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[2021] PBRA 155

Application for Reconsideration by Raza

Application

1. This is an application by Raza (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 29 September 2021 not to direct his release.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers. These are the decision letter, the dossier and the application for reconsideration. I have also considered published guidance for treatment managers relating to a risk assessment tool to which I will refer in the **Discussion** section below.

Background

4. The Applicant is serving an extended sentence comprising a five-year custodial period with a four-year extension period imposed on 20 April 2018 following conviction on three counts of making indecent photographs or pseudo-photographs of children, four counts of attempting/causing/inciting a female child under 16 to engage in sexual activity (no penetration) and one count of attempting/causing/inciting a female child under 13 to engage in sexual activity (no penetration). The Applicant pleaded guilty to all charges.

5. The key dates relating to the Applicant's sentence are reported to be:

    a) Parole Eligibility Date (PED) July 2021;
    b) Conditional Release Date (CRD) March 2023; and
    c) Sentence Expiry Date (SED) March 2027.

6. The Applicant was aged 39 at the time of sentencing. He is now 42 years old.

Request for Reconsideration

7. The application for reconsideration is dated 15 October 2021 and has been submitted on behalf of the Applicant by a family member (who is not legally qualified). Having made due enquiry, I am satisfied that the Applicant's representative meets the requirements of rule 10 of the Parole Board Rules 2019 and may validly represent the Applicant.

8. The application advances a vast number of grounds for reconsideration, many of which overlap, repeat themselves or simply attempt to re-argue the Applicant's case. My distillation of the discernible grounds is as follows and, given that the application has not been drafted by a lawyer, I will deal with each as a matter of procedural unfairness and/or irrationality as appropriate:

    a) The panel gave undue weight to the recommendation of the Applicant's Community Offender Manager (COM) over the recommendation of the prison psychologist and did not provide adequate reasons for preferring the COM's recommendation;

    b) The panel failed to take the fact that the COM had not contacted the Applicant's wife into account when assessing his risks towards her;

    c) The panel failed to challenge the COM's admission that he had not read the prison psychologist's report before updating his risk assessment or giving oral evidence;

    d) The panel did not provide adequate reasons for its conclusion that the proposed risk management plan was not sufficient to manage his risks;

    e) The recommendation for further offending behaviour work in custody should not have been made by reference to a new risk scoring tool which indicated an increased risk of sexual offending compared to an earlier assessment using an older tool;

    f) The panel did not consider an alternative offending behaviour programme which could have been completed in the community and did not provide adequate reasons for not doing so;

    g) The panel failed to consider a move to open conditions;

    h) The panel effectively blocked a move to open conditions;

    i) The panel did not properly consider the Applicant's recategorisation as part of its risk assessment;

    j) The panel did not properly consider the viability of the Applicant waiting to complete programme work in the community;

    k) It was irrational for the panel to reach a decision which effectively made it impossible for the Applicant to be released prior to his conditional release date;

    l) It was irrational for the panel to conclude the Applicant did not meet the test for release when it had no concerns about the Applicant's compliance with reporting requirements or licence conditions;

m) It was irrational for the panel not to challenge the COM who suggested that the psychologist did not assess the Applicant through the lens of public protection;

n) The panel was incorrect to categorise the Applicant's criminal conduct as progressive (from viewing indecent images to contacting children online) as both offences were committed at the same time; and

o) It was irrational for the panel to conclude that the Applicant had exhibited disregard for external controls.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State in October 2020 to consider whether or not it would be appropriate to direct his release.

11. The case was directed to oral hearing by a Member Case Assessment (MCA) panel on 23 April 2021. The dossier before the MCA panel contained, amongst other reports, a psychological report dated February 2021. The MCA panel directed a further update from the Applicant's COM by 23 June 2021 which specifically included confirmation of the latest risk assessments.

12. In response to this, the COM report (dated 21 June 2021) noted that the Applicant had changed his stance on his offending in a video link meeting on 17 June 2021. He admitted to having a sexual interest in children. His Prison Offender Manager (POM) advised this was the first time the Applicant had admitted to this. The COM noted that the Applicant's risk scores had increased as a result of this admission.

13. Panel Chair Directions (PCDs) were made on 4 July 2021 and 24 August 2021, confirming that the case should proceed to oral hearing. Further updates were directed from the COM and prison psychologist in the light of the Applicant's apparent change of stance.

