

[2022] PBRA 95

## Application for Reconsideration by The Secretary of State in the Case of Saunders

### Application

1. This is an application by the Secretary of State ("the Applicant") for reconsideration of the decision of a panel of the Parole Board ("the Board") which on 13 June 2022, after an oral hearing on 1 June 2022, issued a provisional decision to direct the release on licence of Saunders ("the Respondent"). The decision was provisional because it was eligible for reconsideration under Rule 28(1) of the Parole Board Rules 2019.
2. The case has been allocated to me as one of the members of the Board who are authorised to make decisions on applications for reconsideration.
3. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases (as set out in rule 28(2)) on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair.
4. I have considered the following documents for the purpose of this application:
  - The dossier provided by the Applicant which now contains 1256 numbered pages;
  - The panel's decision letter ("DL");
  - The Application for Reconsideration ("the application") dated 5 July 2022 together with submissions in support; and
  - The response by the Respondent's solicitors dated 14 July 2022.

### Background

5. The Respondent is now aged 55 and was convicted by a jury on a 12 count Indictment, receiving a sentence of imprisonment for public protection (IPP) on 16 November 2007 for multiple sexual offences of causing or inciting prostitution or pornography involving



a child, intending to meet a child following sexual grooming, causing a child to watch a sexual act and making indecent photographs on a computer ("the index offences").

6. When sentencing the Respondent, the Judge fixed the 'tariff' (the minimum period required to be served in prison before becoming eligible for release on licence) at 3 ½ years less the time served in prison on remand. The tariff expired on 8 October 2010.
7. The index offences were committed in 2006 and involved the sending of "*internet invitations to young girls between the ages of seven and sixteen suggesting they apply for work as models to perform in the pornographic industry for financial gain. It is also reported that you sent an email with photographs of yourself exposing your penis. When your home computer was searched the sentencing judge noted that 507 pornographic photographs were found, some being at level 5. You have always maintained your innocence of these offences and claims that you were "set up" by a work colleague. The sentencing judge commented that this allegation was "totally untrue".*" (DL p.4).

### **Current parole review**

8. The present review of the Respondent's case commenced on 5 February 2020. It was referred to the Board by the Applicant for the fifth time to decide whether to direct re-release on licence or, if not, whether to recommend a transfer to open prison conditions.
9. On two previous occasions in 2019 a panel of the Board recommended to the Applicant that the Respondent was suitable for a progressive move to open conditions. However, she has continued to be held in the closed prison estate.
10. On 10 March 2021 a single member of the Board reviewed the case on paper and directed an oral hearing.
11. The case was allocated to the panel, which comprised an independent member of the Board, a psychiatrist member and a psychologist member. The panel was chaired by the independent member.
12. Unfortunately the final hearing had to be adjourned/deferred on a number of occasions.
13. The Applicant's representative in written opening and closing submissions urged caution upon the panel in arriving at its decision.
14. The Applicant was represented by her solicitor who sought a direction for release.
15. At the hearing on 1 June 2022 evidence was given by:
  - a) The Prison Offender Manager ("POM");

- b) One of the two Community Offender Managers (“COM”) currently working the case;
- c) The prison forensic psychologist (FP) instructed by the Applicant; and
- d) The independent forensic psychologist (IP) instructed on behalf of the Respondent.

16. Both psychologists supported the Respondent’s application for release on licence.

17. The COM, who had assumed joint supervision of the case in February 2022 supported the making of a recommendation for open prison conditions. The POM supported the COM’s recommendation.

18. The Respondent gave evidence and the panel also heard from three other psychologists who gave evidence on discrete issues.

### **Request for Reconsideration**

19. The application is dated 5 July 2022. The Applicant advances a number of grounds, under the following headings, for reconsideration of the panel’s decision, all based on irrationality:

- A. Failure to appropriately consider risk-related evidence;
- B. The panel have placed inappropriate weight on recommendations; and
- C. The panel have placed inappropriate weight on the relationship with professionals.

20. These grounds, and some of the Respondent’s solicitor’s responses to them, will be discussed in detail below.

### **The Relevant Law**

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

21. The test for re-release on licence is whether the Respondent’s continued confinement in prison is necessary for the protection of the public. This test was correctly set out by the panel at the start of its decision. Indeed, nowadays the test is automatically set out in the Board’s template for oral hearing decisions.

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

23. 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 contains an error of law (b) that it is irrational and/or (c) that it is procedurally unfair.

24. In this case the Respondent is serving an indeterminate sentence of imprisonment and a decision was made by the panel at an oral hearing to direct her release on licence. It is thus eligible for reconsideration.

25. The application made on the basis of irrationality and no other ground is alleged.

### *Irrationality*

26. 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."*

27. 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.

