

[2021] PBRA 160

Formatted: Indent: Left: 0 cm

Application for Reconsideration by Mullaney-Bond

Application

1. This is an application by Mullaney-Bond (the Applicant) for reconsideration of a decision of the panel contained in a decision letter dated 5 March 2021 given after an oral hearing held on 23 February 2021 refusing to direct the release of the Applicant.
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 letter of 5 March 2021, the Application for Reconsideration dated 21 March 2021, an email dated 19 October 2021 from PPCS Reconsideration Team containing the Secretary of State's representations in reply to the Applicant's Application for Reconsideration, the dossier comprising 826 pages, my Request for Further Information dated 21 October 2021 and the Applicant's response.

Background

4. On 7 April 2004, the Applicant, who was then 34 years old, received a Discretionary Conditional Release sentence with a custodial period of 15 years and an extended licence period of 8 years, for 4 offences of Indecent Assault of a Male under the age of 14, 2 offences of Buggery of a Male under the age of 16 years, 5 offences of Making Indecent Photographs of Children, and 5 offences of Possessing Indecent Images of Children.
5. His Sentence End Date (SED) is May 2026.

Request for Reconsideration


6. The application for reconsideration is dated 27 September 2021.
7. The grounds for seeking a reconsideration are as follows:

(A) Irrationality

 3rd Floor, 10 South Colonnade, London E14 4PU  www.gov.uk/government/organisations/parole-board

 info@paroleboard.gov.uk

 @Parole_Board

 0203 880 0885



- i. The panel acted irrationally as it failed to give any consideration to the Applicant's recalls thus disregarding the principles laid down in the case of **Calder** (2015) (Ground 1).
- ii. The panel irrationally failed to appreciate that the Applicant was serving "a DCR-ES 15 years' imprisonment thereafter 8 years' supervision (post 98)" as opposed to an "ES" as the Board/PPCS had noted (types of sentences) (Ground 2).
- iii. The panel acted irrationally as it failed to appreciate that the Applicant was entitled to be released unless the Board was "positively satisfied that he had or would commit a further offence similar in nature to his index offence, thus keeping in with the objectives for which the sentence was passed in the first place" (Ground 3).
- iv. The decision of the panel not to direct release was irrational as it was based on the COM's report and the probation service assessment report which "later was found to be full of errors and otherwise erroneous". It is also said that the oral evidence in chief of the COM to the panel was "misleading or otherwise false" and that there is evidence from a family member of the Applicant that will show that "the COM lied to the panel in his evidence in chief" (Ground 4).
- v. The panel acted irrationally in refusing to allow the Applicant to ask the Chaplain after he had given evidence to confirm that "shortly after [the Applicant] had arrived [prison establishment] [he himself] had added his name to the list to complete the victim awareness course that was being delivered at that time". According to the Applicant, he was told by the panel that he should have put that question to the Chaplain at the time when he was giving evidence even though the Chaplain was still in the panel's hearing room (Ground 5); and
- vi. The Applicant's legal representative submitted written closing submissions containing many errors as "at least 50% of it is incorrect or otherwise wrong" to the panel after the end of the hearing without previously showing those written submissions to the Applicant who did not see them until after he had received a copy of the panel's decision letter (Ground 6).

(B) Procedural Unfairness

The hearing was procedurally unfair as although the Panel Chair did move the Applicant to another table and closer to the panel so he "could now hear some of what the panel members were saying (but still no one else)". The Applicant contends that "he was able to hear less and less, not even [his] legal rep". A few days later, "[he] could hear nothing". The Applicant explained that he did not know why this was so but after visiting healthcare, he realised the reason why he could not hear was because he had large tears in both ear drums. He said that he is "now left 100% deaf and that is the reason why I could hear less and less as my oral hearing

went on". He explained that he "did keep on saying that [he] could hear less as my oral hearing went on ...until I felt that I was being rude, so I sat back just looking through the papers within the dossier".

The Applicant proceeded to explain that "I am not saying that anyone could [have] done more, as at this point no one knew the true extent of the loss of my hearing, not even myself. But it does mean that I did not have a chance to correct people if they were saying something wrong, I may not [have] been answering questions correctly as I may [have] misheard them, as I did not hear them correctly in the first place" (Ground 7).

