

[2024] PBRA 8

Application for Reconsideration by Rexha

Application

1. This is an application by Rexha (the Applicant) for reconsideration of a decision dated 20 November 2023 of a panel of the Parole Board (the *Panel*) following an oral hearing held remotely by video on 9 November 2023. The Panel decided not to direct the Applicant's release.
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.
3. I have considered the application on the following papers:
 - an application for reconsideration dated 29 November 2023 (the *application*) submitted by the Applicant's solicitors;
 - the Panel's decision dated 20 November 2023; and
 - a dossier of 315 pages.

The reply on behalf of the Secretary of State

4. The Secretary of State did not make any submissions.

Background

5. The Applicant killed his partner using extreme violence. He slit the victim's throat with a knife partially decapitating her and stabbed her repeatedly to the head, neck, and upper body. He was considered by two psychiatrists to be seriously unwell at the time he committed the index offence. Initially, the Applicant was found unfit to plead and was transferred to a psychiatric hospital for assessment and treatment under sections 48/49 Mental Health Act 1983, as amended. The Applicant responded to treatment, was assessed as fit to plead, and returned to prison.
6. The Applicant was convicted of manslaughter and, on 2 February 2018, he was given an extended determinate sentence of fifteen years comprising a custodial term of ten years and an extended licence period of five years. The Applicant had



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originally been charged with murder, but the prosecution accepted a plea of guilty to manslaughter on the ground of diminished responsibility.

7. The Applicant became eligible for parole on 2 October 2022. His conditional release date is in January 2026, and his sentence expires in February 2031.
8. The Applicant has no previous convictions.

Request for Reconsideration

9. The application for reconsideration is dated 29 November 2023.
10. The application was not made on the published form CPD 2, but I have accepted it as validly made.
11. The grounds for seeking a reconsideration are as follows:

Ground 1 – Illegality: it is submitted that the Panel considered the wrong risk period by considering an indefinite risk period when making its decision. The application states that *“the current position is that the risk period under consideration should be up to the sentence expiry date”* citing the judgement in **R v Dich and Murphy [2023] EWHC 945 (Admin)**.

The application goes on to argue that **Dich and Murphy** provides that if a risk period that extends beyond the sentence expiry date is considered, *“reasons why would have to be stated illustrating a causal link between continued detention and prevention or reduction of risk”*. The application submits that the Panel’s decision does not set out clearly *“why risk beyond the licence period is being considered”* and concludes that *“the correct legal approach has not therefore been applied”*.

Ground 2 – Irrationality: it is submitted that the decision is *“irrational as a whole”*. It is submitted that the test for release has not been applied correctly and that that Panel must establish a causal link between the continued detention of the Applicant and the prevention or reduction of risk for the protection of the public.

12. The main points made in support of Ground 2 – Irrationality are:
 - (a) the Applicant’s main risk factor, his mental health, is not active and there is no indication that this situation will change. The Applicant’s mental health has been stable since 2019 despite being in the stressful environment of the closed estate for many years and he is not under the care of the prison mental health team;
 - (b) the Panel failed to acknowledge the relevance of intimate relationships to previous mental health episodes and that intimate relationships are an area that will be closely supervised by the probation service and could be managed *“to an acceptable standard”* in the community. It is submitted that it is **only** [my emphasis] when the Applicant is in an intimate relationship that the stressors outlined by the Panel increase the Applicant’s level of risk;

- (c) the two principal reasons given by the psychiatrist witness' (*Psychiatrist*) for not recommending the Applicant's release are contested. It is submitted that the Psychiatrist's first point, that the Applicant should carry out individual work to explore and understand the causes of his offending and the relationship between his mental illness and his offending behaviour, is not achievable as the Applicant does not meet the criteria for one-to-one work. It is submitted that the Psychiatrist's second point, that there is no emergency care plan in place, is not possible until the Applicant is in the community;
- (d) the Panel was incorrect to suggest that the Applicant does not acknowledge the link between his mental health and his offending behaviour;
- (e) both the Applicant's prison offender manager (POM) and community offender manager (COM) consider that there is no further intervention work for the Applicant to complete in custody. The COM confirmed that the Applicant would be able to undertake the Building Better Relationships programme in the community to reduce his risk further;
- (f) the Applicant has already "*undergone immense testing in stressful situations*";
- (g) the Panel failed to attach sufficient weight to the Applicant's recategorisation to a Category D status prisoner and his progress in open conditions, including completion of a number of successful ROTLs (Release on Temporary Licence);
- (h) the probation service has no concerns that the Applicant would not comply with his licence conditions and therefore would disclose a developing intimate relationship making the plan to manage the risk linked to intimate relationships "*more than adequate*";
- (i) the COM is fully in support of the Applicant's release and confirmed that his risk could be managed in the community;
- (j) the Applicant's residence in approved premises for a period of twelve weeks allows for continuous monitoring and supervision of his risk, and for the necessary referrals to be made to community mental health services. It is submitted that the Panel's concerns about the lack of a [mental health] care plan before release "*is not rational*" as it is impossible for a community mental health referral to be made and a plan to be put in place in advance;
- (k) it is irrational for the Panel to have concerns about the Applicant potentially "*falling through the cracks and any relapse ... not being picked up in time*" while waiting for the referrals to be made to community mental health services and other agencies because: (i) the Applicant has not experienced a relapse while in the closed and open estates; (ii) he will be subject to a robust risk management plan; (iii) there is no evidence that he will not be open and honest with the COM and therefore he will disclose any new relationships, problems, and mental health issues; (iv) the COM indicated that he would detect warning signs of risk increasing; and (v) the Applicant

