

## Application for Reconsideration by Whiteley

### Application

1. This is an application by Whiteley (the Applicant) for reconsideration of a decision by a Parole Board Panel following an oral hearing (conducted by video link) on 27 May 2021, refusing to direct his release but to recommend that he be transferred to open conditions.
2. I have considered this application on the papers. These comprise of the dossier containing 861 pages, the application for reconsideration, dated 18 June 2021, and the decision of the Panel dated 1 June 2021.

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### Background

3. On 14 September 2009, the Applicant, having pleaded guilty to an offence of sexual activity with a female under 16 years and three counts of voyeurism was sentenced to an Indeterminate Sentence for the Protection of the Public (IPP) with a minimum term, finalised on appeal, of 440 days (the tariff) before he was eligible to apply for parole. The tariff term expired on 28 November 2010. The voyeurism offences were committed over a 2 year period and the sexual activity offence some three years later.
4. The Applicant had a substantial criminal record for sexual offending against pubescent and post-pubescent children, since the age of 18, the first for rape in 1980. He had served custodial sentences for other rapes, attempted buggery and a variety of other sexual offences, spanning some thirty years and committed against strangers, neighbours and when in a position of trust.
5. The Applicant was released into the community in August 2017 but recalled almost two years later in July 2019, following poor behaviour and non-compliance with licence conditions. Allegations of rape and dangerous sexual practices had been made against him, said to have occurred during the course of a continuing association with a sex worker (S), an association which had, for some time, not been disclosed to Probation. In addition, examination of his mobile phone had found retention of concerning, albeit not illegal, images of "Japanese School Girls" adults dressed pretending to be children.

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### Request for Reconsideration

6. The application for reconsideration comprises a single page letter from the Applicant's Legal Representatives and submits a number of reasons based on which "[the

*Applicant] instructs that he believes the decision is irrational in not granting his release and asks that his case be reconsidered."*

7. The application is for the decision to be reconsidered on the basis that it is irrational. No formal challenge is made as to the other statutory basis of challenge, that the decision was procedurally unfair.
8. Although no formal challenge is made on the grounds of procedural unfairness, one of the grounds of application could be said to relate to an issue of procedural unfairness and the application has been considered, also, on that basis.
9. It is not necessary to reproduce the application in full, but all sections have been considered and the aspects relevant to the issue of irrationality and procedural unfairness are dealt with below.
10. The grounds of the application can be summarised as follows:
  - a) That the Panel had unfairly included alcohol and drugs as relevant risk factors.
  - b) That all professional witnesses, including two Prison Psychologists supported release, that the risk management plan (RMP) was robust and the Panel accepted evidence that any risk was not imminent.
  - c) That all core offending behaviour work had been done and that logistical problems prevented consolidation work, with the Applicant's Community Offending Manager (COM), being done in open conditions whereas it could take place in the community.
  - d) That undue weight had been placed on allegations of sexual misconduct despite no charges having arisen from them, on the vulnerability of the victim as opposed to what, it was suggested, was the Applicant's own vulnerability. There had been continuing contact between him and the victim, after he had been recalled to custody and the Panel failed to take this into account in its decision.
  - e) That the hearing had been deferred in March 2021 and if it had proceeded on that date then the Applicant's previous COM would have given evidence and *"[the Applicant] is of the view that if the hearing had gone ahead that day with his previous [COM] and a different Panel that the decision would have been for release."*

#### **Response on behalf of the Secretary of State**

11. The Secretary of State (SoS) by e-mail dated 24 June 2021 indicated that no representations were made in relation to the application.


#### **Current Parole Review**

12. The case had been referred to the Parole Board on 15 August 2019, the Board being asked to consider whether to direct release or, in the alternative, to consider whether

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to recommend that the Applicant be transferred to open conditions. It was not, specifically, asked to rule as to whether the recall had been justified.

