

[2024] PBRA 9**Application for Reconsideration by Brown****Application**

1. This is an application by Mr Brown ('the Applicant') for reconsideration of the decision of a panel of the Parole Board ('the panel') who on 27 November 2023, after oral hearings on 14 March 2023 and 17 October 2023, made a decision not to direct his release on licence.
2. I am one of the members of the Parole Board ('the Board') who are authorised to make decisions on reconsideration applications, and this case has been allocated to me.

Background

3. The Applicant is aged 41 and is serving an indeterminate sentence for public protection ('IPP') which was imposed on 31 August 2010 for conspiracy to wound another man with intent to cause grievous bodily harm. The minimum term which he was required to serve in prison (his 'tariff') was set at 5 years less the time which he had served in custody on remand.
4. The offence for which the Applicant received his IPP sentence ('the index offence') occurred in August 2009 when he was aged 26. He had previously accumulated a significant criminal record. He had been involved in gang related activity and drug dealing. He had had three long term intimate relationships in which instances of domestic violence had occurred. He was diagnosed as having some unhelpful personality traits.
5. The victim of the index offence was a man who was believed to have stolen a TV set from the address of the Applicant's then partner. The police had decided not to prosecute him, and the Applicant decided to take the law into his own hands. He recruited other men for a revenge attack on the victim, in which the victim received a number of serious injuries.
6. The Applicant's progress in prison was patchy but he successfully completed the appropriate risk reduction programmes, and was released in licence in January 2018. Since then he has been recalled to prison on three occasions.



7. His first recall was in March 2018 as a result of being charged with a public order offence. He was acquitted of that charge and was re-released on licence in October 2018.
8. His second recall was in February 2019 as a result of an allegation that he had head-butted his teenage daughter and kicked her mother. There was no prosecution for that allegation. At an oral parole hearing in December 2019 the allegation was denied not only by the Applicant but by his daughter and her mother. The then panel accepted their evidence and the Applicant was again re-released on licence in January 2020.
9. The Applicant's third and last recall was in March 2020. The principal reason for that recall was an incident which had occurred in a cash and carry warehouse which will be discussed in some detail below. A subsidiary ground for the recall was the Applicant's continued drug use but he had admitted that and agreed to engage with the local drug agency to address it: it is therefore highly unlikely that he would have been recalled on that ground alone.
10. In May 2020 the Applicant's case was referred by the Secretary of State (the Respondent) to the Parole Board to decide whether to direct his re-release on licence and, if not, to advise the Respondent about his suitability for a move to an open prison.

Progress during this review of the Applicant's case

11. For reasons which have been largely outside the Applicant's control, this review has been substantially delayed. The delays have had a serious adverse effect on the Applicant's mental health.
12. In July 2020 his case was reviewed by a single member of the Board who decided that it should proceed to an oral hearing. In due course the case was allocated to a panel of the Board to conduct the hearing.
13. The Applicant's custodial behaviour during the period after his recall was good. He became a drug team mentor and the re-offending representative in the prison where he was detained: these are responsible and trusted positions.
14. The hearing was listed to take place on 3 December 2020 and the panel convened on that day. The hearing had to be deferred for a variety of reasons including the Applicant's state of agitation and distress. It was agreed that an independent psychological assessment should be obtained.
15. Some delay occurred as a result of difficulty in obtaining from the police the documents and information needed to enable the panel to investigate the cash and carry incident.
16. In August 2021 the independent consultant psychologist instructed by the Applicant's solicitors ('the psychologist') submitted her report. It was a very detailed report in which the psychologist concluded, on a fine balance, that the Applicant's risk to the public would be manageable on licence in the community.
17. Also, in August 2021 a consultant psychiatrist instructed at the request of the Parole Board submitted a report in which she concluded that the Applicant does not suffer

from any mental illness, though he does suffer from episodes of anxiety and depression.

