the Parole Board
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[2022] PBRA 96

Application for Reconsideration by Sturman

Application

1. This is an application by Sturman (the Applicant) for reconsideration of a decision of the panel dated 23 June 2022 to refuse to release him.

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 Oral Hearing Decision, the Application for Reconsideration dated 12 July 2022, an email from PPCS dated 20 July 2022 stating that no representations would be made in opposition to the application, the Applicant's dossier containing 527 pages, an Amended Application for Reconsideration dated 25 July 2022 ("the Amended Application") which *"supersedes the application that was submitted on 12 July 2022 following the Parole Board's decision to grant an extension to 26 July 2022"* and an email from PPCS dated 28 July 2022 stating that no representations would be made in opposition to the Amended Application.

Background

4. On 9 January 2015, the Applicant, who was then 19 years old, was sentenced to an extended sentence with a custodial element of 66 months and a 54-month extension period for multiple sexual offences against under-age females, including counts of causing a child under 16 to engage in sexual acts, of possessing indecent photographs, of causing a female child under the age of 13 to engage in sexual activity, of causing a child under the age of 13 to watch a sexual act, of taking indecent images, of sexual activity with a girl under the age of 16, of detaining a child without lawful authority and of meeting a girl under 16 years old following sexual grooming.

5. The Applicant's Sentence Expiry Date (SED) is in December 2023.

Request for Reconsideration

6. The application for reconsideration is dated 12 July 2022. The time for making this application has been extended to 26 July 2022 as a result of a successful application for an extension made by the Applicant's solicitors. The Amended Application made

on 25 July 2022 "supersedes" the original application and includes for the first time Ground 5 below.

7. The grounds for seeking a reconsideration are as follows:

   (a) The decision of the panel was procedurally unfair because the wrong release test was used (Ground 1).
   (b) The decision of the panel was procedurally unfair as the analysis of risk failed to take sufficient account of the Applicant's age and *"the weight to attach to his maturation in the assessment of risk"* (Ground 2)
   (c) The panel was procedurally unfair as it did not make sufficient procedural adaptations to accommodate the Applicant's communication style (Ground 3).
   (d) The indefinite period of risk posed by the Applicant considered by the panel was unlawful as it was based on unlawful policy in the form of the Guidance ("the Guidance") issued by the Parole Board on the decision in **R (on the application of the Secretary of State for Justice) v the Parole Board ex parte Johnson [2022] EWHC 1282 (Admin) (Johnson)** (Ground 4).
   (e) The decision of the Panel was irrational or procedurally unfair in that the Applicant did not have an opportunity to address the Panel on the application of the Guidance on the decision of **Johnson** as it was issued after the hearing of the panel but before the Oral Hearing decision of the panel (Ground 5).

Current parole review

8. A three-member panel met on 14 October 2021 to consider whether the Applicant should be granted parole and, on that occasion, a direction for the production of a psychiatric assessment had not then been complied with. At the start of the hearing, the Applicant stated that it would be unfair for the hearing to proceed without that assessment being produced. The panel duly adjourned the hearing so that the assessment could be produced.

9. The panel held a further hearing on 9 June 2022. On that occasion, a panel comprising 3 independent members of the Board, one of whom was a psychologist. The panel heard oral evidence from
   (a) The Prison Offender Manager (POM),
   (b) 2 Prison-Commissioned Psychologists (PP1) and (PP2),
   (c) An independent Psychiatrist (IP),
   (d) The Community Offender Manager (COM),
   (e) The Applicant's partner; and from
   (f) The Applicant

10. The Applicant was represented by his solicitor. No victim impact statements were adduced.

11. The Applicant, who had no previous convictions, committed the index offences over a period of 19 months starting in May 2012 when he was aged between 16 and 18 years of age.

12. Although the Applicant pleaded guilty to these offences, he has subsequently maintained his innocence in relation to some of the offences and he also claims that none of his conduct was sexually motivated.