Current parole review

8. The oral hearing which is the subject of this Reconsideration application was conducted in person at the prison establishment on 23 February 2021 when full evidence was adduced at a hearing with all witnesses attending in person.
9. The panel was comprised of 3 independent members of the Parole Board one of whom was a psychologist. It heard oral evidence from:
 - (a) the Prison Instructed Psychologist commissioned by the prison to meet the panel's directions for an assessment (the Psychologist).
 - (b) the Applicant's Community Offender Manager (COM).
 - (c) the Applicant's Prison Offender Manager (POM).
 - (d) the Prison Chaplain (the Chaplain); and
 - (e) the Applicant himself.
10. The Applicant committed the index offence against his partner's two brothers. His partner, who was a co-defendant in the criminal proceedings, was also convicted of offences.
11. He was about 32 years old at the time of the offences. The panel attempted to have sight of the Sentencing Remarks, but unfortunately, they had not been retained. In consequence, there was not available a full independent account of the index offences available to the panel.
12. The Applicant had many previous convictions, although no previous convictions for sexual offences. In 1993, he was convicted on two occasions of assault occasioning actual bodily harm. His other convictions related to acquisitive offending, dishonesty matters and driving offences including driving while disqualified.
13. According to the panel, the probation service assessment report assessed the Applicant's risk factors related to accommodation, relationships, lifestyle & associates, thinking and behaviour, attitudes and alcohol misuse. The panel thought additional risk factors were sexual preoccupation, a need for sexual gratification, a sexual interest in male children, his emotional management, limited victim awareness, a poor working relationship with professionals and the Applicant's manipulative and controlling behaviour.
14. The panel noted the Applicant's health issues which were set out in the dossier and at the oral hearing it was evident that he was in poor health although there

had been some concern that he had limited the information available to others about his health and diagnosis.

- 15.No work has been completed to address the Applicant's risk of sexual offending and his evidence to the Panel that he does not understand why he committed the index offences demonstrated a need for him to develop insight into his behaviour.
- 16.Before the Applicant was first released, the panel noted that there were concerns about his association with sex offenders and the sharing of fantasies and discussions about sex with children.
- 17.The Applicant was first released on licence on 24 May 2013, but his licence was revoked on 12 July 2013 after it had been alleged that the Applicant had a number of mobile phones and devices as well as having access to the Internet. When the Applicant's recall was considered by the Board in 2014, it was noted that there were no conditions prohibiting the Applicant's access to mobile phones or the internet and that record keeping at the Designated Accommodation had been poor. The panel held that there was insufficient evidence to show that the Applicant posed a continuing risk at recall, and it directed his re-release.
- 18.The Applicant was re-released on 11 June 2014 after he had completed a training course addressing decision making and better ways of thinking, but his licence was revoked on 7 November 2014 on account of his use of Facebook. In 2016, a panel directed the Applicant's re-release as it was satisfied that it was more likely that the Applicant's family member had set up the Facebook account, but it considered that the Applicant was likely to have used the account more than he was willing to disclose.
- 19.On 27 June 2016, the Applicant was re-released, but his license was revoked on 28 July 2016 when he was reported by the Police to be meeting a known sex-offender. It was also recorded that a mobile phone, sim cards and other property were found in his room at the Designated Accommodation. In 2018, the panel reviewed the recall and it declined to direct re-release. It noted that the Applicant was unable to explain why items were hidden in his room and there were concerns about a relationship since recall with a sex offender and attempts to conceal this. The panel in 2018 recorded that the Applicant had stated in custody that he would engage with offence-focussed work, but he put up barriers when approached by treatment managers. It concluded that core reduction work still had to be completed by the Applicant and that his insight was underdeveloped.
- 20.On 8 November 2018, the Applicant moved to another prison establishment and no work has been completed to address his sexual offending. Following allegations of inappropriate sexual behaviour towards another prisoner in April 2019, "*he was placed in an anti-social behaviour booklet*". He denied any such behaviour and told the panel that he had simply sent a card to another prisoner when the other prisoner suffered a loss. There was also reference in the same month to the Applicant being in a relationship with a prisoner. He denied any relationship and he told the panel that the prisoner was his carer who had bullied him and threatened him.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