14. The COM report (dated 7 September 2021) was written before the psychological addendum was available. It noted the Applicant's view that he had, in fact, always admitted to the offence and always admitted to a sexual interest in children. This contradicted the June 2021 report in which it was said the Applicant has only just then admitted to a sexual interest in children after an earlier period of denial.

15. The report also discussed the Applicant's suitability for accredited offending behaviour programmes for those convicted of sexual offences. He had been previously assessed as low risk (using the assessment tool in use at the time), which meant he was not suitable for accredited offending behaviour programmes. A more recent tool, which is said to be more accurate, assessed the Applicant as a medium risk of further sexual reoffending which now rendered him suitable for accredited offending behaviour programmes. The COM concluded that the Applicant should complete an accredited course addressing sex offending in custody. He did not

support release, but did comment that a transfer to open prison could enable testing under less secure conditions.

16. The psychological addendum report (dated 14 September 2021) noted the Applicant's stance was that he had no sexual interest in children and his offending stemmed from a need for sexual gratification and loneliness. The report acknowledged that the assessment relied heavily on the Applicant's self-report but concluded that his risks would be manageable in the community. The Applicant reportedly reiterated his willingness to undertake any accredited offending behaviour programmes deemed necessary by those working with him.

17. The case proceeded to an oral hearing, before a three-member panel, including both psychologist and psychiatrist specialist members. The hearing was held by video conference. Oral evidence was taken from the Applicant, his POM, COM and the prison psychologist. The Applicant was legally represented throughout. The panel did not direct the Applicant's release.

The Relevant Law

18. The panel correctly sets out the test for release in its decision letter dated 10 June 2021.

Parole Board Rules 2019

19. Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).

20. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under rule 28. This has been confirmed by the decision on the previous reconsideration application in **Barclay [2019] PBRA 6**.

Procedural unfairness

21. 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.

22. 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.

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

Irrationality

24. 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."*

25. 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.

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

The reply on behalf of the Secretary of State

27. The Secretary of State submitted representations dated 27 October 2021 in response to this application. I will refer to these in the **Discussion** section below.

28. Unusually, the Applicant's representative submitted further representations dated 5 November 2021 having had sight of the Secretary of State's reply. While this is irregular, I have admitted them in fairness to the Applicant who is not legally represented. In fairness to the Secretary of State, these additional representations were disclosed, and a further reply was invited. The Secretary of State replied on 11 November 2021. It was made clear to both parties that no further representations would be permitted. I will deal with the additional points raised by the Applicant's representative in the **Discussion** section below.

Discussion

Ground (a): Undue weight to COM evidence

29. It is submitted on behalf of the Applicant that the panel gave undue weight to the evidence of the Applicant's COM over that of the prison psychologist. It notes that the prison psychologist spent more time with the Applicant in forming a view of his risks than the COM and that her views were ignored.

30. First, I do not find that the panel ignored the evidence of the prison psychologist. The panel engages with her evidence at various points throughout its decision. The

panel disagreed with the prison psychologist's recommendation, which it is entitled to do, but this is not the same as ignoring it.

31. Moreover, given that the panel, on this occasion, had the unusual benefit of both a psychologist and a psychiatrist specialist member, I find it unthinkable that it would not have carefully considered both the written and oral evidence of the prison psychologist in reaching its decision.

32. Next, it does not follow that the evidential weight of any professional assessment is somehow mathematically linked to the time and nature of the interactions between author and subject. To suggest otherwise would automatically undermine the ability of professionals who may be new to a case to form opinions based on more limited contact. Panels will naturally and habitually take 'knowledge of the prisoner' into account as one of a range of factors when weighing professional evidence; they will also recognise that psychological assessments are often significantly more contact-intensive than an ongoing relationship with a probation officer.

33. In any event, the application for reconsideration correctly concedes the panel was not bound by the prison psychologist's evidence. Indeed, panels of the Parole Board are not obliged to adopt the opinions and recommendations of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. They would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if they failed to do just that. As was observed by the Divisional Court in **DSD**, they have the expertise to do it.

34. Where there is a conflict of opinion, as in this case, it is plainly a matter for the panel to determine which opinion it prefers. However, its reasons for doing so must be soundly based on evidence (following **R (Wells) v Parole Board [2019] EWHC 2710**) as well as rational and reasonable (or at least not so outrageous in the sense expressed above). This duty to give reasons is heightened when expert evidence is, implicitly at least, rejected by the panel (**Wells** at para. 40 *per* Saini J).