13. The panel considered that the Applicant's offences show *"[the Applicant's] capacity to cause serious harm to female children through sexual abuse"* and *"[they] indicate a sustained pattern of abusive behaviour, over a period of time, against multiple victims".* The panel considered that there appeared to be *"an escalation in the seriousness of the offences over the period of offending."*

14. The Applicant frequently contacted his victims through social media and as the contact continued, the Applicant persuaded these girls who were as young as 11 years of age to engage in sexual activity with him.

15. In May 2013, the Applicant was arrested and released on bail with a condition not to contact children under 16 years of age, but in breach of that condition, he contacted under-age children by, for example, exchanging messages with several under-age girls including meeting a 13-year-old girl with whom he had sexual intercourse as a result of which she became pregnant and had a baby who was taken into care. He also had intercourse with her per anus. In a recent interview with the Applicant's Offender Manager, the Applicant maintained that he did not know the age of this girl and that her evidence contained many lies.

16. Professionals were concerned about many aspects of the Applicant's behaviour including his poor compliance with external controls imposed on him and committing one of his offences while on bail which was of concern regarding the manageability of his risks in the community should he be released. Another matter of concern was that the Applicant's risks were not fully understood. Protective factors in the Applicant's case were based around some evidence of increased maturity.

17. The Applicant was subject to two Parole Board Reviews prior to his Conditional Release Date and neither review directed his release considering core risk reduction work to be outstanding. He had begun some 1-2-1 work prior to his release, but this work was ended before it could be completed because of his lack of engagement.

18. After the Applicant had been released for the first time during his sentence on 28 June 2019, his licence was revoked on 24 December 2019 when he was arrested in a car that was reported to have been stolen and he was found in the company of another registered sex offender. The Applicant's mobile phone showed that there had been communication between the Applicant and the driver of the car over the previous 3 months. It was considered likely by professionals that the Applicant knew that the driver was a sexual offender placing him in breach of his licence. In addition, the Applicant had reportedly failed to disclose the vehicle details to probation and this failure constituted a further breach of the terms of his licence.

19. There was evidence that the Applicant has shown poor compliance before his recall such as that he had received a final warning at the Approved Premises ("AP") for being late for curfew, that he had reportedly used a computer in the AP adopting the "*incognito mode*" to mask some of his activities, that he was said to be "*disruptive*" during the Polygraph Test to which he was subject in the community,

that he had reportedly failed to disclose purchasing a new mobile phone to his COM and that he had received a caution from the police for accessing social media.

20. Since his recall, the Applicant has received a proven adjudication for refusing to move wing in January 2020. There was also some high-grade security linking the Applicant to a mobile phone in May 2020, but since that time there has been a period of stability.

21. The Applicant was subjected to a psychological risk assessment completed by PP1 in August 2020 and it concluded that the Applicant could not be released and had to remain in closed prison conditions although given the Applicant's voluntary mutism, there was no clear treatment pathway that would enable the Applicant to address and reduce his risks. Following that assessment and an allegation that the Applicant asked his partner to take her top off during a video call in March 2022, which led to the call being suspended for a time, PP1 completed an addendum report in April 2022 which confirmed that release could not be supported and that the risk that the Applicant was alleged to pose could not be managed in the community "currently".

22. Following the adjournment, the Applicant was subjected to a psychiatric assessment by the IP in January 2022 who concluded that the Applicant did not have a major mental illness although he did meet the diagnostic criteria for Dissocial Personality Disorder. The IP considered that the Applicant's voluntary mutism would make risk management more difficult and would increase the chances of community supervision being less effective.

23. During the oral hearing, the Applicant's partner gave evidence and she explained that she and the Applicant had initially had a platonic relationship which became romantic over time. The couple have yet to meet in person. She said that she had become aware of the Applicant's convictions, but that she does now know the context of his convictions and that she had read news articles relating to his case. Her evidence was that she and the Applicant communicated via email, and that they had written to each other about 5 times a week over the last couple of years. She denied that their communications were heavily sexualised although she agreed that they could be "suggestive" at times.