21. The Psychologist produced reports of 27 June 2019 and of 20 May 2020 for the panel, but she explained to the panel that there were limits to her report as the Applicant had been unwilling to meet with her and so she had been unable to complete a personality assessment of him.
22. The Applicant raised concerns about errors in the probation service assessment report and although a prior complaint had led to corrections, the panel accepted that there should be an opportunity for him to review his current probation service assessment report with his COM.
23. The report of the Psychologist identified a high risk of the sexual offending by the Applicant and a need for offence-focussed work. She referred to the Applicant's poor relationship with his COM and a need to better understand his risk factors. She considered that he should complete one of the training courses designed to address the use of violence and sex offending, this could be considered in the community if the COM was able to manage the level of risk. In the absence of such a relationship, the Psychologist was unwilling to support release because in that situation "*people will be working in the dark*". She accepted that the Applicant's health issues might limit his contact-offending, but she explained that the index offences were a "*seductive process*" and were not committed through physical coercion. She concluded that it was still possible that the Applicant could commit further contact offences.
24. The Applicant drew attention to errors in the report of the Psychologist and he explained that he had not met her because he did not believe that accounts he might offer would be believed over evidence within other reports. He considered that the "*damage had already been done [in those reports] and therefore there was no point in exploring issues with her*". The panel considered that the Applicant's rigid approach to the interests of professionals in his case provides evidence for the concern that the Psychologist raised about people "*working in the dark*" in managing his level of risk because he lacked insight and understanding into his offending behaviour, and he appeared unwilling to engage with professionals who might be able to help him tackle this issue.
25. The panel noted that the Board's decision in 2018 mentioned the Applicant's barriers to engaging with offence-focused work and "*it would appear those barriers remain*".
26. In his evidence to the panel, the Applicant spoke of potential opportunities to address his risk following release and he submitted that he would be able to work with Probation in a specified county, but the panel noted that the Applicant was in that county at the time of his second recall but his location in the area did not prevent concerns emerging on licence.
27. The Chaplain gave evidence at the Applicant's request in which he spoke of the Applicant's engagement with the Chaplaincy in custody and supported release, but he accepted that he knew little of the Applicant's offending history.
28. The COM did not support release and he referred to the need for the Applicant to complete offence-focussed work. He had supervised the Applicant during his



last release, but it appears that the Applicant's recall to custody had soured their working relationship. The COM doubted the Applicant's likely compliance on licence and questioned his motivation to engage with offending behaviour work. The COM explained that he had sent "*three lots of thought maps*" to the Applicant when he was at the previous prison establishment and that these were returned because the Applicant had stated that he was not at risk to anyone.

29. The POM had only limited knowledge of the Applicant's case as he had only been allocated to the Applicant 9 weeks before the oral hearing. He had not reviewed the psychological report and had limited opportunity to consider the Applicant's dossier because of redeployment at another prison establishment during the COVID pandemic. The panel could not attach any weight to the POM's evidence save for an update that there had been no concerns about the Applicant's behaviour.
30. The probation service assessments highlighted that the Applicant posed a high risk of serious harm towards children, a low risk of serious harm towards the public and known adults and a medium risk of serious harm towards staff and prisoners. There was also an assessment of a medium risk of further general and violent offending. An assessment of risk of re-offending identified a high level of risk.
31. The panel, having noted the Applicant's offending history, his risk factors, the concerns raised in this case, the lack of offence-focussed work and the available evidence (both in the dossier and in the oral evidence) accepted these assessments.
32. Any release of the Applicant would be to Designated Accommodation and would be subject to licence conditions for the protection of his victims and of children together with a requirement to engage with offence-focussed work although the availability of this during the Coronavirus pandemic was uncertain. The Applicant accepted those proposals save for the need for polygraph testing which he felt would produce inaccurate results due to his health issues. The panel accepted that the condition would be proportionate when noting the identified level of risk but those dealing with such testing would first have to be satisfied that it could be administered, but if it could not be satisfied, the Applicant and/or the Secretary of State could seek its revocation.
33. The Applicant said that he would comply with his licence, that he would engage with probation (with a new COM) and would complete offending behaviour work on licence. He referred to support from his family and his hope of building a quiet life with a budgie and finding a friend for support. He also said that he was willing to engage with professionals although the panel said that "*there is little evidence of this within custody*".
34. The panel considered that the risk management plan (RMP) would be "*overly reliant on [the Applicant's] compliance and engagement with professionals*". It pointed out that if those supervising the Applicant had confidence in the Applicant's "*openness and honesty*", then there was a prospect of his risk being manageable in the community but as the Psychologist pointed out "*professionals would most likely be 'working in the dark'*".