18. There was then a delay in listing the case, initially because of an administrative error and then because the panel chair was ill. In January 2022 the panel chair, having recovered, reviewed the situation. There had been a suggestion that the case might be concluded on the papers but the panel chair decided that an oral hearing was required.
19. There was then a further delay and the case was allocated to a new panel (the present one), who were scheduled to conduct the hearing on 17 October 2022. The panel convened on that date, but the hearing had to be adjourned because the Secretary of State had decided to make a non-disclosure application (an application that certain material should be considered by the panel but withheld from the Applicant).
20. The material sought to be withheld related to allegations that the Applicant had harassed his ex-partner (Ms B) by telephone calls from prison and by arranging for someone in the community to damage her car. It was eventually decided that that material should after all be disclosed to the Applicant, and it was. The allegations were strongly denied by the Applicant, and the panel were unable to place any reliance on them in their decision (please see paragraphs 68-80 below where I will discuss these allegations and the consequences flowing from them.)
21. The hearing took place on 14 March 2023. The Applicant was represented by a solicitor. There was a lengthy dossier (975 pages) provided by the Secretary of State, which the panel had read before the hearing. At the hearing oral evidence was taken from the following witnesses:
 - (a) A police officer who had helpfully provided information from police records about the incident in the cash and carry warehouse;
 - (b) The probation officer based at the prison who was responsible for supervising the Applicant while he was there ('the POM');
 - (c) The Applicant himself;
 - (d) The psychologist;
 - (e) The probation officer who up to that time had been responsible for supervising the Applicant in the community if he was to be re-released on licence ('the current COM'); and
 - (f) The probation officer who after the hearing was going to take over the supervision of the Applicant in the community ('the new COM').
22. The panel noted that the Applicant had suffered from quite severe pain in the chest which had been found to be caused by a growth on his lung. The panel chair asked him at the outset of the hearing whether he felt well enough to take part in the hearing. He said that he did, and indeed he was able to participate fully in the hearing and answer all the panel's questions.
23. At the time of the hearing professional witnesses were prohibited, by a policy introduced by the then Secretary of State, from making recommendations to the parole board in their reports. Although there was nothing to stop panels of the Board from asking them at oral hearings what they would recommend, the professional witnesses who gave evidence in this case were under strict instructions from the Head of Public Protection in their area not to make any recommendations in answer to the panel's

questions. The then Secretary of State's policy was subsequently declared by the courts to be unlawful.

24. The panel would normally have issued its decision within the 14 day time limit specified in the Rules for the issuing of decisions. There are good reasons for that time limit, but time limits can always be extended if there is a good reason for doing so. Unfortunately in this case the panel chair (whose responsibility it was to draft the decision before submitting it to the other panel members for any additions or variations which they might wish to suggest) was taken ill and was therefore unable to prepare the draft for some time.
25. On 5 April 2023, the panel chair, having recovered sufficiently, issued directions stating that (a) there would be a further brief adjournment, (b) the case would be reviewed on 19 April 2023, and (c) the decision would be completed and distributed within two weeks of that date.
26. On 19 April 2023 the panel chair issued further directions stating that, in the light of further information which had been provided (and representations submitted by the Applicant's solicitor), a decision would not now be issued on the papers and there would be a further oral hearing.
27. The further information which had been provided related to a deterioration in the Applicant's custodial behaviour. It is clear that as a result of the delay in receiving the panel's decision (coming on top of his health problems and all the previous delays) the Applicant had suffered one of his episodes of anxiety and depression, as a result of which there had been a number of instances of poor behaviour. However, his behaviour then improved. In September 2023 he was commended for his bravery in helping to save the life of another prisoner.
28. The second oral hearing took place on 17 October 2023, by which time the professional witnesses were permitted to make recommendations to the Board. The Applicant was again represented by his solicitor. The dossier now ran to page 1064 pages.
29. Oral evidence was given at the hearing by the POM, a prison key worker, the Applicant, a mental health nurse and the new COM (who was by then in post). The panel evidently did not consider it necessary to take further evidence from the psychologist. As agreed with the panel the solicitor provided closing representations in writing after the hearing.
30. There was again an unfortunate delay in the panel issuing its decision. The 14 day time limit expired on 31 October 2023 but the decision was not issued until 27 November 2023. In directions issued on 2 November 2023 the panel chair explained that she had some urgent and personal issues to deal with, and apologised for the delay. When their decision was finally issued the panel decided not to direct the applicant's re-release on licence and not to recommend to the secretary of state that he should be moved to an open prison.
31. On 13 December 2023 the Applicant's solicitor submitted representations in support of this application for reconsideration of the panel's decision. The case was allocated to me on 22 December.