24. The Applicant's partner reported that she and the Applicant had agreed at an early stage not to exchange naked photographs of each other and that this has never occurred. She strongly denied that the Applicant had asked her to take her top off during a recent video call and in its decision, the panel explained that *"for clarity the panel does not place any weight on [this allegation]*." She explained that the Applicant had been describing his visit to a dermatologist when he was asked to take his top off. She explained that this had led prison staff to believe that the Applicant had made the request, but this was not the case.

25. The Applicant gave evidence explaining that his voluntary mutism was based on his understanding with God. He believed that God wanted him to be silent in 2015 and he respected that wish. He explained that he considered himself to be agnostic and it was possible that he might speak in the future, but that would be God's choice and not his choice.

26. The Applicant has not felt influenced by God to do or not to do anything else. He feels that following this one request by God has been one of the most beneficial changes he had made.

27. In relation to his convictions, the Applicant denied being sexually attracted to "almost all of my victims". He explained that his offending was driven by an attempt to achieve "bragging rights" at school as other boys were obtaining sexual images from girls and he wanted to be accepted by those peers. His evidence was that he did not "choose" or target young girls as such and that some of the victims lied about their ages.

28. The Applicant accepted breaching bail conditions to commit a contact offence and that it was wrong to do so. His evidence was that at the time of the hearing in front of the panel he considered himself to present a much-reduced risk to young girls. His evidence was that he was no longer the immature youth that he had been and that he was no longer driven by peer acceptance and was now more aware of the consequences of his actions.

29. The evidence of the Applicant was that he was not sure why the professionals still considered him to be of high risk as he had shown more maturity and had spent much time in reflection after taking his vow of silence. In consequence, he is determined not to cause harm to others, and he is working on his more positive and pro-social identity.

30. Although the Applicant is recorded as having very negative views on APs prior to his initial release, he denied in his evidence having any issues with an AP placement when giving evidence to the Panel. He felt positive about his relationship with his partner, and he hoped to meet her in person after his release as they had not met yet.

31. The Applicant challenged the different bases for his recall. For example, he denied knowing that the man he was in the car with at the point of recall was a sex offender. He had been accused of purchasing a mobile phone without permission while on licence and he explained that he purchased a temporary phone while waiting for another phone to be delivered. He accepted that technically he was in possession of more than one mobile phone for a very brief period before he returned his temporary phone. He felt that he had learnt lessons from his recall even though he disputes the validity of his recall. His evidence was that he had prepared himself for the challenge of release including working on plans to avoid unsupervised contact with children and to avoid behaviour likely to lead to recall.

32. The panel heard evidence from the professional witness and their evidence was summarised in this way in paragraph 4.10 of the Decision Letter:

"No professional witness supported [the Applicant's] release. His POM felt unable to make a recommendation. [The Prison Commissioned Psychologist 1] considered core risk reduction work to be outstanding and the level of risk that [the Applicant] posed to be unmanageable. [The Psychiatrist] was concerned that there needed to be greater understanding of [the Applicant's] personality traits and whether [he] also has psychopathic traits also before it would be safe to manage [the Applicant] in the community. He considered that assessment needed to occur prior to release.

[The COM] considered that the level of risk was too great and that [the Applicant] was capable of circumventing external controls placed on him."

33. The panel accepted that the Applicant:

    (a) Posed a high risk of serious harm to the public and children,
    (b) Posed a high risk of committing a contact sexual offence,
    (c) Has not shown a positive attitude towards external controls placed on him,
    (d) Has not completed accredited interventions to address and reduce risk, and that he
    (e) Posed a more than minimal risk of causing serious harm currently.

34. The panel concluded that the decision to recall the Applicant was appropriate and made no direction for his release for reasons which will be considered later in this judgment.

The Relevant Law

Parole Board Rules 2019

Irrationality

35. 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."

36. 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

37. 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.

38. 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.

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

Other

40. 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 uncontentious 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.

41. 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

42. PPCS have indicated in an email dated 20 July 2022 that the Secretary of State does not wish to make any representations in response to the Applicant's reconsideration application. In a further email from PPCS dated 28 July 2022, PPCS have stated that no representations would be "*offered*" in opposition to the Amended Application.