35. The panel disagreed with the prison psychologist's view about whether the Applicant's changeable self-report concerning his sexual interest in children necessarily constituted a risk factor. Nonetheless, the prison psychologist noted that her recommendation that risk could be managed in the community relied heavily on the Applicant's self-report of his sexual interests. The panel noted the evidence from both the Applicant's POM and COM that his stance towards his sexual interest in children was both variable and situational. It concluded that this would make risk management difficult, and this was one of the factors that underpinned the panel's ultimate decision not to direct release. I find the panel's reasoning to be clearly expressed, logical, rational, and sustainable. Accordingly, this ground fails on both procedural unfairness and irrationality.

Ground (b): Contact with the Applicant's wife

36. It is submitted on behalf of the Applicant that the panel failed to consider that the Applicant's COM had not contacted the Applicant's wife when assessing his risk

towards her which rendered his view "*misinformed, out of context and exaggerated*" and this amounted to procedural unfairness. The Secretary of State's representations note that there have been "*previous domestic violence convictions against [the Applicant's] wife*".

37. The Applicant's record of previous convictions shows a conviction for battery dated 9 March 2017 to which the Applicant pleaded not guilty. The Applicant received a Community Order, and a 12-month Restraining Order was imposed on conviction prohibiting contact with his wife (save indirectly for child contact arrangements) or access to the family home (other than when accompanied on a single occasion by police to collect his belongings). It is further documented that the Applicant's child had disclosed witnessing violence in the family home.

38. The COM's view was that it would not be safe for the Applicant to reside with his wife and child on release. While he acknowledges in his report of 21 June 2021 that he hoped to speak to the Applicant's wife to ascertain her views about potential move on accommodation (after a period at designated accommodation) the release plan did not countenance direct release to the family home. Move on plans (including the potential suitability of returning to his wife's address) would be developed during the Applicant's stay at designated accommodation.

39. The panel's decision carefully notes the conviction, its impact on the Applicant's child and the surrounding circumstances. It also notes the view of the prison psychologist that the battery took place when the Applicant was stressed (having been arrested for the index offences) and there was no other indication of violence within the relationship. The Applicant also told the panel that he has a strong and supportive relationship with his wife.

40. The panel also noted the documented assessment of the risk of further offending within relationships as being medium, with an accompanying medium risk of serious harm, and agreed with it.

41. Even if the Applicant's wife had provided a picture of a perfect and harmonious relationship, it is difficult for me to see that this would have affected the panel's conclusion based on the evidence before it: the Applicant has been convicted for assaulting his wife when under stress and therefore, could potentially do so when under stress again even though there is no other reported violence within the relationship.

42. In any event, the risk towards the Applicant's wife was not the principal risk with which the panel was concerned. I do not find the panel's handling of this peripheral matter, its risk assessment, or its evaluation of the COM's evidence to be procedurally unfair. Accordingly, this ground fails.

Ground (c): COM had not read the psychology report

43. It is submitted on behalf of the Applicant that the panel should have challenged the Applicant's COM who had not read the report of the prison psychologist prior to the hearing (or updating the probation service assessment report), and this amounted to procedural unfairness. The Applicant submits that (by not reading the report) the

COM "*had made up his mind not to believe [it]*". The Secretary of State's representations note that the COM's report was submitted prior to the psychology report and, by the time the psychology report was disclosed the COM was on leave, returning just prior to the hearing. It is the Secretary of State's view that the prison psychologist was "*fully enabled*" to give her assessment in the oral hearing and did fully explain her assessment.

44. In response to the Secretary of State's reply, the Applicant further submitted that the psychology report was, in fact, submitted in February 2021 with an addendum report in September 2021, so it was "*wrong to claim that the report was dated 14 September 2021*". The addendum report was, in fact, dated 14 September 2021. While I accept there were two pieces of written evidence from prison psychology, it is clear from the context of the Secretary of State's reply that the document referred to in that reply is the addendum report. Moreover, I have compared the probation service assessment reports dated 19 March 2021 (after the disclosure of the first report) and 13 September 2021 (after the disclosure of the addendum) both of which are in the dossier. It is only the latter report that notes "*The Parole Board have requested a psychological report, but I have not had sight of this prior to completing this [report]"*. This further supports the conclusion that the report of which the COM was unaware was the addendum report rather than the earlier (more substantial) report (which was not requested by the Parole Board, but instead was produced by prison psychology of its own accord). The Secretary of State has confirmed this is the case.