could be recalled if the COM was concerned that his risk was no longer manageable (where, for example, his mental health issues could not be addressed in a timely way); and

- (l) the Panel was incorrect in stating that the Applicant did not accept that he had experienced a psychotic episode as he said in evidence that he had suffered a breakdown and had heard voices.

Current parole review

13. This was the Applicant's first review. The Secretary of State referred his case to the Parole Board in January 2022. The case was directed to an oral hearing in May 2022. A remote hearing by video took place on 22 June 2023. The Applicant was seeking release.
14. The hearing was adjourned on 22 June 2023 because the Panel considered that the proposed risk management plan did not address the monitoring and management of the Applicant's mental health in the community adequately.
15. The Panel reconvened on 9 November 2023 and comprised a judicial member as chair, a psychiatrist member, and a psychologist member. Evidence was taken from the POM, the COM, the Psychiatrist, and a prison psychologist (Psychologist). The Applicant also gave evidence to the Panel.
16. The Applicant was in the open estate at the time of the review (having been transferred there in August 2022) and had completed seven resettlement overnight releases (RORs) to approved premises. He had not undertaken any accredited programmes to address his offending behaviour. He did not meet the criteria for the IPV (Intimate Partner Violence) strand of the Kaizen (a programme for men who have been convicted of sexual, violent, or intimate partner violence offences and who are assessed as being high risk) or Building Better Relationships (a moderate-intensity cognitive-behavioural programme for adult men convicted of an IPV offence).

The Relevant Law

17. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The test is correctly set out in the Panel's decision letter dated 20 November 2023.

Parole Board Rules 2019 (as amended)

18. Under Rule 28(1) of the Parole Board Rules 2019 the only types of decisions which are eligible for reconsideration are those concerning whether 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)). Decisions concerning the termination, amendment, or dismissal of an IPP licence are also eligible for reconsideration (Rule 31(6) or Rule 31(6A)).

19. 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)).

Illegality

20. An administrative decision is unlawful under the broad heading of illegality if the panel:
- (a) misinterprets a legal instrument relevant to the function being performed;
 - (b) has no legal authority to make the decision;
 - (c) fails to fulfil a legal duty;
 - (d) exercises discretionary power for an extraneous purpose;
 - (e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - (f) improperly delegates decision-making power.
21. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

Irrationality

22. 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 paragraph 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."

23. 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.
24. The application of this test has been confirmed in previous decisions on applications for reconsideration under Rule 28: **Preston [2019] PBRA 1** and others.

Duty to give reasons

25. The importance of giving adequate reasons in decisions of the Parole Board has been made clear in cases such as **Wells v The Parole Board [2019] EWHC 2710 (Admin)** and **Stokes v The Parole Board [2020] EWHC 1885 (Admin)**.
26. 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 draftsmanship."*
27. Panels of the Parole Board are independent and are not obliged to adopt the opinions and recommendations of professional witnesses. If a panel intends to reject the evidence of a witness, then detailed reasons will be required. This is implicitly recognised in the case of **Wells** at paragraph 40:

"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."

Discussion

28. The application submits that the Panel's decision is erroneous in law and/or irrational.

Ground 1- Illegality

29. The application submits that the Panel was incorrect in considering an indefinite risk period when making its decision because *"the current position is that the risk period under consideration should be up to the sentence expiry date"*. The application further submits that having decided to consider risk beyond the Applicant's sentence expiry date, the Panel did not set out its reasons for doing so and did not show the causal link between the Applicant's continued detention and the prevention or reduction of risk.
30. The application's first submission is fundamentally flawed. **R v Dich and Murphy [2023] EWHC 945 (Admin)** confirms that the statutory test for release when applied to prisoners serving determinate sentences (whether standard or extended) does not involve any temporal (i.e. time-related) element in relation to risk. This means that consideration of the risk presented by a prisoner may go beyond the prisoner's automatic release (either at the conditional release date or the sentence expiry date). Each case must be considered on its facts. In this case it is clear from its decision that the Panel considered risk up to the Applicant's conditional release date as well as future risk which might materialise after his automatic release and after the expiry of his sentence. **Dich and Murphy** also highlights in paragraph 14 that it is *"not necessary for the Parole Board to determine precisely when a risk might materialise"*.