Discussion

43. In dealing with the grounds for reconsideration, it is necessary to stress five 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.

44. 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.

45. 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.

46. Fourth, when considering whether to order reconsideration, appropriate weight must be given to the views of the professional witnesses, but reconsideration cannot be ordered if the panel has put forward adequate reasons for not following the views of the professional witnesses.

47. Fifth, 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

48. This Ground is that the decision of the panel was procedurally unfair because the wrong release test had been used and complaint is made that in paragraph 2.79 of the Decision Letter, it is stated that *"the panel had to conclude that [the Applicant] posed a more than minimal risk of causing serious harm currently".* The Applicant's case is that in deciding whether to release a prisoner, the panel was required to consider *"whether or not it is* ***necessary for the prisoner to be detained to protect the public from serious harm****"* (Emphasis added). I will refer to this as "the Applicant's test."

49. Indeed, in paragraph 4.1 of the Decision Letter, it is stated (with emphasis added) that *"the panel should direct release* ***unless positively satisfied that continued detention is necessary for the protection of the public*** *[from serious harm]"*. It is contended by the Applicant that at no point in the Decision Letter did the panel conclude that it found it **necessary** for the prisoner to be detained to protect the public from serious harm.

50. A further complaint of the Applicant is that the panel adopted the wrong starting and default position. It is contended that liberty (and not confinement) should have been the starting and the default position for the panel. Indeed, the Court of Appeal has explained that Article 5 of the European Convention on Human Rights and section 3 of the Human Rights Act 1998 required a panel to regard liberty as the default position and that there should be *"a presumption in favour of release"* (**Secretary of State for the Home Department v Sim and Another** [2003] EWCA Civ 1845 [50]). Thus, the panel was obliged to direct release unless positively satisfied that continued detention was necessary for the protection of the public. Although the Applicant does not rely on other tests for release that require the Board to conclude that confinement is **necessary**, the presumption in favour of release applies with liberty as the default position.

51. The Applicant contends this approach was not in fact followed by the panel in the crucial conclusion at the end of the Decision Letter in paragraph 4.13 which explained the panel's reasons for its decision by stating (with emphasis added) that

> *"The Applicant was rightly assessed to pose a **high risk of causing serious harm.** The panel could not evidence that [the Applicant] **met the test for release** and, therefore, makes no direction for release."*

52. I have concluded that these complaints were justified, and the panel's approach is procedurally unfair for two reasons. First, the statement in the previous paragraph that *"the panel could not evidence that [the Applicant] **met** the test for release"* shows that the panel regarded the Applicant as having a burden of proof to show release, that he had failed to discharge this onus and so the panel made no direction for release. This reasoning does not reflect the presumption in favour of release, and this shows that the approach of the panel was procedurally unfair.

53. A second reason why this approach is procedurally unfair is that the panel was also required to make a finding on the issue of whether it was positively satisfied that continued detention of the Applicant was ***necessary for the protection of the public***, but that there was no finding on that crucial issue. The finding that the Applicant posed a high risk of causing serious harm does not necessarily mean that the panel was *"positively satisfied that continued detention of the Applicant was necessary for the protection of the public."* In other words, these tests were different, and it is noteworthy that there could have been a requirement that prisoners should automatically be released if they posed a high risk of causing serious harm but, as has been explained, that was not the test for release relied on by the Applicant. So, the panel did not apply the Applicant's test required to order release and the decision was procedurally unfair for that reason.

54. I should add that it seems uncertain as to whether the panel could be positively satisfied that continued detention of the Applicant was necessary for the protection of the public. Although the panel did find that the Applicant posed a high risk of causing serious harm, the panel also agreed with the "the broadly fair assessment" of OASys (Offender Assessment System) that the Applicant posed a "Low" likelihood of further general reconviction (OGP) and a "Low" likelihood of further violent reconviction (OVP) as well as agreeing with the OGRS (Offender Group Reconviction Scale version 3) score which indicates that the Applicant "*belongs to that group of offenders who present with a "Low" likelihood of reconviction within 2 years.*''

55. There was no indication in the decision of the panel as to when (if ever) during the Applicant's sentence these risks would be raised to, for example, "medium risk" or "high risk". In all those circumstances, for all those reasons, the decision was procedurally unfair. So, this ground succeeds, and reconsideration must be ordered.