35. Having considered all the available evidence, the view of the panel was that little has changed since the Applicant's last review as the Applicant *"has little understanding of his offending behaviour and there remains a need for offence-focussed work"* and it was *"reasonable to note that [the Applicant] did not commit further offences during his time on licence [but] it [was] reasonable to note that his time in the community has not been without issue or concern"*.
36. Although, the Applicant was *"clearly unwell"*, the panel accepted the view of the Psychologist that this would not be a barrier to further offending. If released by the panel, the Applicant would be subject to a licence for over 5 years and the panel has accepted that *"there was a real risk of further sexual offending [and the Applicant] has evidenced coercive behaviour"*. It was explained by the panel that although the Applicant maintains that he *"now has little interest in sex, the evidence before this panel suggests that this may not be an accurate picture"*.
37. The panel noted that the Applicant submitted that *"he had attempted to complete offending behaviour work in custody, however the panel was not persuaded that he had evidenced any real commitment towards this"*.
38. In addition, the panel explained that if the Applicant wished to address his risk factors, he could have made efforts to engage with the professional assessment of the psychologist as this would have assisted in establishing treatment pathways in custody and the community. In addition, the panel was not persuaded that the Applicant was truly committed to addressing this through offence-focussed work either in custody or in the community.
39. The panel concluded that there remained a likelihood of further sexual offending and there remained a need to address his offending and so it accepted the recommendation of the psychologist and the COM and consequently, it remains necessary for the protection of the public that the Applicant be confined, and the panel made no direction for his release.
40. The crucial findings of the panel (which I will refer to hereinafter as "the crucial findings") were that:
- (a) the Applicant's *"evidence to the panel of not understanding why he committed the Index Offences demonstrates a need for him to develop insight into his behaviour"*;
 - (b) the Applicant has *"little understanding of his offending behaviour and there remains a need for offence-focussed work"*;
 - (c) *"No work has been completed to address [the Applicant's] risk of sexual offending and his evidence to the panel of not understanding why he committed the Index Offences demonstrates a need for him to demonstrate insight into his behaviour"*;
 - (d) *"the panel was not persuaded that [the Applicant] had evidenced any real commitment [to complete offending behaviour work in custody]"*;
 - (e) *"the panel was not persuaded that [the Applicant] was truly committed to [understanding why he offended] through offence-focussed work, either in custody or in the community"*.



- (f) "there remains a likelihood of further sexual offending [by the Applicant] and there remains a need [for the Applicant] to address his offending"; and that
- (g) the panel accepted the recommendations from the Psychologist and the COM that "it remains necessary for the protection of the public that [the Applicant] be confined and the panel makes no direction as to release".

The Relevant Law

41. The panel correctly sets out in its decision letter dated 5 March 2021 the test for release.

Parole Board Rules 2019

Irrationality

42. 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."

43. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28: **Preston [2019] PBRA 1** and others.

Procedural unfairness

44. 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.

45. 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.



3rd Floor, 10 South Colonnade, London E14 4PU



www.gov.uk/government/organisations/parole-board



info@paroleboard.gov.uk



[@Parole_Board](https://twitter.com/Parole_Board)



0203 880 0885



INVESTORS
IN PEOPLE | Bronze

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

Other

47. 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 uncontested 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.

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

The reply on behalf of the Secretary of State

49. PPCS have indicated in an email dated 19 October 2021 that the Secretary of State will not make any representations in response to the Applicant's reconsideration application save to explain first, why the Applicant's sentence has been correctly stated in the Decision Letter, and second, that any errors the Applicant may have noted did not have any impact on the decision not to order his release.

Discussion

50. In dealing with the grounds for reconsideration, it is necessary to stress four matters of basic importance. The first is that the Reconsideration Mechanism is not a process by which the judgment of the panel when assessing risk can be *lightly* interfered with. Nor is it a mechanism in which the member carrying out the reconsideration was entitled to substitute his view of the facts in place of those found by the panel, unless, of course, it is *manifestly obvious* that there was an error of fact of an egregious nature which can be shown to have *directly contributed* to the conclusion arrived at by the panel.