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

29. The Applicant's submissions do not contain case law but it is helpful to refer to decisions of the courts or reconsideration panels of the Board which identify three specific situations in which a decision of a panel of the Board may be regarded as irrational.

30. The first of those situations is where the panel has failed to give sufficient reasons for its decision. The importance of giving reasons was reiterated in **R (on the application of Stokes) v Parole Board [2020] EWHC 1885 (Admin)**. In that case the court cited the following explanation given by Lord Carnwath in **Dover District Council v CPRE Kent [2017] UKSC 79** for the need to give reasons in public law decision-making:

*'I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the [decision maker] should be disclosed... It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so to make effective the right to challenge the decision by judicial review.'*

31. It follows that a panel of the Parole Board must provide sufficient reasons to explain its logic and how its conclusion follows from the evidence put before it. There should not be an "*unexplained evidential gap or leap*": see the decision of Mr Justice Saini in **R (on the application of Wells) v Parole Board [2019] EWHC 2710 (Admin)**.

32. This principle has been endorsed in a decision of a reconsideration panel directed a re-hearing because the panel had failed to give sufficient reasons for its decision. He stated: "*[The Panel] had to be satisfied that there was evidence of change and reduction of risk ... in my judgment it has not in a detailed decision pointed to evidence of a risk reduction in any key area. It can be said that given the circumstances that led to recall and the subsequent events in prison, the evidence pointed in a different direction ... the obligation upon the panel was to provide a decision that fully explained and fully justified their conclusions*".

33. Other situations are (1) where the decision is '*outside the range of reasonable decisions open to the decision-maker*' (this is the familiar 'Wednesbury unreasonable' test which has been applied for many years by the courts in public law cases), and (2) where '*manifestly disproportionate or inadequate weight has been accorded to a relevant consideration*' (see **R (Gallagher) v Basildon DC [2011] PTSR 731 at §§31, 41; De Smith's Judicial Review at §11-029**).

### The reply on behalf of the Respondent

34. In helpful submissions dated 14th July 2022 the solicitors for the Respondent seek to uphold the decision of the panel to direct release. The solicitors also state, "*We understand [the Respondent] has also prepared handwritten representations which are to be included in the dossier for consideration.*"

35. No such representations appear in the dossier provided to me.

### Discussion

36. In dealing with the grounds for reconsideration, it is necessary to stress certain matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgement 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.

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

38. Third, where a Panel arrives at a conclusion, exercising its judgement 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.

39. I move now to consider in detail the grounds put forward by the Applicant and his arguments in support. Unless otherwise indicated, paragraph references are to those in the application.

**(A) Failure to appropriately consider risk-related evidence**

40. In **Paragraphs 6/7/8** (although paragraph 7 simply repeats paragraph 6) the Applicant makes the bold submission that “the panel did not make a finding of whether the Respondent is a risk to underage female children.”

41. In order to justify this submission the Applicant appears to suggest that, when the panel uses the term ‘young girls’ it is to be understood to be referring only to 16/17 year olds.

42. When dealing with the counts in the Indictment the Trial Judge in his sentencing remarks does indeed use this term and it is right to say that the offence contrary to s.48 Sexual Offences Act 2003 encompasses the allegation that the invitation to apply for work as a model was directed to girls aged 7 to 16. However, it is quite clear that the victims in counts 2-7 were female children aged 12/13.

43. It is also correct that the panel uses the term “young girls” as does the expert witness, IP, but there is no indication that, in either case, this is to be read as being confined to females aged 16 or 17.

44. The psychologist, FP, refers to “children” or “female children” (e.g dossier pp. 388, 391 and 1169) as does IP (eg dossier p 353).

45. The panel notes that the OASys risk assessment indicates that the Respondent poses a high risk of serious harm to children and quotes the opinion of IP in her report of May 2022 that the likely victims of sexual harm are “specifically children”.

46. Crucially, at DL 3.9, the panel makes it clear that it has focused upon the nature of the index offences which it describes as “non-contact sexual offences against female children.....” and in the next paragraph it concludes that, while the Respondent does not pose a high or imminent risk of sexual reoffending, should she reoffend sexually, the risk of serious harm to children would be high.

47. Therefore, when at DL 4.6, the panel indicates its agreement with the assessment of professionals that the Respondent poses a risk to young girls but that this is neither high nor imminent, I am satisfied that this finding relates to female children and is not to be confined solely to girls of the age of 16 and 17. To suggest otherwise is, in my view, untenable.