56. In reaching this decision, I should mention that in the judgment in **Johnson** (supra) (which was delivered on 27 May 2022 about 4 weeks before the decision in the present case which is the subject of the present Reconsideration application) there is set out a different approach from that advocated by the Applicant and set out in paragraph 48 above relating to the circumstances in which release can be ordered. The Applicant has not referred to this aspect of the **Johnson** decision in his Original

or Amended Grounds of Application. In **Johnson**, the members of the Court concluded at paragraph 33 that they were satisfied that statements in **R(King) v Parole Board** [2013] 2 AC 254 [13] were "accurate statements of the law" and those statements were (with emphasis added) that:

*"If the Board **concludes that confinement is necessary**, because there will be a (more than minimal) risk of harm if the prisoner is released, then confinement of the prisoner will be required to avoid that risk"* (hereinafter referred to as "the Johnson/King statement")

57. As the Applicant's original or amended Grounds of Application do not refer to the Johnson/King statement, I will consider them briefly.

58. It will be noted that the Johnson /King statement does not specify that if there is more than a minimal risk of harm, the Board **must** automatically and inevitably conclude that the prisoner must be detained. What is required is for the Board to *"conclude [in the circumstances of the case] that confinement is necessary."* In this case, there has been no evidence that the Board concluded that confinement was "necessary" let alone any reasons for such a conclusion. This shows procedural unfairness and in determining if confinement is necessary, the matters set out in paragraph 54 would be relevant. In addition, if the Board had concluded that confinement was necessary there is no evidence that the Board has applied the presumption in favour of release and it appears that a presumption of detention was applied for the reasons set out in paragraph 52 above. These conclusions provide further reasons why reconsideration has to be ordered.

Ground 2

59. This ground is that the decision of the panel was procedurally unfair as the panel failed to take account of the Applicant's age and maturation in assessing the risk he posed. His evidence was that he was no longer the immature youth he was when he committed the index offence, and he was no longer driven by peer acceptance.

60. The complaint of the Applicant is that the panel failed to explore sufficiently the extent to which the Applicant had matured and the extent to which this maturity meant that it was no longer necessary for him to be detained for the protection of the public. It is said that the panel failed to consider the fact that it is well-known that those who offend sexually as children have a much lower rate of reconviction for sexual offending than adults and reference is made to studies which show that the sexual reconviction rate for children *"are substantially lower (almost half) than those for adults."*

61. The panel was well aware of how young the Applicant was because at the start of the Decision Letter, it is recorded that the Applicant's date of birth was 28 October 1995, that he committed the offences over a 29-month period starting in May 2012 when he was "aged 16-18", that he was 19 years of age when he was sentenced and that at the time of the Decision Letter he was 26 years of age.

62. The panel, having seen the Applicant give evidence and being cross-examined and having noted his responses considered and rejected the Applicant's contention that he had matured, that he had reflected a great deal on his actions and behaviour

since conviction and that he now correctly considered himself more considerate and reflective.

63. The panel explained that in 2019, the Applicant wrote *"a letter implying that he might have to resort to 'killing people' if placed in an AP"*. In addition, the Applicant had written *"in a negative and derogatory way towards his COM shortly before the second oral hearing and he has refused to participate in psychological analysis that would potentially have enabled [the Applicant] and professionals to have a greater understanding of his risk profile."* The panel pointed out that if the Applicant had issues with the prison psychologist, he could have chosen to commission an "independent psychological assessment," but he did not do so.

64. The conclusion of the panel was that this behaviour of the Applicant *"did not evidence change in the panel's assessment"* of the Applicant's maturity, or his risk. The panel, as the designated fact finder, was quite entitled to reach these conclusions and deference had to be shown to this conclusion especially as unlike me they had seen the Applicant give evidence and being cross-examined and noting his responses.

