

**[2024] PBRA 115****Application for Reconsideration by Smith****Application**

1. This is an application by Smith (the Applicant) for reconsideration of a decision of an oral hearing panel dated 9 May 2024 (the Decision) not to direct the release of the Applicant.
2. 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)) 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. This is an eligible case, and the application was made in time.
3. I have considered the application on the papers. These are the Decision, the Application for Reconsideration dated 24 May 2024, the email from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) to the Parole Board dated 4 June 2024 offering no representations in response to the Application for Reconsideration and the dossier totalling 405 pages.

**Request for Reconsideration**

4. The application for reconsideration is dated 24 May 2024.
5. The grounds for seeking a reconsideration are that the Decision to refuse to release the Applicant was:
  - (a) irrational as:
    - i. after a previous oral hearing on 12 October 2023, the panel decided not to release the Applicant as it was considered necessary that he should complete further risk reduction work such as New Me MOT and engagement with PROSPER;
    - ii. the Applicant has now completed risk reduction work as outlined in various reports (including the work envisaged by the previous panel) and has also completed both group and one-to-one therapy as well as a number of educational and vocational qualifications;

- iii. the release of the Applicant was advocated in an updated psychological risk assessment completed in October 2023 (the October 2023 psychological assessment);
- iv. the release of the Applicant was also advocated in the oral evidence to the panel of the author of the October 2023 psychological assessment;
- v. the Prison Offender Manager (POM) and the Prison Psychologist recommended release but the Community Offender Manager (COM) preferred a recommendation for open conditions as this appeared to be based on a view that it would be beneficial as opposed to being essential and that it was not necessary to protect the public, but when cross-examined the COM appeared at one point to concede the release test was met;
- vi. all professionals were agreed that there was no core risk reduction work outstanding and the remaining risk was not imminent;
- vii. a robust risk management plan was proposed with a number of additional licence conditions including residence at Approved Premises; and
- viii. the panel placed "*insufficient weight*" on the evidence of the POM and the Prison Psychologist who supported release and undue weight on the evidence of the COM (Ground 1);

and further or alternatively that the decision was

(b) procedurally unfair (Ground 2).

### The Applicant's Offending

6. On 18 September 2009, the Applicant received 2 indeterminate concurrent sentences of imprisonment for public protection with a minimum of 2 years' imprisonment to be served prior to release, less 182 days spent in prison on remand for each of 2 offences of sexual assault of a female child and of commit any offence other than by means of kidnap/false imprisonment with intent to commit relevant sexual offence (the index offences).
7. The Applicant's first index offence was committed when he sexually assaulted a girl who was 16 years old and who was dressed in her school uniform when he followed her and put his hand up her skirt touching her genital area over her underwear. The Applicant's second index offence was committed when he followed and stared at another girl, who was 16 years old, on her way to and from school over a period of weeks placing her in fear. The Applicant's guilty plea showed that he was anticipating committing some form of sexual assault on her.
8. The Applicant was aged 32 years old at the time of sentencing. He is now 47 years old.
9. He had two earlier previous convictions in 2003 (the 2003 convictions) when he was 26 years old. His first conviction in 2003 was for stealing underwear with his



motivation being to masturbate to thoughts of a teenage girl, while his second conviction in 2003 was for attempted kidnapping and having an imitation firearm when he was targeting a 15 year old schoolgirl who he threatened with that weapon in an apparent attempt to get her to enter into his car so that he could sexually assault her. She managed to run away before she could be sexually assaulted.