51. 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.

52. 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.

53. 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

54. It is contended that the panel acted irrationally as it failed to give any consideration to the Applicant's recalls thus disregarding the principles laid down in the case of **Calder (2015)**.

55. I am unable to accept this contention for 4 reasons. First, each of the three occasions when the Applicant had been recalled was considered by this panel as explained in paragraphs 17 to 19 above and each of the previous recalls was considered by a panel soon after recall had occurred.

56. A second further or alternative for not accepting this contention is that it is not suggested, let alone established, that the reasoning in the decision letter relating to the previous recalls is defective.

57. A further or alternative reason why this submission cannot be accepted is that the panel did not rely on the circumstances of the recall to justify the decision to refuse to release the Applicant. In other words, any failure on the panel's part to give proper consideration to the Applicant's recalls is not an error or act of an egregious nature that *directly* contributed to the crucial findings set out in paragraph 40 above and which led to the decision to refuse to order the Applicant's release.

58. Another alternative or further reason why this submission cannot be accepted is that due deference is due to the expertise of the panel who saw and heard the witnesses, and it is not manifestly obvious that there are compelling or any reasons for interfering with the decision of the panel.

Ground 2

59. It is submitted that the panel irrationally failed to appreciate that the Applicant "was serving 'a DCR-ES 15 years' imprisonment thereafter 8 years' supervision (post 98) and not as the Board/PPCS had noted 'ES'". So, it is said that the Panel failed to give any regard to the principles set out in **R(Sim) v Parole Board (2003)** which dealt with a prisoner, who like the Applicant was sentenced pursuant to the **Powers of Criminal Courts (Sentencing) Act 2000 s 85**.

60. This ground must fail because the critical feature relating to the term and nature of the sentence is and was that the period of risk that the panel had to consider and did consider which was the period up to the sentence end date of 25 May 2026. That was the period considered by the panel as they, for example, stated in the decision letter that if released by the panel in March 2021, the Applicant would be subject to licence "for over 5 years".

61. A second further or alternative reason why this submission cannot be accepted is that even if it is correct, it does not undermine the crucial findings of the panel set out in paragraph 40 above.

62. Further or alternative reasons why this ground must be rejected is that it cannot be shown that this was an error of fact of an egregious nature made by the panel which directly contributed to the decision under challenge.

Ground 3

63. This ground is that the panel acted irrationally as it failed to appreciate that the default position was that the Applicant was entitled to be released unless the Board was "positively satisfied that he had or would commit a further offence similar in nature to his index offence, thus keeping in with the objectives for which the sentence was passed in the first place".

64. Even if that was the approach that the Board was obliged to follow, the panel complied with it as it explained that having noted the Applicant's offending history, his identified risk factors, the concerns raised in the case, his lack of offence-focussed work and the available evidence (both in the dossier evidence and the oral evidence), it accepted the probation service assessment report's conclusion that the Applicant posed a high risk of serious harm to children. In addition, the panel for the same reasons also accepted the assessment of risk of re-offending which assessed the risk of reconviction of the Applicant for a sexual offence was high.

65. The panel noted that the Applicant was "clearly unwell", and it accepted the evidence of the Psychologist that this would not be a barrier to further offending. It was entitled to reach that conclusion and it pointed out that "the Applicant has evidenced coercive behaviour" and that for example he continued to attempt to "contact a prisoner (including using false details) despite being told not to and later an application was made to marry the prisoner". In addition, some of the Applicant's sexual offences were committed by using the internet to induce under-age youths to engage in indecent activities and by possessing indecent photographs.

66. The panel concluded having considered all the evidence (including having seen and heard the Applicant's evidence) that there was a real risk of further sexual offending during the outstanding part of his licence period and that there remained a likelihood of further sexual offending by the Applicant. This was a conclusion open to it and that is a reason for rejecting this ground.

67. Further or an alternative reason for not acceding to this ground of challenge to this decision is that due deference is owed to the panel in making decisions relating to risk and it is not manifestly obvious that there are compelling

reasons or indeed any valid reasons for interfering with this decision of the panel relating to the risk posed by the Applicant.

