the Parole Board
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[2024] PBRA 207

Application for Reconsideration in the case of Ling

Application

1. This is an application by the Secretary of State (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 4 September 2024 directing the release of Ling (the Respondent) following a two day hearing that took place on 16 and 17 July 2024.

2. Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that applications for reconsideration may be made in eligible cases, as set out in rule 28(2), either on the basis (a) that the decision contains an error of law, (b) that it is irrational and/or (c) that it is procedurally unfair. This is an eligible case, and the application was made in time.

3. I have considered the application on the papers. They include the panel's decision which runs to over 30 pages, the dossier, now comprising 1161 pages and detailed written submissions from the parties.

Background

4. The Respondent was born in 1974. In December 1998 aged 24 he pleaded guilty to the murder of a 29 year old woman. They met in a pub during the evening of 24 December 1997. The Respondent had a great deal to drink. When he left the pub in the early hours of Christmas morning he persuaded the victim to accompany him to his home which was then unoccupied.

5. The facts of his offending over the next hours are set out in all their very disturbing detail in the decisions of this and earlier reviews and other documents in the dossier. Statements bear moving testimony to the lifelong grief of the victim's family. Their suffering is heartrending.

6. Having got the victim inside his house he punched her and attempted to have sexual intercourse with her. She submitted through fear. He took a knife from the kitchen and returned to where she was upstairs and raped her. Either during or immediately after the rape he stabbed her and attempted to suffocate her. A second knife was used after the first was broken. The attack lasted for about two hours. During the attack he made cuts to her vagina and made attempts to carve something on her body. The pathologist found a total of 60 injuries, 31 of which were knife wounds or lacerations. There was evidence that his victim tried to defend herself. The

Respondent attempted unsuccessfully to set fire to her body. The cause of death was bleeding from multiple stab wounds. He was arrested later that morning for drink driving and admitted the killing to the police.

7. The judge in passing sentence said that in his view there was in the Respondent's motivation an aspect of sadism, killing his victim in "circumstances of great violence and frenzy". The judge observed that despite the absence of any previous convictions, the Respondent posed a serious threat to women. He was assessed by three psychiatrists at the point of sentence and none of them considered him to be suffering from any mental illness or diminished responsibility. Since those assessments there has been one [mental health assessment] which concluded that he continues to have no major mental disorder. A [mental health assessment] was completed in 2000 and found that he did not meet the diagnostic criteria for [a mental health condition].

The oral hearing

8. The oral hearing, which lasted for two days, was conducted in public following decisions made by the Chair of the Parole Board in May 2023 and in February 2024. Observers were located at the Royal Courts of Justice and the hearing was streamed live to that location.

9. The panel chair had directed that the Respondent's oral evidence be heard entirely in closed session. The majority of the evidence of other witnesses was heard in open session except when dealing with parts of the evidence touching upon the proposed risk management plan.

Request for Reconsideration

10. An application was lodged dated 30 September 2024 seeking a reconsideration of the panel's decision on the basis that the decision was irrational. I set out the three grounds as follows:

    <u>Ground 1</u>: The decision fails properly to consider how the Respondent will respond in the community to stressful situations, without first having been tested in the community.

    <u>Ground 2:</u> The decision mischaracterises the full extent of the Respondent's risk profile.

    <u>Ground 3</u>: The decision inadequately addressed the extent to which the proposed risk management plan is a sufficient mechanism to protect the public from harm.

The reply on behalf of the prisoner

11. On 3 October 2024 written submissions on behalf of the Respondent were lodged opposing the application essentially on two grounds which I summarise as follows:

i. The application, in effect, simply repeats the Applicant's strong disagreement with the findings, assessments and conclusions already advanced in closing submissions at the conclusion of the oral hearing which have not been accepted by the panel in its detailed decision.

ii. The application does not meet the required public law threshold for a challenge on the basis of irrationality.

12. I will return to consider the grounds and the response in due course and in some detail.

The Relevant Law

13. The panel correctly sets out in its decision letter dated 4 September 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019 (as amended)

14. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).

15. Rule 28(2) of the Parole Board Rules provides the sentence types which are eligible for reconsideration. These are indeterminate sentences (rule 28(2)(a)), extended sentences (rule 28(2)(b)), certain types of determinate sentence subject to initial release by the Parole Board (rule 28(2)(c)) and serious terrorism sentences (rule 28(2)(d)).

16. 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**.