10. The Applicant has admitted to the 2022 panel a long-term sexual attraction to teenage girls. He told the panel considering his case in 2022 that he would probably always have a sexual interest in girls in uniform and he acknowledged his desire for power and control as factors in his offending which he attributed to his low self-esteem. He told the panel that *"his enduring interest in girls in school uniform [derived] from his experience of being belittled and socially isolated by peers at school causing him a sense both of resentment...and of wanting to make up for what he missed out on sexually at that age and in that context"*.
11. A time came when it was decided that the Applicant had completed all required core risk reduction work and that he could be he transferred to open conditions. He was transferred to open conditions in February 2018 where his conduct was positive, and he achieved Enhanced IEP status. The Applicant was released on licence on 7 May 2019 after a direction to that effect was made by the Parole Board after a hearing. He was moved from Approved Premises (AP) to live at his mother's home, but he was recalled in August 2019.
12. His licence was revoked on 16 August 2019 when he was recalled *"nine/ten days after moving from the AP"* after a police check on his internet web browsing history revealed that the Applicant had been viewing multiple teen-themed pornographic videos including a site with a title which indicated that the site was concerned with sexual intercourse with a 12-year-old "daughter". It was evident from the OASys that the Applicant had made *"hundreds of visits to various pornographic websites"* and that he had engaged in *"frequent viewing of 'teen girl' and schoolgirl themed pornography"*.
13. A panel in 2020 reviewed and confirmed the Applicant's recall, which the Applicant did not challenge. It found that he had *"outstanding core risk factors"* and that he *"had very rapidly been unable to apply the skills he had learned"*. It concluded that the Applicant *"lacked the internal mechanisms to manage his risks and was highly dependent upon external controls"*.
14. Before his review by the 2022 panel, the Applicant had engaged in therapy aimed at exploring better relationships and he was assessed to have engaged to a high standard. He described his sexual thoughts at that time as *"80-90% healthy"*.
15. In deciding that the Applicant did not meet the test for release, the 2022 Panel referred to its concerns including the Applicant's minimisation of his internet search history, telling the panel that *"half the time he did not see the headers"* to the material. The 2022 Panel in deciding that the Applicant did not meet the test for release or the criteria for progression explained that the Applicant's COM considered that the Applicant still had core risk reduction work to do while his POM accepted that the Applicant still had work to do to reduce his risk.



16. The Applicant in his oral evidence to the 2022 Panel stated that *"in [the] face of 'overwhelming' feelings of isolation, he had turned to the pursuit of pornography as his means of 'self-soothing'"* and he acknowledged that if he had not been detected, *"he might have progressed on to contact offending"*. In the Decision, it is recorded that the Applicant told the 2022 panel that he would *"probably always have a sexual interest in girls in uniform"* and he *"acknowledged his desire for power and control as a factor in his offending, attributing this to low self-esteem"*. In his evidence to the current panel, the Applicant *"sought to explain his enduring interest in girls in school uniform deriving from his experience of being belittled and socially isolated by peers at school causing him a sense of both resentment ... and of wanting to make up for what he had missed out on sexually at that age and in that context."*
17. The Panel noted that the Applicant had sought to make constructive and positive use of his time in custody including completing the new Me Toolbox and Maps for Change worksheets in his cell.
18. The Applicant's COM noted the Applicant's acknowledgment that *"though he had completed all the relevant programmes before his release, he had been unable to manage his sexual thoughts appropriately when faced with challenges in the community [and] he had felt unable to discuss his issues fully with his then supervising officer"*. The Applicant had disclosed his sexual thoughts *"have never fully gone away but he has tried to learn how to control these thoughts"*. He has told his COM that *"he still has inappropriate sexual fantasies from time to time"*.
19. In his oral evidence to the Panel, the Applicant refers to his reduced sexual drive but described experiencing *"fleeting ('20-30 seconds') interest in schoolgirl-related images he can encounter when watching TV drama"*.

### **Analysis of the Manageability of the Applicant's Future Risk**

20. According to the Applicant's Risk Management Plan (RMP), it was anticipated that the Applicant would have an initial placement in Approved Premises (AP) with move on to semi-supported accommodation where his COM was based. The Applicant's longer-term wish has been to move back to where some of his family live. Under the RMP, there would be continuing involvement with a professional service to support the Applicant in maintaining mental health, psychological well-being and reducing emotional distress as well as continuing current work with the Applicant's COM. If required, a substance misuse worker would be available to provide support for the Applicant in the recovery process.
21. In his oral evidence, the COM gave the Panel an update of the proposals in relation to the AP placement and the move on arrangements. He explained that the AP placement would be for up to 12 weeks and thereafter the Applicant would move on to a project where he could be accommodated for up to two years. During the AP placement this would be within a Police area where the e-sure software internet monitoring system would be available to closely monitor the Applicant's internet use. This monitoring would probably not be available when the Applicant leaves that area and moves on to a different area.



