison Offender Manager (POM), the Applicant's Community Offender Manager (COM), a Police Officer (PC) and the Applicant. The Applicant was represented by his legal representative.

13. The Applicant was found guilty of the index offences which were committed as part of the same incident on 19 July 2005, although he maintains that he was innocent of the offences. Reports state that the Applicant knew the female victim of the offences through her relationship with his father. On the night of the offence, he went to her home asking if he could wait there until his father picked him up. She agreed. When she put her two young children to bed, she fell asleep only to be woken up by the Applicant demanding oral sex. When she refused, he threatened to rape her and grabbed her around the neck while she was in bed with her 2 young children. The Applicant barricaded the room where he held the victim and her two children captive for the evening.

14. The Applicant denied committing the index offences. He told the panel that he did not give evidence at his trial on the advice of his legal team. Records show that at the time of the sentencing for the index offences, the Applicant said that the case against him was one of mistaken identity. He later said he was involved in supplying drugs at that time and had used his victim's address to store them. He said that he was not at the victim's house on the night of the index offences and that he had no idea why he was accused.

15. The Applicant has an extensive record of offending over the previous three decades. His previous offences included robberies, assaults, anti-social and threatening behaviour. There was a pattern of violence in these previous offences, but there is only

one case of previous sexual offending when at the age of 15 he had been convicted of indecently assaulted a 14-year-old girl. His previous offences of violence included assaulting a taxi driver with intent to commit a robbery when using a knife in 2001, the robbery of his aunt in 2002 and biting a police officer in 2005 when he was apprehended. At the time of the index offences, he was on licence for an offence of assault occasioning actual bodily harm. There were reports of him assaulting prison staff early in his sentence and a history of poor compliance with 2 offences of escaping from lawful custody and offending whilst on bail subject to Court orders and licences.

16. The Applicant's custodial behaviour was poor during the early part of his sentence and he received adjudications for assaults, threats, and disobedience of orders.

17. His conduct improved after he completed for a second time a training course addressing decision-making and better ways of thinking in 2013 and a training course addressing the tendency to use violence in 2014. He also completed work on alcohol and drug awareness, but he was not regarded as being suitable to attend a training course addressing sex offending as he continued to deny having committed the index offences.

18. He was transferred to open conditions for the first time in 2015 but he was returned to closed conditions after a few weeks when staff at the prison received complaints about a phone call to his partner and a letter to a female friend who both felt threatened by him. He denied the complaints and no adjudications followed, so, it was difficult for the panel to place any weight on these complaints.

19. The Applicant returned to open conditions in January 2017 where overall he engaged well with staff, but he was returned to close conditions after 8 months after concerns about his aggressive and threatening behaviour towards a workplace supervisor.

20. The Applicant's behaviour improved, and the Parole Board directed his release. So, on 16 November 2018 he was released to Designated Accommodation (DA), but after spending 2 months in the community, he failed to return one evening and his licence was revoked on 26 January 2019. He then spent almost three weeks unlawfully at large and information in the dossier shows that he was arrested at the address of one of his father's friends. He originally claimed he was held hostage by masked men, but he later admitted that this excuse was fabricated. He then said that he had become stressed about move-on plans, that he had drunk alcohol, and that he disengaged with his risk management plan (RMP). He was returned to prison in February 2019, and he received a consecutive sentence of 7 days' imprisonment for failing to notify police of a change of his address under the terms of the Sex Offender Register.

21. The Applicant was re-released to a DA on 21 July 2020 but 8 days later he failed to return to the DA and despite records showing a call from him to indicate that he was delayed, he did not return. On 30 July 2020, the police received a complaint that the Applicant had made threats to kill the victim and her mother. The threats were allegedly made to the victim's relative (X), while she was at the house of the Applicant's father. I will return to consider the allegation of threats to kill, which the Applicant denies, when I deal with the First Ground for Reconsideration. The Applicant stated that he was effectively falsely imprisoned by a number of individuals, including X. The panel noted the similarities between the Applicant's account of being falsely imprisoned during his second release and his account of being held hostage during his first release.

22. The POM confirmed that the Applicant has maintained a status in custody by which he has earned more privileges through good custodial conduct since August 2020, and I will return to consider his conduct in custody and the risk he poses on release when I deal with the second Ground for Reconsideration. The POM read out to the panel three security entries in 2021 for which there were no gradings, but the POM said that the gradings were *"likely to be high".*

23. The first entry, which was from mid-June 2021, when the Applicant was found in possession of 3 banned books both linked with extremist views and conspiracy theories. They were investigated and no action was taken. The second entry in August 2021 was a suggestion from an email was that the Applicant was a member of a group on a certain wing within the prison. In November 2021, the security log indicated threats were made to staff. The POM had no further details of these entries, but she noted there were no resulting sanctions and that he maintained his employment.