48. At Paragraph 9 it is submitted that weight should have been placed by the panel on the prison phone logs which were disclosed. These comprise over 400 pages (dossier pp.574-982) of monitored telephone conversations between the Respondent and (almost exclusively) her husband and her erstwhile partner (Ms. X).
49. A note about these logs is provided by a prison employee, from which it appears that the calls may not have been listened to on the same day that they were made. Also, some paraphrasing took place and a number of members of the prison staff were involved in preparing the transcripts. Their identities were not provided nor were any statements confirming that the logs constitute a true and accurate recording of what was said.
50. The note will, however, have been of some assistance to the panel and it is difficult to see what purpose the prison employee's attendance at the hearing would have served as she was not, apparently, someone who listened to the recordings and/or compiled any of the logs.
51. In submissions on behalf of the Respondent (dossier p.1233) it is noted that the Applicant's representative did not put any questions to the Respondent in relation to the phone logs while the panel had the benefit of the views of IP who viewed the logs and stated that she was unable to discern any specific risk concern posed in them by the Respondent to Ms. X.
52. It is concerning that the Applicant has chosen in this submission not to quote the whole of the panel's findings with regard to the phone logs since the panel goes on to find that, *"where there were apparently risk-related comments attributed to [the Respondent] within the logs, the panel placed these within the context of [the Respondent's] overall pattern of making intemperate comments or threats to others but with no evidence that these have been or ever would be acted upon."*
53. The panel will have considered the logs carefully in the light of the prison employee's statement and took the view that it could place little weight on their contents for the reasons which the panel gave.
54. I can find nothing in the analysis provided by the panel upon which to base a finding of irrationality.
55. At Paragraph 10 it is submitted that the panel failed to consider the risk posed to Ms. X.
56. The panel noted that the OASYS risk assessment suggested a medium risk to a known adult (Ms. X) (based on concerns round coercion and manipulation) but it also had the

evidence of the POM (dossier p.1233) that she did not pose a risk of serious harm to a known adult.

57. In addition, IP notes that the Respondent has no history of physical violence and her risk remains exclusively towards children.

58. Furthermore, the COM reported for the purposes of the oral hearing that, although it had previously been proposed that the Respondent's contact with Ms. X in the community should be restricted "*following no recent indication of escalation of risk within this relationship, the MAPP panel have deemed it unnecessary to continue this restriction or propose the restriction on licence.*" (dossier p. 1176).

59. The panel specifically considered the Respondent's relationship with Ms. X, which it described as being well known to probation such that any changes in the relationship or any matters arising that were directly relevant to risk could be, in the panel's view, monitored and managed through supervision. In addition, it imposed no specific licence condition to restrict their contact in the community.

60. I am satisfied that the panel gave proper consideration to the question of the risk to Ms. X.

61. At Paragraph 11 the Applicant suggests that the panel misinterpreted the risk assessments.

62. I do not find this to be the case. The quotations relied on by the Applicant relate to two different matters. There is first of all the level of risk which the Respondent would pose if she were to reoffend sexually. In reliance upon the professional assessments, the panel understandably found that the risk of serious harm to children would be high.

63. The risk of sexual reoffending is a separate issue. Again, in reliance upon the professional assessments, the panel found that this risk was neither high nor imminent.

64. At Paragraph 12 the Applicant seeks to argue that the panel should have fully explored why the risk management plan (RMP) provides for the Respondent to be released to a male Approved Premises (AP). It is rather surprising that the Applicant should make this point.

65. It is understandable that the panel should have sought to explore a decision to move the Respondent who is "*legally recognised as a woman*" (dossier p.542) from the closed female estate to a male AP for a number of reasons including the Respondent's own misgivings. However, this is a matter for the Applicant and the panel's decision has to be confined to applying the public protection test and to considering (as it did) whether it would be safe to release the Respondent to the designated AP.



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66. At Paragraph 13 the Applicant submits that the panel has failed to fully consider and detail the protective factors in the case which it relied on.

67. I find that the panel had considerable evidence before it which came under the umbrella of "protective factors" some of which they detail in their conclusions at DL 4.3, 4.5 and 4.6 and I am satisfied that it has provided sufficient reasons to explain and justify its findings.

68. At Paragraph 14 the Applicant suggests that it is irrational for the panel to conclude that the Respondent's limited acceptance of her offending could act as a protective factor as it stems from feelings of shame. In my judgement, this was a panel whose composition made it particularly well qualified to come to just such a finding when applying its expertise to the evidence before it.

(B) The panel have placed inappropriate weight on recommendations

69. The independent forensic psychologist, IP, initially met with the Respondent in November 2020. She provided three reports, the most recent dated to May 2022. She consistently recommended the Respondent's release on life licence and provided a detailed analysis of her history, psychosexual development, offending behaviour and progress in prison together with a thorough risk assessment and consideration of the manageability of the Respondent's future risk.