13. The Applicant, through his Legal Representative, applied for re-release and this was supported in oral evidence by the Prison Psychologists, the Applicant's COM and his Prison Offender Manager (POM).
14. The Panel decision outlined the circumstances of the recall, the Applicant's evidence in relation to it and an acceptance by him that he had been in a developing relationship with S and that he should have disclosed the relationship to his COM. The panel formally found that the recall was appropriate.
15. The Panel undertook a detailed analysis of the Applicant's past behaviour with a focus on repeated and serious sexual offending over a period of over 45 years since the age of 18, on continuing allegations of sexual misconduct over a five year period with different prisoners in different locations and on involvement with a sex worker very soon after release leading to serious allegations against him. It acknowledged that the prison allegations and those of the sex worker were denied and that no charges or convictions had resulted but emphasised his failures to be open and honest with Probation as to the extent and development of that relationship. It gave him credit for his positive conduct since return to prison and dealt in detail with the psychology work undertaken with a Prison Psychologist.
16. The Panel acknowledged that all witnesses supported release but noted that the Psychologist with whom the work had been done had found that the Applicant had difficulties in identifying individually high-risk situations and that focus was necessary on consolidation of learning over a sustained period of time. Although her recommendation was for release with a robust RMP, that recommendation was not, she had accepted, a confident one.
17. The Panel considered that the proposed RMP was heavily dependent on the Applicant's engagement and openness with those supervising him and that he had failed to do so in the past. It concluded that consolidation of his current progress was necessary to demonstrate a sustained ability to implement learned skills in different environments.
18. In coming to its decision, the Panel had separately identified eight different risk factors, four of which were specifically sex related, two relating to the effect of problems with both intimate and non-intimate relationships, one to feelings of isolation, loneliness and boredom and, finally to the complained of item, the use of alcohol, drugs (and also of sex) as maladaptive ways of coping.
19. It concluded that the Applicant's risk could not currently be managed under the RMP in the community, made no direction for release but that he had made sufficient progress to be tested in the more realistic environment of open conditions.



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## The Relevant Law

20. The Panel correctly sets out in its decision letter dated 1 June 2021 the test for release.

21. Rule 28(1) of the Parole Board Rules provides that applications for reconsideration may be made in eligible cases either on the basis that the decision was (a) irrational or that it is (b) procedurally unfair. This is an eligible case.

22. A decision to recommend or not to recommend a move to open conditions is not eligible for reconsideration under Rule 28 (**Barclay [2019] PBRA 6**).

23. In **R (on the application of 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".*

24. 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 uses the same word as is used in judicial review demonstrates that the same test should be applied. This test for irrationality is not limited to decisions whether to release but applies to all Parole Board decisions.

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

26. Procedural unfairness under the Parole Board Rules relates to the making of the decision by the Parole Board and an assessment is required as to whether the procedure followed by the Panel was unfair.

## Discussion

### *Irrationality*

27. In my judgment, the decision to refuse release cannot be said to meet the test of irrationality. The Panel has clearly set out both details of evidence heard by it and the basis for its decision. In the event of a decision which does not accord with the recommendation of witnesses, a Panel should clearly explain on a rational basis how it

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came to that decision. In the view of the Reconsideration Assessment Panel (RAP) this has been done.

28. That the weight to be given to specific aspects of evidence is basically a matter for the Panel and, in the view of the RAP it cannot be considered in any way unreasonable.

29. Although the Panel makes reference to alcohol and drugs as relevant factors in coping strategies and the RAP accepts that there is little, if any, evidence of that, there is overwhelming evidence of the existence and effect of the other listed factors.

30. I have considered the specific submissions of the Applicant. Reconsideration is not an examination of the evidence and I can find nothing to suggest that the test of irrationality has been met.

31. It is not within the remit of the Panel to consider the practical difficulties involved in the implementation of outstanding work. That is a matter for the Prison Authorities. The duty of the Panel is to consider whether it is safe to release – this has been done.

#### *Procedural Unfairness*

32. The Applicant complains of the practical effects of a nine weeks delay in relisting the hearing from an earlier adjourned date, suggesting that the presence of a former COM and "a different Panel" would have resulted in a direction for release. This complaint has no merit. The Applicant was professionally represented and it would have been open to the Legal Representative to make application for attendance of the relevant witness. No objection was taken to the constitution of the Panel, and, in any event, no grounds for seeking recusal are suggested.

#### **Decision**

33. For the reasons I have given, I do not find that the Panel's decision was irrational or procedurally unfair and, accordingly, the application for reconsideration is refused.

**Edward Slinger**  
**6 July 2021**



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