24. The POM has stated that she identifies boredom as a significant risk factor for the Applicant as are drugs, his peers, and his father. She acknowledged that supervision broke down quickly when the Applicant was in the community and he displayed little evidence of internal controls which she believes he undoubtedly possesses. The issue in the future is whether he chooses to use them in the community especially in relation to contact with his father. She also recognises that there is outstanding work for the Applicant to do on sexual offending.

25. The Applicant maintained his denial of the index offences. According to the panel, he became frustrated when asked to answer questions about the time of the index offence and he demonstrated a lack of insight into his offending behaviour and the impact on the victim. He takes responsibility for breaching his second licence as he did not return to the DA.

26. The panel agreed with the assessment of risk of reoffending of the Applicant which is that he poses a high risk of reconviction for a contact sexual offence and a low risk of non-contact offending. The panel also agrees with the probation assessment report that the Applicant poses a high risk of causing serious harm to the public and known adults.

27. The panel issued its decision dated 23 November 2021, which is the subject of this Reconsideration application, on the following day in which the release of the Applicant on licence was not directed and a transfer of the Applicant to Open Conditions was not recommended.

The Relevant Law

28. The panel correctly sets out in its decision letter dated 23 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

29. 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)).

30. 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

31. 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."*

32. 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 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.

33. 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

34. 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.

35. 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.

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

Other

37. The test to be applied when considering the question of transfer to open conditions is the subject of a well-established line of authorities going back to **R (Hill) v Parole Board [2011] EWHC 809 (Admin)** and including **R (Rowe) v Parole Board [2013] EWHC 3838 (Admin), R (Hutt) v Parole Board [2018] EWHC 1041 (Admin)**. The test for transfer to open conditions is different from the test for release on licence and the two decisions must be approached separately and the correct test applied in each case. The panel must identify the factors which have led it to make its decision. The four factors the panel must consider when applying the test are:
    (a) the progress of the prisoner in addressing and reducing their risk.
    (b) the likeliness of the prisoner to comply with conditions of temporary release
    (c) the likeliness of the prisoner absconding; and
    (d) the benefit the prisoner is likely to derive from open conditions.

38. 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.

39. 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.*"

40. 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

41. The Secretary of State stated that he did not wish to make any representations.

Discussion

42. 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.

43. 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.

44. 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.

45. 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

46. It is contended that *"it was irrational/procedurally unfair for the Panel to make a finding of fact against [the Applicant] with regard to the allegation which led to his recall, the allegation of threats to kill"*.

47. This contention relates to the statement allegedly made by the Applicant to kill the victim and her mother made to X whilst she was at the house of the Applicant's father. The Applicant is alleged to have said that "*I am not going to seek them out but if I come across them then it's game over*". The Applicant denies that he said this, but he accepts that X was at the same address that he was at. In essence, his case is that she made up the statement. He offered no explanation as to why she would give a false statement other than that she is a friend of his father and that she takes drugs.

48. The panel explained that it "*carefully balanced the witness statements and the transcript of the 999 call in the dossier with the oral evidence*" as well as "*his offending history, pattern of giving inconsistent accounts in particular relating to the previous recall and the wider circumstances of the allegation*". This evidence included:

(a) The Applicant's denial that he had made the threat.
(b) The statement of X who said that the Applicant had made the threat.
(c) The statement from the victim who was not present when the threat was made but was contacted by X on 30 July who repeated the threats allegedly made by the Applicant.
(d) The transcript of the 999-call made by a male on behalf of X in which reference is made to X having seen the *Applicant "a few hours ago".*

(e) The evidence of the PC who explained that following a review of the evidence available and on the basis that the Applicant and X were alone when the threat to kill was allegedly made, *"the matter was not proceeded with".*
(f) The account that the Applicant gave at the hearing which differed from that given to his COM shortly after his recall which suggested more people were at the flat.
(g) Much evidence of the Applicant's offending history.
(h) The Applicant's history of giving inconsistent accounts in the past.