Irrationality

17. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined some 76 years ago **in Associated Provincial Houses ltd -v- Wednesbury Corporation 1948 1 KB 223** by Lord Greene as follows: *"if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".* The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

18. **In R(DSD and others) -v- the Parole Board 2018 EWHC 694 (Admin)** a Divisional Court applied this test to parole board hearings in para. 116 in this way: *"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."*

19. **DSD** is therefore an important case setting out the limits of a rationality challenge in parole cases such as the one made in this application. Since DSD was decided another division of the High Court in **R (on the application of the Secretary of State for Justice v The Parole Board [2022] EWHC 1282 Admin) the Johnson case**, adopted what was described as *"a more modern"* test set out in the case of **Wells [2019] EWHC 2710 (Admin)**

20. In **Wells** Saini J set out in paragraph 32 of his judgment what he described as:

    "a more nuanced approach in modern public law which was to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can…be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied".

21. As was made clear by Saini J this is not a different test to the **Wednesbury** test. The interpretation and application of the **Wednesbury** test in Parole hearings as explained in **DSD** was binding on Saini J.

22. What is established by all these authorities, which are of course binding on the Parole Board, is that it is not for me when deciding an irrationality challenge on a reconsideration, to substitute my view for that of the oral hearing panel who had the opportunity to see the witnesses and evaluate all of the evidence. Therefore, it is important that it should be clearly understood that it is only if I decide that the decision of the panel did not come within the range of reasonable conclusions that could be reached on all of the evidence, that I should allow this application.

23. Panels of the board are wholly independent and are not obliged to adopt opinions and recommendations of professional witnesses. In **DSD** the court made it perfectly clear that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the panel in making decision relating to parole. A panel's duty is clear and it is to make its own risk assessment and to evaluate the likely effectiveness of any proposed risk management plan. That will require a panel to test and assess all the evidence and decide what evidence it accepts and what evidence it rejects. While the views of professional witnesses must of course be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. It must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

24. The giving of reasons by a decision maker was described in **Breen v Amalgamated Engineering Union [1971] 2 QB 75** as *"one of the fundamentals of good*

administration". When reasons are provided, they may indicate that a decision maker has made an error or failed to take a relevant factor into account. As I understand the principles of public law engaged in this application, an absence of reasons in a decision does not automatically give rise to an inference that the decision maker has no good reason for the decision. Neither is it necessary for every factor to be dealt with explicitly for the reasoning to be legally adequate in public law. The way in which a panel fulfils its duty to give reasons will vary, depending on the facts and circumstances of any particular case. For example, if the panel is going to reject the unanimous evidence of professional witnesses then detailed reasons will be required. In **Wells** at para. 40 the court observed:

"The duty to give reasons is heightened when the decision maker is faced with expert evidence which the panel appears, implicitly at least, to be rejecting".

25. In **DSD** the court considered the manner in which a panel of the parole board is obliged to undertake the evaluation of risk as follows:

"117. The evaluation of risk, central to the Parole Board's function is in part inquisitorial. It is fully entitled, indeed obliged, to undertake a proactive role in examining all available evidence and the submission advanced…The individual members of a panel, through their training and experience, possess or have acquired skills and expertise in the complex realm of risk assessment.

118. The courts have emphasised on numerous occasions the importance and complexity of this role, and how slow they should be to interfere with the exercise of judgment in this specialist domain…

119. A risk assessment in a complex case is multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself".

26. When considering whether the decision in this case is irrational, I must therefore keep well in mind that it is the panel who are expert in assessing risk. It was the panel who had the opportunity to question the witnesses and to make up their own minds what evidence to accept and what evidence to reject. My function is to decide whether the panel in this case erred in law or reached a decision that was unreasonable in some respect.

Recommending a transfer to open conditions

27. Before making a recommendation for the transfer to open conditions a panel must consider:

i. All the information placed before it including any written or oral evidence; and
ii. Whether the prisoner has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm (in circumstances where the prisoner in open conditions may be in the community, unsupervised under temporary release); and
iii. Whether the prisoner can be assessed as presenting a low risk of abscond.

The Grounds – Analysis and Discussion

Ground 1

28. **The panel's decision fails properly to consider how the Respondent will respond in the community to stressful situations without first having been tested in less restrictive custodial conditions and temporary release on licence.**

29. The Applicant submits that the decision fails to develop an analysis of how, for example, increased sexual thoughts in the community or other stressful stimuli would be reduced or avoided without the intense support the Respondent has had in prison. Further, it is submitted that the panel failed to give fuller consideration to what is suggested to be a lack of internal controls particularly in light of the fact that the Respondent's control mechanisms have not been tested in open conditions.