The Relevant Law

32. The test for release on licence is whether the Applicant's continued confinement in prison is necessary for the protection of the public.

The Parole Board Rules 2019 (as amended)

33. Under Rule 28(1) a decision is eligible for reconsideration if (but only if) it is a decision that the prisoner is or is not suitable for release on licence. A decision not to recommend a move to an open prison is not eligible for reconsideration.
34. Reconsideration will only be directed if one of more of the following three grounds is established:
- (a) It contains an error of law;
 - (b) It is irrational;
 - (c) It is procedurally unfair.
35. A decision that a prisoner is or is not suitable for release on licence is eligible for reconsideration whether it is made by:
- (a) A paper panel (Rule 19(1)(a) or (b)) or,
 - (b) An oral hearing panel after an oral hearing, as in this case, (Rule 25(1)) or
 - (c) An oral hearing panel which has made the decision on the papers (Rule 21(7)).
36. The panel's decision in this case not to direct release on licence is thus eligible for reconsideration. The application for reconsideration is made on the grounds of irrationality and procedural unfairness. No error of law is alleged.

Irrationality

37. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out as follows the test for irrationality to be applied in judicial reviews of Parole Board decisions:

"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."

38. This was the test which had been set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374** and applies to all applications for judicial review. 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 Board in making decisions relating to parole.
39. The Parole Board, when deciding whether or not to direct a reconsideration, adopts the same high standard as the Divisional Court for establishing 'irrationality'. The fact that Rule 28 uses the same adjective as is used in judicial review cases in the courts shows that the same test is to be applied. The application of this test to reconsideration applications has been confirmed in previous decisions under Rule 28: see, for example, **Preston [2019] PBRA 1**.

40. Other cases establish that the test may be satisfied if panel has (a) given manifestly disproportionate or inadequate weight to a relevant consideration or (b) failed to provide adequate reasons for the rejection of the unanimous recommendations of professional witnesses.

Procedural unfairness

41. Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed, thereby producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate from the issue of irrationality (which focuses on the actual decision).
42. The kind of things which might amount to procedural unfairness include:
- (a) A failure to follow established procedures;
 - (b) A failure to conduct the hearing fairly;
 - (c) A failure to allow one party to put its case properly;
 - (d) A failure properly to inform the prisoner of the case against him or her; and/or
 - (e) Lack of impartiality.
43. The overriding objective in any consideration of a prisoner's case is to ensure that the case is dealt with fairly.

The application for reconsideration in this case

44. The application was made by the Applicant's solicitor on his behalf. It was supported by extensive written representations running to 32 pages. The various grounds advanced will be discussed below.

The Respondent's position

45. The Secretary of State is a party to all parole proceedings (the other party being the prisoner) and is therefore entitled to make representations to the Board in response to an application for reconsideration by or on behalf of the prisoner.
46. By e-mail dated 20 December 2023 the Public Protection Casework Section of the Ministry of Justice ('PPCS') stated that the Respondent offered no representations in response to this application.

Documents considered

47. I have considered the following documents for the purpose of this application:
- (a) The dossier provided by the Secretary of State for the second hearing, which now runs to 1229 pages and includes a copy of the panel's decision;
 - (b) The representations submitted in support of the application for reconsideration; and
 - (c) PPCS's e-mail of 20 December 2023.

I have also, as indicated above, listened to the whole of the recordings of the two hearings.