45. In any event, the panel's decision notes that the COM's recommendation was made "*having heard the evidence during the hearing".* This would have included the prison psychologist's oral evidence which appears, from the decision, to have covered the points from her report and her addendum that the panel considered to be most relevant to its own risk assessment. Disagreeing with a recommendation is not the same as closing one's mind to it. The COM had the benefit of hearing oral evidence from the psychologist before forming his own view. I do not find that the COM not having read the addendum report prior to the hearing undermined his oral evidence such that the panel giving primacy to it amounted to procedural unfairness. Accordingly, this ground fails.

Ground (d): Failure to given reasons regarding the inadequacy of the risk management plan

46. It is submitted on behalf of the Applicant that the panel had not provided reasonable grounds as to why it found the risk management plan insufficient. The application for reconsideration goes on to assert the reasons why it disagrees with the panel. It is not within the ambit of the reconsideration mechanism to re-hear evidence as to the sufficiency of the plan. The only ground which can rightly be pleaded here is the panel's failure to give reasons for its conclusion that the risk management plan was insufficient.

47. The panel carefully gives reasons: it notes that the plan would fail unless and until the Applicant had addressed his areas of risk. It noted the versatility of his sexual offending, including both contact and images, the multiple victims, and the duration of his offending when other protective factors were ostensibly in place. I find that

the panel has more than adequately discharged its common law duty to give reasons on this point. Accordingly, this ground fails.

Ground (e): Choice of risk scoring tools

48. It is submitted on behalf of the Applicant that the conclusion that he needed further offending behaviour work in custody should not have been made by reference to a new risk scoring tool (the "new tool") which indicated an increased risk of sexual offending compared to an earlier assessment using an older tool ("old tool"). It is submitted this doing so was both procedurally unfair and irrational.

49. The Applicant's "old tool" score indicated that he shared broad characteristics in common with men who pose a low risk of future sexual reoffending.

50. The Applicant's "new tool" score indicated a medium likelihood of proven re-offending related to viewing and downloading of indecent images and a medium likelihood of proven contact and other types of non-contact re-offending.

51. I have read the published *Guidance for Treatment Managers* (the "Guidance", version 1.0, October 2020) relating to the "new tool" and the *Policy Framework for the Implementation and Use of [the "new tool"]* (the "Framework", 3 August 2021) Key points from the Guidance and Framework are:

    a) From 1 March 2021, all new cases will have "new tool" scores calculated producing both a contact and an indecent images risk score. This score will replace "old tool" scores and be used for assessing eligibility for accredited programmes for people with convictions for sexual or sexually motivated offences;

    b) The introduction of the "new tool" is not intended to overturn any sentence planning decisions that have already been implemented or acted upon, based on the "old tool", prior to 1 March 2021; and

    c) The sentence plan should not change automatically based on the "new tool" scores. That said, the "new tool" scores should be considered as new information, for example, giving more information about what specific risk an individual poses (i.e., a prediction of contact and internet proven reoffending rates). If there are concerns about the individual's commitment to comply with conditions which are suggestive of offence related risks, or evidence of ongoing acute risk factors, a programme referral should be considered.

52. In the Applicant's case, the "new tool" scores were considered by the COM to indicate that the Applicant should complete an accredited course addressing sex offending in custody. The POM noted that the suggested course may not be helpful (as it does not require participant to discuss their offences) and, in any event, there is a backlog. The prison psychologist did not consider that the suggested course needed to be done in custody. Again, there is a difference of opinion between professionals, which requires the same analysis as previously: the panel's agreement with the COM's position needed to be rational and supported by reasons for departing from the views of the psychologist and the POM. Mere disagreement is not automatically irrational.

53. The Applicant's "new tool" scores are accepted to be more accurate, indicate an increased level of risk and eligibility for an accredited course in custody. Agreeing that he needs to do this course is in no way irrational. The panel's reasons point to the Applicant's lack of internal controls and an "*ongoing and enduring sexual interest"* that is unaddressed before concluding the newly indicated course should be completed in custody before release. I find the panel has discharged its duty to give reasons. There is no procedural unfairness or irrationality on this ground, and it fails accordingly.

Ground (f): Failure to consider alternative community courses

54. It is submitted on behalf of the Applicant that the panel should have considered an alternative community course that is "*specifically for internet offending and hence more appropriate for [the Applicant] to complete*" and that the panel did not provide sufficient reasons for concluding that the custodial course was appropriate.