65. Indeed, it is settled law that the reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be lightly interfered with especially whereas in this case on this issue, there is no evidence of an error let alone one of an egregious nature. Indeed, there were other factors which justified these conclusions that there had been no change in the assessment of the Applicant's maturity or risk such as the fact that *"[the Applicant] continue[d] to express the belief that children can consent to sex at age 13".*

66. For those reasons, this ground of challenge must be rejected.

Ground 3

67. This ground is that the decision of the panel was procedurally unfair as there were insufficient procedural adaptations made to accommodate the Applicant's communication style. The Applicant had taken a vow of silence which is based on a religious conviction which means that he only communicates in writing. The complaint of the Applicant is that this was well known at the point of listing, but that insufficient time had been allocated to the hearing in the light of his communication style with the consequence that the hearing was rushed as the Applicant was faced with the choice of concluding the hearing in a day with aspects of it being rushed or alternatively of seeking a further day in the future to complete the hearing.

68. It is said that the hearing was listed for 6 hours notwithstanding a dossier of many hundreds of pages and that there were a large number of witnesses to be called. This meant that the hearing was rushed, and that the Applicant's counsel was advised by the Panel that if the hearing had to be completed on another date, this would lead to a delay. The complaint of the Applicant is that the hearing ought to have been adapted to accommodate the Applicant's communication style at the outset either with a listing for two days or that there would be *"the provision of a list of key issues to examine and/or a timetable for hearing witnesses throughout the day or ensure that proceedings were fair and not rushed."*

69. The complaint of the Applicant is that as a result of these matters, the panel did not conduct the proceedings fairly to accommodate the Applicant's communication needs because *"fairness requires that hearings are conducted in such a way as to accommodate the communication needs of applicants and failure to do so where the communication needs stem from a religious conviction is discriminatory."*

70. There is no allegation that the Applicant or his legal representative asked for further time to present his case and/or that either of them was somehow prevented from presenting the Applicant's case or parts of it properly because of time restraints caused by his inability to communicate orally. Further or alternatively, it is not contended how (if at all) the Applicant was prejudiced by inadequate time being available to present his case. Further, there is no contention (let alone proof) that the prospects of the Applicant on the application for release would have been improved if more procedural adaptations had been made to accommodate the Applicant's communication style.

71. In those circumstances, it is not possible to conclude that the hearing was procedurally unfair, and this ground of challenge must be rejected.

Ground 4 and Ground 5

72. It is convenient and appropriate to deal with these two grounds together. In Ground 4, it is contended that it was irrational and unlawful for the panel to consider the risk posed by the Applicant over an indefinite period as it was based on the application of the Guidance following the case of **Johnson** and that this was *"unlawful as it was based on an unlawful policy issued by the Parole Board."*

73. Ground 5 sets out a preliminary point, namely that it was irrational and procedurally unfair for the panel to consider and rely on the Guidance as the Applicant did not have the opportunity to address the Panel on the application of the Guidance, because it was issued after the hearing but before the decision was given without the Applicant's representative having been given the opportunity to consider and make representations on the correctness and applicability of the Guidance.

74. The basis of Ground 4 is that the panel explained that it relied on the Guidance following the case of **Johnson.** That Guidance, as cited in the decision, states in terms that: *"the statutory test for release does not include a temporal element. The test is whether release would cause a more than minimal risk of serious harm to the public at any time. Therefore, consideration of risk goes beyond conditional release dates (CRD) and sentence expiry dates (SED)."*

75. The panel did not refer to the statement in the Guidance that:

"This means that, in determinate sentence cases, the test should be approached in the same way as in life and IPP sentences. Panels will need to consider all potential future risk."

76. The case for the Applicant is that the decision of the panel and the Guidance based on it did not contain a correct interpretation of **Johnson** because that decision required the panel to consider risk until the end of the licence period (i.e., until the SED in December 2023) rather than indefinitely or until the end of the custodial

term. The Applicant is in the preventive phase of the sentence namely beyond the custodial term but prior to his sentence end date. So, it is submitted that the Parole Board cannot be asked to consider the risk posed by a prisoner beyond the currency of the sentence as to do so would be to conflate the extended sentence with an indeterminate sentence.