31. The second argument advanced in the application is that having made the decision that the risk period to be considered should be indefinite, the Panel should have set out its reasons for that decision and shown the causal link between continued confinement and the prevention or reduction of risk.
32. This argument is misconceived. A causal link need only be established where the Panel is considering risk beyond the Applicant's conditional release date in January 2026, when he will be automatically released. It is clear from the Panel's decision that its main focus was on the risks which might materialise after release and considerably earlier than January 2026 and therefore the Panel is not required to establish a causal link between continued confinement and the prevention or reduction of risk.

Ground 2 – Irrationality

33. The application submits that the Panel's decision was irrational "*as a whole*". It is argued that "*the test for release has not been applied correctly*" because "*there must be a causal link between continued detention and the prevention or reduction of risk for the necessity of public protection*". I have set out in paragraph 12 above the main points made in support of the irrationality argument. In considering those points, I have taken account of the matters set out below.
 - (a) The reconsideration mechanism is not a process by which the judgment of the Panel when assessing risk can be interfered with lightly. It is also not a means by which the member carrying out the reconsideration is entitled to substitute his or her view of the facts for the view of 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.
 - (b) When deciding whether the Panel's decision was irrational, due deference has to be given to the expertise of the Panel in making decisions relating to parole.
 - (c) Where the Panel arrives at a conclusion, exercising its judgment based on the evidence before it and having regard to the fact that it 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.
 - (d) 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.
34. The first point to make is that the application appears to conflate two tests. The statutory test for release is straightforward: the Panel can only direct release if it is no longer necessary for the protection of the public that the prisoner should be confined. The Panel is required to look at whether release would cause a more than minimal risk of serious harm to the public. The causal link test is relevant where the Panel takes account of future risk to justify continued detention after a conditional



release date or a sentence expiry date, even if it cannot determine when that risk is likely to materialise. In that case, a causal link between continued detention and the prevention or reduction of risk must be established.

35. I have therefore considered the arguments made by the application in the context of the statutory test. There is general agreement that the Applicant's mental health is the main risk factor. The principal areas of dispute arise in relation to the Applicant's insight into his mental health and its link to his offending behaviour, and the monitoring, management, and treatment of his mental health in the community.
36. The application argues that the Applicant's mental health is not active and that there is no indication that this situation will change. It states that the Applicant acknowledges the link between his mental health and offending behaviour and that he accepts that he experienced a psychotic episode at the time of the index offence. The Panel explores these issues in detail with the benefit of expert witnesses and its own specialist members. The Panel accepts that the Applicant's mental health is currently stable and notes his compliant behaviour and progress. The Panel then addresses the key issue of insight and its relevance to risk. The Panel notes that the Applicant "*was under the impression that his mental health problems consisted of anxiety and depression. So far as he was aware, there was no other diagnosis*". The evidence of the Psychiatrist to the Panel was that while the Applicant had some understanding of his early warning signs, he still had a limited understanding of the triggers for a relapse in his mental state and the extreme level of violence used in the index offence. The Psychiatrist's view was that it was essential for the Applicant to engage in individual work to explore and understand the causes of his offending and to process the relationship between his mental illness and his offending behaviour. The Panel accepted the Psychiatrist's evidence which does not appear to have been challenged by the other witnesses.
37. Of relevance to the issue of risk is the Psychiatrist's working diagnosis of schizophrenia for the Applicant's mental illness (in her report the Psychiatrist refers to it as atypical schizophrenia). Schizophrenia is a relapsing and remitting mental disorder, and it was the Psychiatrist's view that its relapsing and remitting nature made an effective relapse prevention plan important, and that the Applicant should have an opportunity to develop a relapse prevention plan in custody.
38. The application argues that the Applicant has "*undergone immense testing in stressful situations*" and that the Panel failed to attach sufficient weight to the Applicant's recategorisation to a Category D status prisoner and to his progress in open conditions. It is clear from its decision that the Panel recognised that the Applicant had made progress without any adverse issues and had undertaken RORs and day releases on many occasions without any problems however, it considered that "*he had not been exposed to the stresses and strains which will inevitably arise out of the challenges of everyday living. He is likely to be confronted by many of the issues which were present at the time of the index offence and resulted in the psychotic episode with its devastating effect*".
39. The application argues that the Panel failed to acknowledge the relevance of intimate relationships to previous mental health episodes. It also submits that it is **only** [my emphasis] when the Applicant is in an intimate relationship that the stressors outlined by the Panel increase the Applicant's level of risk. The Panel



discusses in detail the relevance of intimate relationships to previous mental health episodes including examining his mental state during a previous relationship.