55. There is no discussion of the alternative community course in the decision or the dossier. On the papers before me, there is nothing to suggest that it was discussed or considered at the hearing. Neither was it necessary for the panel to do so, given its conclusion that a course needed to be done in custody. I have already found the basis on which the panel came to that conclusion to be both rational and procedurally fair. It was supported by cogent and defensible reasons. The same reasoning, by extension, can be applied to the question of whether an alternative community course would be suitable. Having concluded that a custodial course was necessary for public protection, the consideration of any community alternatives became unnecessary. There is no procedural unfairness or irrationality on this ground, and it fails accordingly.

Ground (g): Failure to consider open conditions

56. It is submitted on behalf of the Applicant that the panel's failure to consider a move to open conditions is a "*mystery"* and that its reasons for not probing the Applicant's COM regarding his recommendation were inadequate.

57. A recommendation for open conditions is not something the panel was empowered to make. It was outside the scope of the Secretary of State's referral. The panel had no need to consider such a move, adduce evidence in relation to it or provide any reasons for not doing so. This ground must fail.

Ground (h): 'Blocking' transfer to open conditions

58. It is submitted on behalf of the Applicant that the effect of the panel's decision that he needs to complete an accredited course in custody effectively blocked his transfer to open conditions, despite his re-categorisation *"in September 2019"*. It is submitted that this amounts to irrationality.

59. The Applicant received his Category D status in September 2020 as there were no concerns regarding his custodial behaviour. It is reported that he had not progressed due to limited transfers (resulting from COVID-19) and (more recently) being on 'Parole hold'.

60. The effect of the panel's decision that the Applicant needed to complete an accredited course in custody is not a relevant factor provided it was made correctly. Public protection is the panel's sole concern. I have already found that the panel reached a rational and procedurally fair decision on this matter. The Applicant's outstanding core risk reduction work to be completed in closed conditions cannot be trumped by a recategorisation founded on good custodial behaviour. It would be irrational if it did. This ground must therefore fail.

Ground (i): Failure to consider re-categorisation

61. It is submitted on behalf of the Applicant that the panel did not provide reasons for failing to consider, discuss and address the reasons the Applicant was recategorised to Category D conditions.

62. The Panel's decision notes the grant of Category D status in September 2020 and the POM's comment that the Applicant's categorisation may be reviewed if the panel decided the risk reduction work needed to be completed prior to release. It cannot be said that the panel did not have this in mind. It is also clear from the panel's decision that it noted a number of factors occurring after the recategorisation review that led it to its conclusion, including the Applicant's changing accounts of the extent of his sexual interest in children and the reassessment of his level of risk. These are factors I have already dealt with extensively. The panel does not have to provide reasons for every minute aspect of his decision-making process provided that its overall reasoning reaches an adequate standard in public law. This ground fails.

Ground (j): Failure to consider completion of programme work in the community

63. It is submitted on behalf of the Applicant that the panel did not provide reasons why the Applicant could not complete an accredited course in the community. It notes the evidence of the POM that, even if the Applicant were assessed as suitable for such a course, there would be a significant delay until it could be started. It is submitted that the panel failed to give an adequate justification why the Applicant could not wait to start such work in the community under the proposed risk management plan.

64. In addition, it is submitted that the COM was not sure if the Applicant would be assessed as suitable for an accredited course in the community. The Secretary of State submits that the issue was, in fact, one of delay. It was possible that the Applicant may either not be able to complete the course in the community before the end of his sentence or would have to wait a considerable time in the community without the benefit of accredited risk reduction work. It is noted that a person "*must have at least 18 months left on his licence"* to start the community course and if the Applicant was released in November or December 2021 "*he would not have sufficient time left on his licence".*

65. The Applicant is serving an extended sentence with CRD March 2023 and SED March 2027. It is not clear whether the Secretary of State's time constraint refers to time to CRD or time to SED. If it is time to CRD, then the assertion that the Applicant would not have enough time left to begin the community course is correct; if it is time to SED, it is incorrect. This point is raised on behalf of the Applicant in the second set of submissions and conceded by the Secretary of State in response.

66. However, the panel gave reasons why the Applicant needed to complete an accredited course in custody. It follows that the Applicant's risks were such that the panel was not satisfied that he met the public protection test and thus, as a matter of logic, it would not be acceptable for him to be waiting, untreated, in the community before any accredited risk reduction could begin (even if there was, in fact, sufficient time left on his licence for this course of action to be feasible). The panel's reasons are clearly identifiable from a sensible reading of its decision. Accordingly, this ground fails.