30. The Respondent submits that these issues were all given thorough consideration in the panel's decision.

31. The decision deals directly with the Respondent's response to stressful stimuli. It is recorded that when the Applicant rejected a recommendation for open conditions by a previous panel, the Respondent was very disappointed and was [placed on reporting conditions]. Similarly, he was placed on [reporting conditions] when he was struggling to cope with the prospect of his hearing being conducted in public. The panel noted that during both periods there was no evidence of risk to others increasing. The panel also noted that the Respondent continued to co-operate with professionals, and continued to meet his obligations as a [role within prison] and cope well with disruption in the prison due to staffing issues. Furthermore, the panel observed that following the second rejection of a panel's recommendation of progression to open conditions the Respondent self-referred to a particular therapeutic service and requested that his parole review be deferred while he completed therapy.

32. The Prison Offender Manager (POM) who had worked with the Respondent for five and a half years and who had given evidence to differently constituted panels in the reviews in 2020 and 2022 told the present panel that she knew him well and met with him at least every three weeks. She gave evidence of his openness in talking to her about managing his grief [after suffering a personal loss] and openly discussed with her any sexual thoughts he had – none of which gave the POM any cause for concern. It was her professional opinion that risk factors would develop over time and be readily observable. She did not think he was manipulative in his dealings with professionals. Her evidence was that he had developed internal controls to manage his risks and was not over – reliant on professionals to maintain this.

33. As for the psychological evidence considered by the panel. Both psychologists who gave evidence had completed numerous risk assessments both for this and earlier reviews. Together they had delivered a total of seven reports which included one joint report which had identified areas of divergence in their assessments which the panel had not found to be significant. Both were in agreement that the Respondent

had completed all core risk reduction work, both of them having reached that same conclusion at earlier reviews of this case. Both psychologists gave evidence together. The panel noted that each found that the Respondent had provided consistent accounts of his progress over time and there was no evidence that he was attempting to portray himself in a socially desirable light. One of the psychologists said that she considered the Respondent to be at the higher end of open and honest. Neither of them considered that stressors such as participating in a public hearing or being exposed to media intrusion would be triggering for him to the point where he would revert to risk – related behaviour.

34. Neither psychologist considered open conditions were necessary and both agreed that the Respondent would not need a huge amount of extra support on release. The prison commissioned psychologist gave evidence of having seen a clear journey through his sentence with positive evidence of him having addressed his risk factors. She added that the fact that he has internalised the gravity of his offending was a strong deterrent from further offending.

35. Both psychologists considered that the Respondent met the test for release and they each recommended his release. Both were confident that the risk management plan was robust and appropriate. Both considered that any necessary adjustment to living in the community could be achieved safely and that open conditions would offer little in terms of support. They agreed that as the Respondent was not a "rule breaker" open conditions would not serve the purpose of testing his compliance. They each were of the opinion that warning signs that he was not coping would be readily observable.

36. The Community Offender Manager (COM) in his evidence said that he saw nothing to suggest that the Respondent's risk could not be managed during a period of transition into the community.

37. As for the assertion on behalf of the Applicant that the Respondent had shown a lack of internal controls to manage his risk, this must be seen against the specific finding of the panel that he has developed alongside other protective factors *"robust internal controls".* To this should be added the robust risk management plan which in the panel's judgment provides sufficient external controls and support and which will serve to complement the Respondent's own internal controls.

38. The challenge made by the Applicant is that the panel failed to "*fully consider"* all the submissions made by the Applicant on the issue of internal controls. The basis of that submission appears to rely on the fact that in expressing its disagreement with the Applicant's position, the panel observed that particular emphasis was being placed by the Applicant upon a single incident that had taken place over 13 years ago. The Applicant had submitted that there was in fact more than one incident or event and these appear to have been overlooked or disregarded by the panel.

39. At the point of making its decision the panel had before it a dossier of 1127 pages and had heard oral evidence over two days. In addition, it had the benefit of written

submissions from the parties both before and after the oral hearing. This was a very comprehensive decision by a highly experienced panel. In my judgment, the panel demonstrably considered all of the arguments, written and oral. I do not accept that the panel failed to give the fullest possible consideration to all relevant material touching upon the issue raised in this ground.

40. Ground 1 therefore fails.

Ground 2

41. **The decision mischaracterises the full extent of the Respondent's risk profile.**

42. This ground relates to two allegations made against the Respondent that pre-dated the index offence. If I have understood this ground correctly it is submitted in effect that the panel gave insufficient weight to what had been alleged.