22. According to the actuarial risk measurement in the most recent OASys in March 2024, the Applicant had a profile indicating a "low" probability of proven reoffending (OGRS3) and the same probability of proven non-violent reoffending (OGP) and of proven violent reoffending (OVP). The Applicant's "risk of serious recidivism" score was also assessed as "low".
23. The Panel considered that these actuarial rankings accurately reflected the Applicant's criminal record and the input of available data but it was considered that these scores should be "applied cautiously" in the light of the nature of his index offences, the circumstances of his recall, his static risk score and the Probation Service's assessment that the Applicant poses a "high" risk of causing serious harm to children "primarily teenage girls, including those of school age and in school uniform" and a low risk to other categories.
24. Application of the OASys Sexual Reoffending Predictor (OSP) shows that the Applicant has a profile in common with men who pose a "high" risk of proven "contact" sexual reoffending, though a low risk of proven "image related sexual reoffending".
25. The Applicant told the Panel that he did not consider that he posed a danger to others or a "high risk", although he stated that he could understand how other people might think this. He did not oppose any aspects of the RMP proposals.
26. The Prison Psychologist concurred with a previous assessment that the Applicant posed a moderate/high risk of future offending and considered that the risk would not be imminent and that there would be an increase of risk should the Applicant "be under significant levels of uncertainty and/or stress in particular related to the breakdown or change of his professional support network". She considered that it was essential that the Applicant and those working with him "do not become complacent in the long term and those areas of heightened risk are clear and therefore strategies could be considered and put in place i.e. breakdown of professional relationships".
27. The professional opinion of the Prison Psychologist was that the Applicant had completed open conditions and a period in an AP would be "without cause for concern", but she considered that "whilst manageable a further period of time in open conditions may impact the progress, he has so far made with regards to developing links with the community". Her conclusion was that release was "the most viable option to ensure continuity of care that [the Applicant] requires both with probation and ongoing mental health teams [and] support networks for [the Applicant] and the COM are ready and available in the community". She confirmed this recommendation in her oral evidence as did the POM in her oral evidence prior to hearing the further witnesses.
28. The COM in his report of November 2023 considered that a period of testing in open conditions prior to re-release would "enable [the Applicant] to demonstrate appropriate decision-making and coping strategies". He also believed that progressions through the open conditions "would allow [the Applicant] to **show professionals** working with him that his risks **can be managed** in the community" (emphasis added). The COM's report also explained that the Applicant would be given "the opportunity to demonstrate that he is able to remain offence-free and



*manage his emotional well-being and sexual thoughts more appropriately whilst in the less controlled environment of open conditions”.*

29. When giving his oral evidence, the COM *“struggled to express his view regarding whether [the Applicant] met the test for release, offering different judgment calls that appeared to shift with the posing of the issue by different questioners”*. In the Decision, it was stated that the COM *“appeared to consider that without the period in open conditions ... he could not be confident that [the Applicant] could be safely managed in the community although he also stated in answer to a question from the Applicant’s legal representative that he considered time in the open estate to be ‘beneficial’”*.

## The Panel’s Conclusion

30. The Panel stated that in deciding whether to direct the release of the Applicant, it took account of the fact that the Applicant has sought to address his risk issues in the period since his recall and that he has made further progress since his failure to persuade the 2022 panel that he was safe to be released or to merit progress to open conditions. The Panel also acknowledged that the Applicant *“has gained in self-esteem, self-confidence, assertiveness and sense of purpose”*. It said that it took account of the closing submissions of the Applicant’s legal representative, but it decided that it was unable to direct the Applicant’s release because:

- a) *“his preceding entrenched and deviant interest in preying on pubescent girls”;*
- b) *“the very concerning nature of [the Applicant’s] predatory course of conduct” as shown in the index offences “with the obvious potential for causing greater physical and psychological harm of a sexual nature”;*
- c) after having been released from open conditions and moved on from AP, he gained access to the internet and then within a short period of time he reverted to the pursuit of his deviant interest and had to be recalled very shortly thereafter in 2019;
- d) although the panel commended the work done with the Applicant, it considered that further work is required in relation to the Applicant’s *“enduring interest in schoolgirls and how he experiences and manages that interest currently ...[which] remains work in progress”;*
- e) the sentencing judge’s conclusion that the Applicant *“posed a continuing danger of reoffending in [a way similar to the index offences]”;*
- f) notwithstanding the Applicant’s *“apparently sound experience of open prison prior to release [he] rapidly reverted to the quite unambiguous, substantial pursuit of those deviant interests on release, by his account within a few days of moving on from [the AP] and as soon as he gained access to the internet [and] resorted to permission giving rationalisations without regard to the external controls applying to him”;*
- g) it could not discount the Applicant’s POM’s conclusion that if the Applicant *“does not like what he is told, then he can be negative and hold onto resentful beliefs*



*and this could impact him in the future” although another person who has recently acted as the Applicant’s POM explained that this had not been her experience of the Applicant;*

- h) the release plan for the Applicant would require him to be at the AP for 16 and half hours daily and the COM agrees that *“the need for such restriction raises real questions whether [the Applicant] can be considered to meet the test for release”;*
- i) the panel were *“ultimately unpersuaded that [the Applicant] meets the statutory test [and] consider that [the COM’s] reservations are justified and [the panel] prefer his more cautious approach [as they] have to consider risk in the longer term and ... are not confident that warning signs would be reliably clear, even with the proposed licence conditions”.*

31. These matters will hereinafter be referred to as ‘the Panel’s reasons’.

## The Relevant Law

32. The panel correctly sets out in its decision letter dated 9 May 2024 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 (as amended)*

33. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (rule 31(6) or rule 31(6A))

### *Irrationality*

34. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd -v- Wednesbury Corporation* 1948 1 KB 223 by Lord Greene in these words *“if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere”.* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

35. In *R(DSD and others) -v- the Parole Board* 2018 EWHC 694 (Admin) a Divisional Court applied this test to parole board hearings in these words 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.”*

36. In *R(on the application of Wells) -v- Parole Board* 2019 EWHC 2710 (Admin) set out what he described as a more nuanced approach in modern public law which was *“to test the decision maker’s ultimate conclusion against the evidence before it and to*



*ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied)".* This test was adopted by a Divisional Court in the case of R(on the application of the Secretary of State for Justice) -v- the Parole Board 2022 EWHC 1282(Admin).

- 37.As was made clear by Saini J this is not a different test to the Wednesbury test. The interpretation of and application of the Wednesbury test in Parole hearings as explained in DSD was binding on Saini J.
- 38.It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.
- 39.Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

#### *Procedural unfairness*

- 40.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.
- 41.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;
  - (e) the panel did not properly record the reasons for any findings or conclusion; and/or
  - (f) the panel was not impartial.
- 42.The overriding objective is to ensure that the Applicant's case was dealt with justly.

#### **The reply on behalf of the Respondent**

- 43.In an email dated 4 June 2024 to the Parole Board, PPCS on behalf of the Respondent stated that no representations were being offered in response to the Application for Reconsideration.

#### **Discussion**

##### **Ground 1**



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44. This ground is that the decision not to release the Applicant was irrational as:

- i. after a previous oral hearing on 12 October 2023, the panel decided not to release the Applicant as it was considered necessary that he should complete further risk reduction work such as New Me MOT and engagement with PROSPER;
- ii. the Applicant has now completed risk reduction work as outlined in various reports (including the work envisaged by the previous panel) and has also completed both group and one-to-one therapy as well as a number of educational and vocational qualifications;
- iii. the release of the Applicant was advocated in an updated psychological risk assessment completed in October 2023 (the October 2023 psychological assessment);
- iv. the release of the Applicant was also advocated in the oral evidence to the panel of the author of the October 2023 psychological assessment;
- v. the POM and the Prison Psychologist recommended release but the COM preferred a recommendation for open conditions as this appeared to be based on a view that it would be beneficial as opposed to being essential and that it was not necessary to protect the public, but when cross-examined the COM appeared at one point to concede the release test was met;
- vi. all professionals were agreed that there was no core risk reduction work outstanding and the remaining risk was not imminent;
- vii. a robust risk management plan was proposed with a number of additional licence conditions including residence at Approved Premises; and
- viii. the panel placed "*insufficient weight*" on the evidence of the POM and the Prison Psychologist who supported release and undue weight on the evidence of the COM.