49. The task for the panel was to decide whether they accepted the evidence of the Applicant that he did not make the threat to kill. In carrying out this exercise, they, unlike me, have had the advantage of seeing and hearing the Applicant give evidence. There was much evidence to support the contention that the Applicant made the threat to kill in that:

(a) He originally gave a false account of what had happened to him after he was recalled after his release in November 2018 when he had been unlawfully at large for almost three weeks. Initially, he claimed that he had been held hostage by masked men, but he later admitted that this was untrue and he must have realised this when he gave this explanation. This shows that he has not been averse to giving inconsistent and dishonest accounts in the past to try to avoid liability;

(b) His account about the events leading to his arrest after his second release in 2020 when he stated he was effectively falsely imprisoned by several individuals including X. The panel stated that it "*was concerned to note the similarities between the account [the Applicant] gave for this [detention at the end of his second recall] and [the account he gave for his detention at the end of] his previous recall in 2019".*

(c) The Applicant's offending history shows, he has convictions for aggressive behaviour and that he was returned to Closed Conditions for threatening behaviour when in Open Conditions as explained in paragraph 5 above.

(d) The panel noted that the account the Applicant gave at the hearing differed from the account given to his COM shortly after his recall which suggested more people were at the flat and this undermines confidence in his evidence that he did not make the threat to kill.

(e) The panel was entitled to conclude as it did in paragraph 4.2 of its Decision that the Applicant's account that *"he had no credit on his phone to ring the [DA], was locked in a flat where he sat laughing at the females and then fell asleep lacked plausibility".*

50. The panel was entitled to conclude that on the balance of probabilities that the Applicant's offending history, his pattern of giving inconsistent accounts and his

inconsistent accounts of his conduct that it was more likely than not that he made the alleged threats to kill. Crucially, in any event, this ground must fail because that decision falls a long way short of meeting the test of being irrational set out in paragraph 31 above as it was not *"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".*

51. I have found nothing in the judgments in **R (Sim) v Parole Board [2003] EWCA Civ 1845** or in the Parole Board's Guidance on Allegations (March 2019 v1) which is inconsistent with this reasoning. Indeed, the reasoning of the panel shows that they carefully considered the arguments for and against accepting the contention that he made the threat to kill, and they were cautious before accepting that he made the threat when they knew from the evidence of PC set out in paragraph 47(e) above that there has been no conviction recorded or other judicial determination.

52. In any event there are further or alternative reasons why this ground must fail, and those reasons are that:

    (a) Due deference must be given to the *expertise* of panels of the Board in making decisions relating to parole;

    (b) In any event, it is 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. There are no such compelling or indeed other reasons in this case for interfering with the decision that the Applicant made the threat to kill;

    (c) In any event, I do not have the advantage that the panel had of hearing and seeing the Applicant and the professional witnesses giving evidence and the panel is entitled to further deference for its decision for that reason;

    (d) This was a case where there could be more than one decision that a panel could be entitled to arrive at depending on its view of the facts; and

    (e) A claim for procedural unfairness can only succeed if it can be shown that the Applicant's case was not dealt with justly, but there is no evidence that the Applicant's was not dealt with justly.

Ground 2

53. It is contended that it was irrational for the panel to refuse to release the Applicant which was contrary to the recommendations of the professionals given their clear support for the Applicant's release. It is true that the professionals supported the Applicant's release, but the duty of the panel was to scrutinise this evidence carefully especially as the Applicant's previous releases were not successful nor were his moves to open conditions.

54. The submissions made on behalf of the Applicant set out the reasons why he should be released, and they included:

(a) Referring to the reasoned conclusions of the professionals advocating the release of the Applicant and their opinion that the Applicant met the test for release and that he had shown increased maturity since his return to custody;

(b) The facts that he had maintained his status in custody by which he has earned more privileges and that he held a trusted position of employment in the kit room;

(c) The restrictions in the Applicant's RMP prevented the Applicant from associating with negative peers including his father which were factors which led to his previous recall;

(d) The absence of any outstanding core risk reduction work required for the Applicant to complete in custody;

(e) The progress that the Applicant had made since recall in addressing his poor consequential thinking; and

(f) His empathy towards staff and other prisoners and the reliance by staff on assistance from the Applicant.

55. The panel noted that the Applicant did not challenge his recall and it concluded that the recall decision was appropriate bearing in mind that he failed to return to the DA and disengaged with the RMP. In determining the Applicant's application for release, the panel properly balanced the serious nature of the index offence, his conduct leading to his previous recalls, the lack of any violent convictions since the index offence, his compliant prison behaviour and the proposed RMP.