70. She gave oral evidence to the panel who had the opportunity to question her thoroughly.

71. The forensic psychologist, FP, initially met with the Respondent in May 2021. She also provided 3 reports, the most recent dated to May 2022 and also consistently supported the Respondent's release on life licence.

72. She provided a full assessment including personality features and the risk of sexual violence and she gave oral evidence to the panel which had the opportunity to question her thoroughly.

73. The COM began to jointly work the case in February 2022.

74. The numerous references in the DL to the written and oral evidence of IP indicate that the panel gave careful consideration to her views and I can discern little to support the submission of the Applicant (**Paragraph 15**) that the panel held contradictory views to that of IP.

75. In addition, I find no merit in the suggestion that the panel's finding that the nature of the index offences had the potential to progress to contact sexual offences

contradicts IP's view that an element of sexual interest (which IP acknowledges) was not a driving force behind the index offences.

76. The views referred to by the Applicant in fact relate to separate issues, the one looking to the past and the possible motivation for the index offences and the other looking to the future and the potential for a different sort of offence to be committed if the Respondent were released on licence. In my judgement the views expressed are not contradictory and do not justify a finding that inappropriate weight was placed on the recommendations of IP which had the support of FP.

77. As to the Applicant's submission at Paragraph 16, it is a pity that once again he fails to quote the relevant passage in full or to acknowledge the context.

78. FP in fact addresses this issue in her first report at p. 399 of the dossier: "*While progression to open conditions may be considered a safer option, in terms of external controls, this has been denied to [the Respondent]. I believe that provided appropriate licence conditions are in place, release to an Approved Premise may offer a more contained environment and afford [the Respondent] with greater opportunities to develop resettlement plans.*"

79. The Applicant, however, chooses to quote from FP's third report (dossier p.1172) but fails to go on to include the next sentence in which FP explains why she continues to support release:

*"It is my opinion, however, based on my assessment of risk of sexual violence and consideration of risk of serious harm, that with appropriate licence conditions and MAPPA arrangements, [the Respondent's] risk of harm could be managed in the community, initially residing in an Approved Premise."*

80. In any event, this submission is based on a misunderstanding of the panel's role. The panel has first to consider whether the Respondent meets the test for release. Having decided that she did meet that test, the panel was under no obligation to go on to consider the question of open prison conditions.

81. I am satisfied that, read as a whole, the DL provides ample justification for the panel's reliance upon the full assessments, detailed analysis and unanimous recommendations of both psychological witnesses, particularly given their respective experience and qualifications, and for its reliance on their assessments and conclusions.

(C) The panel have placed inappropriate weight on the relationship with professionals

82. The issue of the Respondent's relationship with professionals and her manageability in the community had to be an important issue for the psychologists as well as for the panel.

83. IP acknowledged that the Respondent could be challenging and that her supervision in the community would not be straightforward as a result. Nevertheless, she

considered that her risk was manageable in the community by means of licence conditions and careful monitoring of her use of the internet.

84.FP described a poor and challenging relationship with Probation who, in their turn, had serious concerns about being able to manage the Respondent in the community owing to her threatened non-compliance. However, FP noted that, despite misgivings, the Respondent would be willing to work with her COM and try to build their relationship.

85.Nevertheless, both psychologists continued to recommend release.

86.The POM confirmed that the Respondent did engage with her and they had open and honest discussions.

87.The panel was obviously well aware of the professional concerns and set out them out in detail at DL 3.17.

88.I do not propose to set out here the whole of DL 3.17 as, in my view, it contains a detailed, measured and insightful analysis of the concerns with the panel drawing a careful distinction between intemperate verbal outbursts and comments to staff and the reality of a prisoner who maintains Enhanced status and has been largely compliant in custody while bringing legitimate complaints within the appropriate forum.

89.I find that the specific comment upon which the Applicant chooses to rely (Paragraph 19) is simply one example of the kind of comment which the panel examined with appropriate care and I reject the suggestion that this issue was insufficiently explored.

90.As to the relationships with Ms R and her husband, IP notes that the Respondent has no history of physical violence and her risk remains exclusively towards children.

91.As to her husband, the Panel found (DL 2.27) that the Respondent was currently estranged from him and that she does not seek to resume that relationship.

92.As to Ms. X, IP having considered the logs, was unable to discern from them any specific risk concern posed by the Respondent to her (dossier p. 1210).

93.I find that the panel fully acknowledged the very real concerns in relation to the Respondent's relationship with professionals and its implications for her safe management in the community and came to the conclusion that, in the light of the unanimous psychological evidence, the Respondent's risk being assessed as neither high nor imminent and the proposed licence conditions and robust risk management plan, the Respondent met the public protection test for release.

## Decision

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

**Peter H.F Jones**  
**5 August 2022**

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