

## Application for Reconsideration by Wing

### The Application

1. This is an application by Wing (the Applicant) for reconsideration of a decision of an Oral Hearing Panel of the Parole Board (OHP) dated 10 January 2022 not to direct his release. The OHP had convened on 6 January 2022 via remote video link.
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. This is an eligible case.
3. I have considered this application on the papers. These include the application for reconsideration itself, detailed written submissions from the Applicant, the Decision itself and the dossier which ran to a total of 320 pages.

### The Background

4. The Applicant is now 80 years of age. In November 2002, when he was 61 years old, having entered pleas of guilty, he received a sentence of life imprisonment in respect of two counts of rape of two young boys. Concurrent determinate sentences of 7 years imprisonment were imposed in respect of 12 counts of indecency with a child and 2 further counts of taking indecent photographs of a child. Some of the offences were committed with a co-defendant who was convicted after a trial. The offending took place over a period of five years in the Applicant's own home. When the offences were discovered, the boys were aged 8 and 9 respectively. Devices had been set up in the home to film and record much of the sexual activity that took place. The judge in passing sentence described the applicant's home as "*a magnet for small boys, providing all those facilities designed to groom and corrupt: games, toys, sweets and money.*" He described the Applicant and his co-defendant having "*a depraved and sexual interest in young boys, who have no understanding of what you do to them or what you make them do to you*". The details of the offending are set out in disturbing detail in the dossier.
5. The Index Offences do not stand alone. The Applicant, prior to his appearance before the court in 2002, had three convictions for similar offending spanning a period of no less than 50 years. In 1966 he had been placed on probation for three offences of indecent assault on a male under 14 and had asked for 8 further offences to be taken into consideration. In 1983 for 6 similar offences, he received a suspended sentence of imprisonment. In 1988, for 8 similar offences, plus 2 of buggery and 3 of attempted buggery, he received a sentence of 10 years imprisonment. The OHP in its Decision described the Applicant's offending history as revealing:

*"...evidence of a pattern of serious and persistent offending against young boys over virtually the whole of [the Applicant's] adult life".*

6. The OHP observed that there was no evidence of predatory behaviour, but noted that the Applicant's modus operandi was to groom young boys by enticing them to his home. It noted that the Applicant accepted responsibility for his offending but remains of the view that he has done nothing wrong because he continues to believe that young children can consent to and enjoy a sexual relationship with adults. The OHP found this attitude to be deeply entrenched.
7. In December 2007 the life sentences passed in 2002 in respect of the two offences of rape came before the Court of Appeal Criminal Division. It is important to make the position clear, not least because the Applicant has in his own submissions in support of this application, and in his own evidence to the OHP, misstated the position. As I have indicated, in respect of the two counts of rape the sentencing judge imposed sentences of life imprisonment. That remains the sentence imposed by the court. In passing sentence, the judge said that in light of the Applicant's criminal history he declined to make any recommendation as to a minimum term that the Applicant should serve prior to becoming eligible to be considered for parole. It was as I understand it only this decision taken by the judge that was reconsidered by the Court of Appeal in 2007. The appeal was allowed but only to the following extent - by substituting a sentence of Life Imprisonment with a specified minimum term to be served of 12 years less 465 days on remand. The position is therefore that the Applicant by his pleas of guilty remains properly and lawfully convicted of the two offences of rape. The life sentences imposed in 2002 remain, the only difference being that there was imposed in respect of each of them a specified minimum term to be served before parole could be considered.

### **Proceedings before the Parole Board**

8. The decision that is under consideration in this review was the result of the sixth parole review of the Applicant's sentence. The fifth review was concluded in July 2019. The panel then did not direct the Applicant's release but recommended to the Secretary of State that the Applicant should be transferred to open conditions. In the event the Secretary of State was not persuaded that the 2019 panel's decision sufficiently explained and justified why it dissented from the recommendation of report writers who were against a progressive move to open conditions.