68.If, which is not the case, I had been in doubt as to whether this ground had any merit, I would have proceeded to consider whether the test for release was whether the Applicant could be safely released into the community. If that was the correct test, the evidence referred to above shows that he could not be safely released especially in the light of the crucial findings of the Panel set out in paragraph 40 above.

Ground 4

69.The essence of this ground is that the decision of the panel not to direct release was based on the COM's report and the COM's probation service assessment reports *which "later were found to be full of errors and otherwise erroneous. So much so, that [the Psychologist] told the panel that due to errors etc. her report [was] even more unsafe to rely upon & concluded that any risk by [him] would not be imminent"*. It is also alleged that *"the oral evidence in chief of the COM to the panel re: mails and phone call was misleading and otherwise false, my [named family member] says he is more than willing to give the board original copies of emails, and a CJA (1967), S.9 statement with the full details word for word of the telephone call between himself and the COM, this will show that the COM lied to the panel in his examination in chief"*.

70.Even if these allegations of the Applicant are correct, they do not undermine the crucial factors set out in paragraph 40 above and which were the reasons why the panel did not order the release of the Applicant. These crucial factors show why the panel was entitled to conclude that it was not safe to release the Applicant. The decision to refuse to release the Applicant had nothing to do with any of these errors. For example, paragraph 1.14 of the decision letter states that *"no work has been completed to address [the Applicant's] risk of sexual reoffending and his evidence to the panel of not understanding why he committed the Index Offences demonstrates a need for him to develop insight into his behaviour"*.

71.In other words, the Applicant cannot satisfy the requirement that needs to be satisfied before there can be an Order for reconsideration which as has been explained (with emphasis added) that *"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"*.

72.A further reason why the panel's decision cannot be accepted is that due deference is owed to the panel in making decisions relating to risk and it is not manifestly obvious that there are compelling reasons or indeed any valid reasons for interfering with this decision of the panel relating to the risk posed by the Applicant especially in the light of the crucial factors set out in paragraph 40 above.

Ground 5

73.The Applicant complains that the panel was irrational in not allowing the Applicant to ask the Chaplain after he had given evidence to confirm that

shortly after the Applicant arrived at the prison establishment, he had added his name to the list to complete the victim awareness course that was being then delivered. According to the Applicant, he was told by the panel that he should have put that question to the Chaplain at the time when he was giving evidence even though the Chaplain was still in the hearing room.

74. This ground must also be rejected for three reasons. The first was that any such evidence from the Chaplain would not have undermined in any way the crucial findings of the panel set out in paragraph 40 above and to that extent this evidence from the Chaplain would have been irrelevant.

75. A second further or alternative reason is that deference is due to the panel especially on procedural issues and it was entitled to say it was too late for the Chaplain to be recalled.

76. The third further or alternative reason for rejecting this ground is that even if this decision of the panel was an error, it cannot be regarded as an error of an egregious nature which can be shown to have directly contributed to the conclusion arrived at by the panel.

Ground 6

77. This ground of irrationality made against the panel is based on the allegation that Applicant's legal representative did not make oral submissions at the end of the hearing, but she stated that she would instead submit written closing submissions to the panel which she duly did. The Applicant did not see the written submissions until after he had received a copy of the panel's decision letter and he complains that there are "*many errors within [it], at least 50% of it is incorrect or otherwise wrong*".

78. There is nothing irrational about the panel's conduct. They merely received and considered the closing submissions which the Applicant's legal representative had express or ostensible authority to serve on behalf of the Applicant. The panel was under no obligation to check if the Applicant had seen or approved the contents of the written submissions. In any event, the Applicant has not set out any reasons showing why the panel had such an obligation. This ground of complaint is misconceived and must be rejected.

79. If the Applicant has any complaint that the legal representative of the Applicant's failure to show the written representation to him or obtaining his approval before sending them to the panel, such complaint (if valid) must be made to the legal representative.

Ground 7

80. This complaint is that the hearing was procedurally unfair as the Applicant "*could not hear what was being said by anyone, the chair did move me to another table and closer to the panel, so [he] could now hear some of what the panel members were saying (but still no-one else). However, as the hearing [went on he] was able to hear less and less not even [his] legal rep*".