56. The panel looked at how the Applicant had behaved when released and they were concerned that, as already explained, the Applicant had been released twice and recalled twice for misconduct. It was noteworthy that he had also been transferred to open conditions twice before being sent back to closed conditions on account of his misconduct as I have explained.

57. As the panel pointed out, a reason for that was that the Applicant has shown on previous releases that while he can comply with restrictions in custody, he cannot comply with restrictions on release. In addition, in the past he and the professionals have said when supporting his application to be released he has learnt from previous misconduct on release, but sadly, subsequently after release, he failed to apply this determination within a very short period after release. Furthermore, the protective factors on which he relies have failed in the past to deter him from reoffending.

58. Similarly, the panel explained another reason why they did not believe that the Applicant could be safely released was that at *a "previous hearing in 2020, [the Applicant] said he had learnt from his first recall and intended to avoid his father…it is therefore of serious concern that he failed to apply this determination, within a very short period after release."*

59. Having considered the Applicant's risk factors, the panel *"assessed the risk of him failing to comply with the proposed [RMP] as high and noted that the protective factors in place did not prevent him from breaching his licence conditions".* The panel considered that because the Applicant *"returned to a high-risk situation so quickly after release, they considered the risk of harm to be imminent"*. A further or alternative reason why it was open to the panel to reach that conclusion was because, as I have explained, he had made the threat to kill.

60. The panel was entitled to conclude having carried out their own assessment of the Applicant's risk management that they were not satisfied that he had the internal controls to manage risky situations. In those circumstances, the panel was entitled to conclude that the Applicant did not satisfy the test for release and that they were not satisfied that it was no longer necessary for the protection of the public that he should be so confined. Crucially, in any event, this ground must fail because that decision falls a long way short of meeting the test of being irrational set out in paragraph 31 above as it was not *"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".*

61. In any event there are further or alternative reasons why the panel was entitled to conclude that the Applicant should not be released, and those reasons are that:

(a) Due deference must be given to the *expertise* of panels of the Board in making decisions relating to parole;

(b) In any event, it is 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. There are no such compelling or indeed other reasons in this case for interfering with the decision that the Applicant should not be released;

(c) In any event, I do not have the advantage that the panel had of hearing and seeing the Applicant and the professional witnesses giving evidence and the panel is entitled to further deference for its decision for that reason; and

(d) This was a case where there could be more than one decision that a panel could be entitled to arrive at depending on its view of the facts.

Ground 3

62. Ground 3 is that it was irrational and procedurally unfair that the panel failed to give consideration to providing a recommendation for Open Conditions as per the referral from the Secretary of State.

63. First issue to be considered is whether the reconsideration mechanism introduced in the Parole Board Rules 2019 (the Rules) applied to the 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 at [5] that*: "under Rule 28(1) of the [Rules] the only kind of decision which is eligible for reconsideration is a decision by 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".*

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

65. Even if that reasoning was wrong, this ground must fail as there was no support at the hearing for the Applicant's return to open conditions as the witnesses considered that it would de-motivate the Applicant and the Applicant explained that he would not consider such a move.

66. Although the panel saw benefit in the Applicant going to Open Conditions, in the light of the Applicant's resistance to such a move and his history of absconding from his designated accommodation, it had concerns about whether he would comply. The panel therefore concluded that it would not be appropriate to make a recommendation for transfer to open prison. The panel was entitled to reach that conclusion.

67. Crucially, this ground must fail because that decision falls a long way short of meeting the test of being irrational set out in paragraph 31 above as it was not *"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".*

68. In any event, there are further or alternative reasons why the panel was entitled to conclude that it should not recommend the release of the Applicant to Open Conditions and those reasons are that:

(a) Due deference must be given to the expertise of panels of the Board in making recommendations to open conditions;

(b) In any event, it is inappropriate to direct that the decision not to recommend that the Applicant be moved to Open Conditions be reconsidered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. There are no such compelling or indeed other reasons in this case for interfering with the decision that the Applicant should not be recommended for release to open conditions;

(c) In any event, I do not have the advantage that the panel had of hearing and seeing the Applicant and the professional witnesses giving evidence and the panel is entitled to further deference for its decision for that reason;

(d) This was a case where there could be more than one decision that a panel could be entitled to arrive at depending on its view of the facts; and

(e) A claim for procedural unfairness can only succeed if it can be shown that the Applicant's case was not dealt with justly, but there is no evidence that the Applicant's was not dealt with justly.

Decision

69. 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
7th January 2022