### **Risk Factors**

9. It is in my judgment important to record the Applicant's relevant and current risk factors (matters which would make it more likely that he would re-offend) as found by the OHP. These included lack of consequential thinking; associating with other sex offenders; a sexual interest in young boys; child abuse supportive beliefs; feeling more comfortable with children than with adults; sexual obsessions and preoccupations; a lack of emotionally intimate adult relationships and not developing empathy for others.

### **The Request for Reconsideration**

10. The grounds for seeking a reconsideration are set out by the Applicant himself in the form of three closely written manuscript documents which run to a total of 21 pages which are dated between 20 and 28 January 2022, therefore between 14 and 22 days following the conclusion of the remote oral hearing. I have considered these grounds



in considerable detail and have taken into account all the observations and comments made by the Applicant. My task has not been an easy one, but in so far as it is possible to identify grounds for seeking a reconsideration the submissions appear to argue that the decision of the OHP was defective on grounds of irrationality and procedural unfairness as follows :

- a) **The Decision was irrational upon the basis that an offender risk assessment report contained errors which prejudiced the Applicant's case, and,**
- b) **The proceedings were procedurally unfair because the Panel Chair indicated that he had a limited amount of time in which to conclude the hearing and therefore the panel's consideration of the case was curtailed, and,**
- c) **The proceedings were additionally procedurally unfair because the OHP did not have before it an updated medical report which would have confirmed that the Applicant's health issues precluded him from being a risk of harm to the public.**

## **The Relevant Law**

The Parole Board Rules 2019

11. 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)).

### *Irrationality*

12. **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."*

13. 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.



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

#### *Procedural unfairness*

15. 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.

16. In summary any applicant seeking to complain of procedural unfairness under Rule 2 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 the panel was not impartial.

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

### **The reply on behalf of the Secretary of State**

18. It has been indicated on behalf of the Secretary of State that he does not wish to make any submission regarding this application.

### **Discussion**

19. The importance of giving adequate reasons in the decisions of the Parole Board has been made clear in the cases of **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board and the Secretary of State [2020] EWHC 1885 (Admin)** which contain helpful guidance on the correct approach to deciding whether a decision made by a panel in the face of evidence from professional witnesses can be regarded as irrational.

20. It is suggested in **Wells** that rather than ask whether "*was the decision being considered irrational?*" the better approach is to test a panel's ultimate conclusions against the evidence placed before it and ask whether the conclusions reached can be safely justified on the basis of that evidence, while giving due deference to the panel's experience and expertise.



21. Panels of the Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. It is the responsibility of panels to make their own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. If a panel is going to depart from the recommendations of experienced professionals, it is required to explain its reasons for so doing and ensure as best it can that its stated reasons are sufficient to justify its conclusions.
22. The reconsideration mechanism is not a process where I am required to indicate whether or not I would have reached the same or a different conclusion from that reached by the OHP in this case.
23. What lies at the heart of my determination of this application is whether I am satisfied that the conclusions reached by the OHP are first justified by the evidence they considered and secondly are adequately explained.
24. Before turning to consider the specific grounds upon which the Applicant seeks a reconsideration of the decision not to release him, it is appropriate to set out in summary form key aspects of the findings made and the conclusions reached by the OHP based upon its consideration of all of the evidence and having taken into account the closing submissions provided by the Applicant's legal representatives dated 6.1.2022:
- (i) The OHP found that the account the Applicant gave regarding the index offences was similar to and consistent with the evidence he had given in earlier reviews.
  - (ii) He had difficulty in appreciating he could have caused any harm to his victims.
  - (iii) He argued in his evidence that he did not pose a risk to children and had no intention of offending further particularly bearing in mind that his age and complex health issues, which included three heart attacks, a lack of balance and other ailments all limited his capacity to offend. The psychologist's evidence was that while the Applicant's health issues might reduce his physical capacities to offend that did not necessarily equate to a reduction in risk.
  - (iv) A professional witness confirmed that there were no issues with the Applicant's custodial conduct while remaining concerned he still had very little insight into his risk factors.
  - (v) Another professional witness noted that his attitudes were deeply entrenched and further that he did not accept that work to manage his risk was necessary. Of real concern to professionals was his firmly held belief that children had the capacity to consent to and benefit from a sexual relationship with an adult.
  - (vi) The OHP accepted the professional's opinion that the offender risk assessment report and other risk assessments were overall properly assessed to be high.