77. This distinction was noted by the court in **Johnson** which confirmed that the protection of the public is achieved through the licence conditions:

"Unless the prisoner is subject to an indeterminate sentence, there will be cases where the prisoner must be released even though they present a risk of harm to the public. Protection of the public then will be by operation of the licence provisions." [29]

78. The Applicant says this approach is consistent with the analysis of extended sentences by the Court of Appeal in **Sim** (supra) and this is (with emphasis added) that:

*"This very much puts the extension period into the category of cases in which there is a substantial period in the sentence for the protection of the public, **during which period** there may need to be further assessments of the degree of risk which the offender still represents" [35]*

79. So the case for the Applicant in Ground 4 is that the Guidance, and therefore the application of it in this decision, is unlawful for two reasons. The first reason is that the Parole Board can only be asked to consider risk during the currency of a sentence and the sentence itself defines the temporal limit of the measure of control being exercised over the individual. It is for this reason that Parliament has provided for indeterminate sentences in cases where the risk is perceived to be greater at the time of the sentence.

80. The second reason is that the role of the Parole Board is to ascertain whether the risk that a prisoner poses is manageable in the community while subject to licence conditions. The crucial role of the licence conditions has been emphasised by the courts as being integral to the risk assessment. For example, the Court of Appeal in **R (Hassett) v Secretary of State for Justice** [2017] EWCA Civ 331 described the Parole Board's task as follows:

"The question which the Parole Board seeks to answer is whether a prisoner can safely be released at an appropriate point in his sentence, in circumstances where there are possibilities for his management in the community to contain and safeguard against the risk he might otherwise pose..." [51]

81. The argument for the Applicant is that it is and was not rational for the Board to be required to try and anticipate what risks might arise once the sentence is over and the licence conditions are ended. Such an approach would make the provision of a risk management plan for prisoners serving determinate sentences irrelevant as that will always cease at some point. According to the Applicant, the approach in the current Guidance appears to require the Board to be satisfied that all risk had been extinguished for an indefinite period.

82. It is contended by the Applicant that such an interpretation of **Johnson** places a higher threshold on determinate prisoners than on an indeterminate prisoners who the Courts had regarded as more risky as shown by their sentences. Another argument put forward by the Applicant is that this approach *"subverts the whole purpose of the licence conditions regime, and particularly the nature of the extended sentence, which envisages that people on these sentences will be released for an extra-long period under supervision on licence to ensure that the public is protected"*

83. It is said by the Applicant that if the Board applies the Guidance, only a person serving a determinate sentence who required no risk maintenance at all would meet the test for release while a person deemed so exceptionally dangerous as to meet the test for an indefinite sentence could be released under the proposed risk management plan on the understanding that it could last as long as necessary.

84. In Ground 5, the Applicant raises a preliminary objection to the fact that the panel relied on the Guidance even though the Applicant had no opportunity to address the panel on the application of the Guidance as it was issued on 15 June 2022 which was after the hearing of the Applicant's case on 9 June 2022 but before the decision letter was completed on 20 June 2022. Surprisingly, the Applicant was not afforded the opportunity before the decision letter to raise his concerns about the Guidance, such as that it did not correctly interpret and apply the dicta in the **Johnson** judgment before the panel gave its decision especially as the panel attached importance to the Guidance as is apparent from, for example, paragraph 4.3 of the written decision. Reconsideration has to be ordered under Ground 5 as it was procedurally unfair and irrational not to have given the Applicant the opportunity to make submissions on the applicability and correctness of the Guidance.

85. As reconsideration has to be ordered in respect of Ground 5, the issue of whether the risk posed by the Applicant has to be considered over an indefinite period will also have to be reconsidered. It is therefore unnecessary to consider Ground 4 which seeks the same relief.

Decision

86. Accordingly, I do consider, applying the test as defined in case law, that the decision of the panel to be irrational/procedurally unfair. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Sir Stephen Silber
4 August 2022