Ground (k): Irrational decision effectively made it impossible for the Applicant to be released prior to his conditional release date

67. It is submitted on behalf of the Applicant that it was irrational for the panel to decide that the Applicant needed to remain in custody to complete a course which (it transpired after the hearing) is unlikely to be started prior to the Applicant's next parole review.

68. The panel made its decision soundly based on public protection principles. I have already found that it did so fairly and rationally. The consequences of that decision for the Applicant or the ability of HM Prison Service to deliver core risk reduction work are not a matter for the panel. This ground therefore must fail.

Ground (l): Irrational conclusion on the test for release

69. It is submitted on behalf of the Applicant that it was irrational for the panel to conclude that the Applicant did not meet the test for release when it also concluded that it had no concerns about his compliance with the reporting requirements of his licence or his licence conditions.

70. The manageability of any prisoner's risk is a combination of external factors (including reporting requirements and licence conditions) and internal factors (including the prisoner's own insight, self-control and motivation not to offend). The decision makes it clear that, although the panel was indeed satisfied with the stringency of the external controls placed on the Applicant, and his ability to comply with them, it did not consider that those controls, of themselves, would be sufficient to manage his risks. The risks arising from the Applicant's lack of internal controls outweighed the mitigation of those risks afforded by the external controls. The panel's decision making is clear and logical. It is not an irrational conclusion. This ground therefore fails.

Ground (m): Irrational failure to challenge COM

71. It is submitted on behalf of the Applicant that it was irrational for the panel not to challenge the view of the COM who made comments in his evidence that the psychologist did not conclude her assessment with a view of public protection.

72. I have already dealt with the issue of why the panel's decision to prefer the view of the COM over the prison psychologist was fair and rational. I was not present at the hearing and cannot comment on the oral evidence of the COM. However, even if he had commented as reported, he was entitled to do so, and the panel was entitled to form its own view of the evidence before it. The Applicant was also legally

represented throughout the hearing, and, if the Applicant's solicitors had considered the comments of the COM to be prejudicial, she could have explored this in her own questioning, or (if more concerned) could have raised the matter directly with the panel. In any event, there is no irrationality here and this ground fails.

Ground (n): Incorrect categorisation of the Applicant's criminal conduct as progressive

73. It is submitted on behalf of the Applicant that it was incorrect for the panel to categorise the Applicant's offending as escalating or being progressive. The panel's decision notes that the Applicant "*progressed from viewing indecent images to contacting children online"*. The Applicant submits that, as both offences were committed at the same time, and there was no significant gap between the two, then this was not escalation or progression.

74. Having read the trial judge's sentencing remarks regarding the chronology of the Applicant's criminal conduct, I am not persuaded that the Applicant's conduct was not progressive. Even if I was so persuaded and the panel was in error, any such error would not be material in the context of the panel's overall decision-making process. The assertion that the Applicant was simultaneously viewing indecent images while contacting children online would do nothing to help his case and would not undermine the panel's assessment of his risk.

75. It is not clear from the application whether this submission is made on the basis of procedural unfairness or irrationality. I do not find that it makes out either basis and accordingly it fails.

Ground (o): Irrationality – external controls

76. Finally, it is submitted on behalf of the Applicant that the panel's conclusion that external controls would be insufficient to manage his risks was irrational. It notes the passage from the decision which reads, "*The panel did not consider that external controls were sufficient, given that [the Applicant] continued to offend despite being fully aware that [he was] committing imprisonable offences."* It is submitted that there is no evidence that the Applicant has exhibited disregard for the external controls that will be placed on him in the community, and it is irrational to conclude that external controls would fail in the future even if they did so in the past.

77. There is no evidence that the Applicant has exhibited disregard for the external controls that will be placed on him in the community as he is not yet in the community.

78. In the absence of the risk reduction work which the panel has (again, fairly and rationally) concluded is necessary prior to release, in order to strengthen the Applicant's internal controls, it is not irrational for the panel to conclude that external factors would be insufficient if released now. This ground fails.

Additional matters raised in further representations

79. The second set of submissions raised on behalf of the Applicant refer to a conversation which was alleged to have taken place between him and his POM referring to the reconsideration application. Any such conversation is irrelevant to the way in which the panel reached its decision and is therefore irrelevant to the determination of this application. I am therefore disregarding it.

Decision

80. For the reasons I have given, I do not consider that the decision not to direct the Applicant's release was procedurally unfair or irrational and accordingly the application for reconsideration is refused.

Stefan Fafinski
15 November 2021