- (vii) There was no support from any professional witness for either release or a transfer to open conditions. One witness expressing the view that he was not suitable because his insight into his risk had regressed.
- (viii) Careful consideration was given to a proposed risk management plan but there were significant uncertainties surrounding important aspects of it. The OHP did not consider it to be sufficiently robust to manage the Applicant's risk in the community.
- (ix) The panel concluded that the Applicant's risk had reduced – but his deeply held underlying view remained – that despite acknowledging what the law says about his offending he did not accept that he had done anything wrong.

## Conclusions

25. **Ground (i)** The Applicant was represented throughout this review and at the oral hearing. I am in no doubt that had there been any "error" of significance in the offender risk assessment report with even the potential of prejudicing the panel it would have been drawn to the OHP's attention and been the subject of further examination, analysis and if necessary, evidence. It is noteworthy that no comment nor complaint has been made about any part of the Assessment by the Applicant's representatives. This was a highly experienced panel who will have been well versed in assessing the material set out in an risk assessment reports on a very regular basis. As I have noted, the Decision in paragraph 2.10 engages in a careful and in my view fair minded analysis of the offender risk assessment reports. There is in my judgment no arguable basis upon which this ground can be supported.

**Ground (ii)** I have had appropriate enquiries made of the Panel Chair regarding the suggestion that the OHP's consideration was in some way inappropriately curtailed due to lack of time. I am advised that the Applicant's hearing was the first case heard on the day; that the Panel Chair is entirely satisfied that the panel heard all the evidence it required and that it did not feel nor did it regard itself as being in any sense under undue pressure of time. Time limitations are a regular and unavoidable feature of many hearings. No panel is under any obligation to reach a decision at the conclusion of the oral hearing. More often than not panels reconvene in the days following for further detailed discussions. That is one of the reasons why 14 days are allowed for the delivery of a final decision. I am entirely satisfied that fairness in the manner in which the decision was reached was not in any way compromised. It is noteworthy that in detailed submissions made on the day by the Applicant's solicitors there is no complaint made of a lack of time for consideration. I do not find that there was any procedural unfairness.

**Ground (iii)** Paragraph 24(iii) above seeks to summarise a combination of paragraphs 2.5 and 2.8 of the Decision. Clearly the OHP were very well aware of the Applicant's medical issues both from him and the reporting psychologist. Had the panel been invited to adjourn for a further report then no doubt there would be some mention of that and there is not. There was in my judgment no procedural unfairness.



26. This is without doubt a serious and troubling case. The two issues I must decide are first whether I am satisfied that the conclusion reached by the OHP was justified by the evidence and secondly whether that conclusion was adequately and sufficiently explained.

27. As for the first issue, I am entirely satisfied that the decision not to direct release was fully justified on the totality of the evidence placed before the OHP.

28. As for the second issue, I conclude that in a carefully reasoned decision, which sets out fully the findings, assessments, operative reasoning and conclusions of the witnesses and takes into account the evidence given to the OHP including that of the Applicant himself, the OHP satisfied the public law duty to provide evidence based reasons that in my judgment adequately and sufficiently explained the conclusion they reached.

### **Decision**

29. For all the reasons set out above I am not persuaded that the decision in this case was procedurally unfair and/or irrational and accordingly the application for reconsideration is refused.

**16 February 2022**  
**HH Michael Topolski QC**