45. I have considered with care the Applicant's grounds but for the following reasons (whether considered individually or cumulatively) I reject the claim for reconsideration.

46. First, there was much evidence which showed why the decision not to release the Applicant was not in the words of the Divisional Court in the words of the **DSD case** set out in paragraph 35 above "*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*".

47. The evidence was that:

- a) the Probation Service considered that the Applicant posed a high risk of causing serious harm to children "*primarily teenage girls, including those of school age and in school uniform*";



- b) the 2 index offences show that the Applicant poses a risk of sexually assaulting teenage girls in school uniform and the 2003 convictions also show the Applicant's disturbing sexual interest in teenage girls;
- c) on the only previous occasion when the Applicant was released on licence in 2019 nine/ten days after moving from the AP, there was a police check on his internet web browsing history which revealed that the Applicant had been viewing multiple teen-themed pornographic videos, including a site with a title which indicated that the site was concerned with sexual intercourse with a 12-year-old "*daughter*". It was evident from OASys that the Applicant had made "*hundreds of visits to various pornographic websites*" and that he had engaged in "*frequent viewing of 'teen girl' and schoolgirl themed pornography*".
- d) in his evidence to the current panel, the Applicant has not shown that he does not now have any sexual interest in schoolgirls, but has "*sought to explain his enduring interest in girls in school uniform deriving from his experience of being belittled and socially isolated by peers at school causing him a sense of both resentment ... and of wanting to make up for what he had missed out on sexually at that age and in that context.*"
- e) the Applicant had disclosed his sexual thoughts "*have never fully gone away but he has tried to learn how to control these thoughts*" but he has told his COM that "*he still has inappropriate sexual fantasies from time to time.*"
- f) although the panel commended the work done with the Applicant, it considered having heard him and the professionals give evidence that further work is required in relation to the Applicant's "*enduring interest in schoolgirls and how he experiences and manages that interest currently. [which]. remains work in progress*";
- g) for all these reasons, the Panel was entitled to conclude that the COM's reservations are justified and to prefer his more cautious approach as the Applicant's risk has to be considered in the longer period and they are not confident that warning signs would be reliably clear even with the proposed licence conditions.
48. A second reason why the panel's decision not to release the Applicant was not irrational is that I do not accept the submission of the Applicant that the panel was required to follow the recommendations of the POM and the Prison Psychologist that the Applicant should be released. As has been explained in paragraph 39 above, panels are not obliged to adopt the opinions and recommendations of professional witnesses. It is the panel's responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. That is precisely what the panel did in its reasons set out in paragraph 30 above and it was entitled to reach those conclusions.
49. Third, where in this case a panel exercising its judgement based on the evidence before it and having regard to the fact that they (unlike me) had seen and heard the witnesses, including the Applicant as well as the COM, POM and the Psychologist



before had then come to its decision that the Applicant did not meet the test for release, reconsideration of that decision cannot be ordered unless it is manifestly obvious that there are compelling reasons for interfering with the decision of the panel. In this case, no compelling reasons have been established for interfering with the decision of the panel to refuse to release the applicant and therefore this is another reason why reconsideration cannot be ordered.

50. For those reasons, I reject the contention that the decision of the panel was irrational.

## **Ground 2**

51. The Applicant contends that the decision of the panel to refuse to release the Applicant was procedurally unfair.

52. The Applicant has failed to put forward any submissions supporting this ground. There is no basis for considering that the Applicant's case was not dealt with justly and therefore, this ground is rejected.

## **Decision**

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

**Sir Stephen Silber**  
**19 June 2024**