43. It is necessary to begin consideration of this ground with a summary of what the panel knew and recorded in the decision about two incidents that took place involving the Respondent and two other females:

    i. When the Respondent's case was directed to an oral hearing in January 2023 it was noted that in a professional report in the dossier there were references to two disclosures made by two young women relating to encounters they each had with the Respondent before the commission of his offence in 1997.
    ii. Further enquiries were directed by the panel. It was understood that certain correspondence had been received by the Public Protection Casework Section at the Ministry of Justice from a Member of Parliament. The correspondence enclosed two short statements from two women who alleged offence paralleling behaviour by the Respondent prior to 1997. It appeared that the statements had been provided to the MP by the victim's mother.
    iii. In January 2023 the statements were forwarded to a police unit. A police officer of the rank of Inspector advised that [further offences] would be recorded as crimes.
    iv. The two women were contacted and each of them made short statements. The first statement says [details of allegation]. The second statement said that [details of allegation].
    v. [details of allegation].

44. The panel was not provided with any further information about any police investigation and it appears that the Respondent was not interviewed (and not

prosecuted) regarding either incident. The panel in its decision observed that the alleged [further offence] could not now have been prosecuted given the lapse of time since it happened.

45. During the Respondent's evidence the panel explored the two statements and the incidents with him. He accepted that both events had happened although he had now limited recall of the [second incident]. He said that he had no memory of the [further offence] incident given the large number of times he had done this. As to the other complainant he said that he apologised to her later on when he saw her. He told the POM that he had walked the complainant home after a night of heavy drinking and had put his foot in the door to try and get into her home. He provided a similar account to one of the psychologist witnesses, telling her he was probably hopeful they would have sex but denied there was any planning involved.

46. The panel concluded that this second incident did have offence paralleling elements to it. The panel records that the Applicant submitted that this meant there may be limitations on understanding of the Respondent's risk profile and that he had shown a lack of candour with professionals by concealing this information which has implications for future disclosure.

47. The panel obviously considered those submissions and concluded that it was confident that the Respondent's risk profile was well understood and that the incident did not suggest anything different. As for candour, the panel considered that both the Respondent and the professionals had focussed on the killing, his indecent exposures (of which there had been on his own admission, many) and his sexual thoughts. The panel's conclusions were that he had been able to discuss his thinking and behaviour in detail; that when reminded of the incidents he accepted they had happened; that he had not attempted to minimise grounds for concern and it was not remarkable that after 25 years his recall was limited.

48. The Applicant submits that the panel placed *"insufficient weight"* on the Respondent's failure to admit to the attempted entry into the young woman's home *"in an unprompted way"*. It is further submitted that the panel failed to fully consider the impact on the assessment of his risk given that the full extent of an understanding of his risk profile may now be limited.

49. The prison instructed psychologist considered that in relation to both allegations, the Respondent had not intentionally underreported and that in her opinion it was normal to struggle to remember some things.

50. It is important to note that this part of the evidence did not impact upon the assessments made by the professional witnesses. There was no suggestion that the known facts of these two incidents and the Respondent's responses about them

either to professionals or the panel placed any limits or reservations upon their joint assessment of his risk profile.

51. Clearly, the Applicant does not agree with the panel that it should have been confident that the Respondent's risk profile remains well understood. In my judgment this and the other conclusions reached by the panel were all conclusions that the panel was, upon consideration of all of the evidence, perfectly entitled to reach and which were fully and clearly explained and justified. It is appropriate to recall the judgment in **DSD** (paragraph 25 ante) in which the court stressed how slow it should be to interfere with the exercise of a panel's expert judgment in the specialist area of risk assessment. In my judgment this ground falls far short of being properly characterised as irrational.

52. Ground 2 fails.

Ground 3

53. **The Decision has inadequately addressed the extent to which the proposed risk management plan is a sufficient mechanism to protect the public from harm.**

54. In support of this ground, the Applicant submits that the panel:

(i) did not consider sufficiently that the previous offending (which I assume refers to the two allegations dealt with in Ground 2) was committed without warning.
(ii) failed to consider the Respondent's acceptance of leading a double life and its relevance to risk management;
(iii) did not consider sufficiently that the COM and the POM recommended a move to open conditions "due to the benefits that would bring";
(iv) gave insufficient consideration to what are submitted to be differences between the evidence of professional witnesses;
(v) failed to provide sufficient reasons for preferring the evidence of certain witnesses;
(vi) gave insufficient weight to the Respondent's own evidence on a progressive move.