81. The Applicant said that a few days later, "[he] could hear nothing". The Applicant explained that he did not know why this was so, but after visiting healthcare, he realised the reason why he could not hear was because "he had large tears in both ear drums [and] this is the reason [he] could hear less and less as [his] oral hearing went on".

82. His complaint is that he "did keep on saying that [he] could not hear anything as the hearing proceeded...until [he] felt that [he] was being rude, so [he] sat back just looking through the papers within the dossier [because he] did not want to appear rude by keeping interrupting the panel and just repeating [himself]". He stated that "[he] did not have a chance to correct people".

83. The medical assessment of the Applicant carried out in August 2020 recorded that he had perforated ear drums. As was explained in the decision letter, "the panel took time to ensure that [the Applicant] was able to hear all witnesses, it adjusted the seating arrangements in the hearing room and arranged for replacement batteries to be provided for [the Applicant's] hearing aids."

84. A recording of the panel's hearing, which lasted for 3 hours and 44 Minutes, was helpfully made available to me and it contains much evidence to show that the Applicant was able to participate fully in the hearing and that his interruptions were very limited in that:

(a) the Applicant when giving his oral evidence was questioned for more than 90 minutes in the middle of the hearing. There is no evidence that he had any difficulty in hearing clearly the questions from the panel members or from his legal representative.

(b) he did not at any time complain or suggest when giving his evidence that he could not hear some or all of the questions.

(c) the recording reveals that contrary to the Applicant's complaint, he did not "keep on saying that [he] could hear less as [his] oral hearing went on". He did complain once after the recording had been going for about 2 hours and 37 minutes when he said after the Psychologist had given her evidence that he "had never heard one word" of her evidence. Then at the Panel Chair's suggestion, the Applicant's legal representative then gave an oral summary to the Applicant of the Psychologist's evidence. The Applicant's legal representative then gave the oral summary to the Applicant, and she reported to the Panel Chair that she was happy that she had been able to summarise the Psychologist's evidence to the Applicant. The Applicant did not suggest then or subsequently at the hearing that he could not hear what his legal representative had told him or that after listening to his legal representative's account, he was ignorant of any aspect of the Psychologist's evidence.

(d) After the Applicant's legal representative had said that she had been able to explain the Psychologist's evidence to the Applicant, the Panel Chair then told the Applicant that if he was struggling to hear anything said at the hearing, it was important that the Applicant should raise it so that he could be told what has been said.

(e) the Applicant did not avail himself of that opportunity and he did not state when any other evidence was being given that he was or had been struggling to hear anything that been said at the hearing.

(f) on the contrary when the COM was giving evidence later in the proceedings, the Applicant was able to interrupt vociferously to state that the COM's evidence was incorrect. By that time, the recording had been going for 2 hours and 50 minutes which was under an hour before the end of the recording.

(g) at the end of the hearing, the Panel Chair asked the Applicant if he wanted to say anything. The Applicant made some comments on the evidence which showed that he had heard and understood it. He did, however, say that he had difficulty hearing some evidence. The Panel Chair offered the opportunity for the Applicant and his legal representative to talk in order to discover if the Applicant needed to have some evidence repeated. The Applicant did not take advantage of this offer to ask for any evidence to be repeated.

85. These points, whether considered individually or cumulatively, show that even if the Applicant could not hear some evidence, he was able to participate in the hearing as a result of three helpful and sensible interventions by the Panel Chair.

86. First, when he reported that he had not heard "one word" of the Psychologist's evidence, the Panel Chair arranged for the Applicant's legal representative to give an oral summary to the Applicant of the Psychologist's evidence. Second, at that time, the Panel Chair also told the Applicant that if he was struggling to hear any evidence, he was invited to draw the attention of the Panel Chair to this and he would be told what the evidence was. Third, at the end of the hearing, the Panel Chair gave the Applicant a further opportunity to have a meeting with his legal representative at the end of the hearing to ascertain if he needed to have some evidence repeated.

87. Significantly, as has been explained, the Applicant did not choose to take advantage of any of these sensible offers, save in respect of the Psychologist's evidence. I am quite satisfied that the combination of these factors means that the Applicant's case had been dealt with justly and that this complaint must be rejected.

Decision

88. For the reasons I have given, I do not consider that the decision not to release the Applicant was irrational, nor procedurally unfair and accordingly, the application for reconsideration is refused.

Sir Stephen Silber
29 November 2021