40. This in my view is an inaccurate and misleading simplification of the complex nature of the Applicant's stressors and triggers. The evidence before the Panel did not suggest that stressors experienced by the Applicant increased his risk only when he was in an intimate relationship. The Psychiatrist pointed out that the Applicant experienced "*stress vulnerability*" and the Panel listed several sources of stress at the time of the index offence including work, family's expectations, the Applicant's desire to please his parents, and his failure to seek help for mental health difficulties. In addition, the Psychiatrist highlighted that the Applicant's "*relapse signature*" was not well understood as he had only experienced one psychotic episode. Having assessed this evidence, the Panel considered that, "*whilst there is a risk to future intimate partners should he enter a new relationship, it extends beyond that. It is impossible to predict the situations where violence might occur and to whom*".
41. The application points out that the COM was fully in support of the Applicant's release and confirmed that his risk could be managed in the community. The Panel gives a detailed description of the risk management plan and records that the COM considered the risk management plan to be sufficiently robust to manage risk. However, when questioned, the COM "*agreed that there were unknowns in that nothing was in place for medical / mental health provision for the period after the Applicant left the AP [approved premises]*". Significantly, the COM acknowledged that there was likely to be a delay in accessing community mental health services. The Panel considered this to be significant because based on his history the Applicant's mental state could deteriorate rapidly which meant that "*early assessment and intervention*" was essential.
42. The Panel is not obliged to adopt the opinions and recommendations of professional witnesses, such as the COM. If it decides to reject the evidence of the COM, it has a duty to explain why, and the Panel does so in paragraph 4.7 of its decision. The COM's view that the Applicant's risk could be managed in the community was considered by the Panel to be "*an optimistic view on the current state of the risk management plan, given the flaws in monitoring and treating his mental health. He [the COM] had not considered any further work was necessary in custody and, on this point also, the panel disagreed with him*".
43. The application argues that the Panel is irrational in its assessment of the mental health provisions of the risk management plan in particular in the context of a relapse. A report from the prison's mental health team had stated that community mental health services would not accept the Applicant until he had been released. The Psychologist and the Psychiatrist were questioned by the Panel about the risk management plan and asked what should be in place for public protection. The Psychologist assessed that the Applicant's risk of serious harm would be imminent if his mental health deteriorated and was concerned about the unpredictability of psychotic episodes and that they might not be recognised soon enough. The Psychiatrist pointed out that at the time of the index offence the Applicant's "*overall presentation had not been overt or obvious to professionals*" and when he had visited A&E "*nobody recognised his condition*". In that context, the Psychiatrist's view was that the risk management plan was inadequate and she highlighted the



absence of a relapse prevention plan and a contingency plan, that there was no out of hours crisis arrangement, and the inevitable delay before he was assessed and accepted by a community mental health team.

44. The application suggests that the Applicant would disclose mental health issues and noted that the COM indicated that he would detect warning signs of risk increasing. The Panel considered both the Applicant's internal and external risk management measures. The expert psychiatric evidence before the Panel was that the Applicant had limited insight into his mental illness and that healthcare staff had not recognised that he was experiencing a psychotic episode at the time of the index offence. The Panel expressed concerns that there was no arrangement for an alert to be placed on the Applicant's medical record with a summary of his history and therefore that healthcare staff might not detect symptoms of a mental health illness. The Panel was also concerned that the transition from custody to the community had the potential to destabilise the Applicant's mental health, that there would be a gap between release and his assessment by community mental health services (no time estimate had been provided and no enquiries appear to have been made with a specialist forensic community health team), and that there was potential for a break in the continuity of his care when he left approved premises and had to register with a GP and community mental health services in a different region.
45. In my view, the Panel undertook a thorough exploration of the Applicant's key risk factors, his insight, and the insight of professionals into his mental disorder, the nature and presentation of his mental disorder and the challenges that posed, and the adequacy of the mental health provisions in the current RMP. It took detailed evidence from all the professional witnesses and explained why it chose to disagree with the COM and the POM, and to accept the evidence of the Psychiatrist. The Panel summarised its approach and conclusions in the 'Conclusion' section of its decision. A brief summary is given in the first sentence of paragraph 4.13 of the Panel's decision:

"Core reduction work is outstanding, the risk management plan is inadequate, and [the Applicant] has insufficient understanding of his mental health, voices, and triggers, and how he will manage them".

46. I am satisfied that the Panel applied the correct tests in considering the Applicant's case and in my view the Panel established that the statutory test for release was not met.

Decision

47. For the reasons I have given, I do not consider that the decision contained an error of law or was irrational and accordingly the application for reconsideration is refused.

H Emrys
15 January 2024