55. I do not accept all or any of these submissions for the following reasons:

(i) As for "warning signs". I accept the submission on behalf of the Respondent that this important issue was dealt with fully by the panel in its decision. The Respondent's own evidence given to successive panels was that although his

offending appeared to come suddenly and out of the blue, there was, in fact, *"a slow build up".* The panel noted the evidence given by the POM who knew the Respondent very well, that his risk factors would develop in intensity overtime and be readily observable. Importantly, it is recorded by the panel that the POM said that had the Respondent been in a position to be observed by professionals prior to the index offence the same warning signs would have then been visible. Both psychologists agreed there would be warning signs of increased risk. The panel recorded that the evidence of all the professional witnesses was that observable changes in circumstances and presentation would have to occur for the Respondent's risk of causing serious harm to increase to high. Finally, it is noteworthy that the panel concluded that while it accepted that probation will have to place some reliance on self- report, all the professionals were able in the Respondent's case to consistently identify observable warning signs of increasing risk such as avoidance, emotional instability and isolation.

(ii) It is in my judgment inconceivable that this highly experienced and careful panel somehow failed to consider the Respondent's evidence of leading "a double life" and how that impacted upon future risk management. Indeed the expression "a double life" is quoted by the panel in its detailed summary of his evidence.

(iii) As for a move to open conditions. It is concerning that submissions made on behalf of the Applicant do not appear to appreciate that the criteria for the making of a recommendation by a panel for a move to open conditions is no longer based upon a consideration of whether such a move would be more beneficial or advantageous. No longer, as a matter of law, is the Parole Board to be concerned with carrying out a balanced assessment of risks and benefits. The current panel in its decision spelt out the current correct test as follows: *"It is not for the panel to decide which option - release or open conditions is better or more beneficial… It must first decide whether the test for release is met. Only if it is not met can the panel go on to consider whether to recommend open conditions."* I would only add that it is to be noted that the POM in her evidence when recommending a move to open conditions said in terms that she was confident that the Respondent met the test for release and that the risk management plan was sufficient to manage the Respondent's risk of causing serious harm in the community. Her recommendation was that a transfer to open conditions would better prepare him and assess how he dealt with new challenges. She added that much of the work involved in preparation for release which might otherwise be done in open conditions could be done in the closed estate.

(iv) I do not accept that insufficient consideration was given by the panel to its analysis of the evidence of professional witnesses. I agree with submissions made on behalf of the Respondent that there was less of a difference between the evidence of the psychologists and that given by the offender managers than is suggested by the Applicant. No witness suggested that the

Respondent was not manageable in the community supported by the proposed risk management plan which was regarded as robust and appropriate. No witness suggested that he did not meet the test for release. Evidence that was given to the effect that a more gradual transition was appropriate left the panel to decide whether this necessitated continued detention or whether the statutory test was met. Plainly, the considered and reasoned conclusion of the panel was that the test for release was met and therefore continued detention was not required, there being in the panel's opinion no need for any further risk related work to be done in open conditions. The approach taken by the panel was in my judgment one that cannot legitimately be criticised and again falls far below being characterised as irrational.

(v) I do not accept that the panel failed to provide sufficient reasons to explain and justify their analysis of the evidence. The test I must apply is whether the conclusions they reached can be safely justified on the basis of the evidence. In my judgment that was indeed the position throughout.

(vi) I do not accept that this experienced panel gave insufficient weight to any aspect of the Respondent's own evidence. This submission is in my judgment without foundation or merit.

56. Ground 3 fails.

57. Taking a step back and considering the Applicant's grounds both individually and cumulatively, I am driven to observe that in my judgment they amount to no more than robust disagreement with the panel's decision and the route taken to reach it, which can never by itself justify nor support a finding of irrationality.

Conclusions

58. This was and remains a case of very considerable seriousness and notoriety. The terrible consequences of the brutal rape and murder of a wholly innocent young woman will forever darken the lives of her family and friends.

59. Having had the advantage of hearing and assessing all of the evidence, which of course included the evidence of the Respondent himself, a very experienced panel provided a fair and comprehensive decision which clearly considered all of the evidence with great care and considerable sensitivity. The panel in my judgment satisfied the public law duty to provide evidence based reasons that fully and sufficiently justified and explained the various conclusions that it reached. In my judgment it cannot be sensibly argued that this was a decision that no reasonable panel could have come to.

Decision

60. For all the reasons I have given the application for reconsideration is refused.

HH Michael Topolski KC
22 October 2024