Discussion

48. In her lengthy representations in support of this application the Applicant's solicitor makes a large number of criticisms of the panel's decision. Those criticisms are of varying degrees of seriousness.
49. At one end of the scale the solicitor points out an unusual number of drafting mistakes, such as sometimes referring to a female witness as 'Mr' and repeatedly referring to the name of the Applicant's latest intimate partner by the wrong name. Mistakes of this kind do not amount to procedural unfairness and they will rarely if ever affect the rationality of the panel's decision.
50. A little higher up the scale the solicitor points out several mistakes of fact made by the panel, such as stating that the Applicant told the panel that when on licence he did not get on well with the staff at the hostel where he was required to live: in fact, although he referred to various problems with his then COMs, he had always got on well with the hostel staff. Again mistakes of this kind do not amount to procedural unfairness and do not often affect the rationality of the panel's decision.
51. Much higher up the scale were a number of matters on which I will focus for the purpose of this decision. I will discuss them under the following headings:
 - (a) the recall incident;
 - (b) the allegations concerning the Applicant's ex parter (Ms B); and
 - (c) the evidence of the professional witnesses.

The recall incident

52. A number of facts relating to this incident emerge clearly from the evidence: other facts are unclear because of the absence of what would have been significant evidence if it had been available.
53. The clearly established facts are that:
 - (a) on 16 March 2020 there was an altercation of some kind at the warehouse;
 - (b) the police received a call from the manager of the warehouse reporting that there were three men causing trouble;
 - (c) two police officers attended the warehouse in response to that call but by the time they arrived all three men had left the scene.
54. The Applicant has always accepted that he and two friends were involved in the altercation though he says that they were not the trouble-makers.
55. There is no independent evidence about how or why the altercation began. That would have been shown on the CCTV which was operating throughout the warehouse. The two officers returned to the warehouse on the day after the incident to take possession of the recordings, but the manager did not want any further police involvement and the recordings were not taken and have not now survived.
56. The only evidence about what led to the altercation is therefore that which was given by the Applicant in his evidence to the panel. His account is that on the day in question he drove two of his friends (who, he stressed, were law-abiding citizens) for an outing in a car of which he had the use: it belonged to one of his ex-partners who had allowed

him to use it. At one point he and his friends stopped to pick up some drinks and snacks at the warehouse. As they were about to go in, one of the Applicant's friends sneezed. Due to the COVID pandemic they were refused entry. They asked to speak to the manager. Some men then came out and started shouting at the Applicant and his friends. The Applicant and his friends gained entry and got to speak to the manager. According to the Applicant they were only there for about five minutes before leaving.

57. The dossier contains a transcript of the manager's call to the police from which it is clear that he wanted the Applicant and his friends out of the premises. He said that the three men were trying to get him into his office. When asked by the call taker whether they had weapons he said they had their hands in their pockets. When then asked whether they were threatening, he said that they were and that they had "*Bats and Balls*" and he thought they had a gun.
58. The CCTV footage, before it was lost, was viewed by a police officer from the special unit which was participating in the management of the Applicant's case while he was on licence. The officer was of course able to identify the Applicant in the footage. The officer could not see any sign of any weapons. He initially thought that what he could see happening might be an attempted robbery but then it looked to him more like a possible Public Order Act offence.
59. Understandably, given that the manager did not want any further police or court involvement, the police decided that 'no further action' should be taken against the Applicant in respect of the warehouse incident. In fact no action at all had been taken against him by the police. He was not arrested or spoken to by them. He was however, on the basis of the information provided by the police to probation, recalled to prison by the Secretary of State at the request of probation. He had had no opportunity to give his side of the story before the recall took place. That is, however, often the case.
60. In their decision the panel stated: "*Having considered the Police evidence, including the transcript of the 999 call, the existence of CCTV footage etc, the panel assesses that [the Applicant's] version of events lacks credibility.*" The panel went on to state: "*The panel assesses that the incident that led to recall represents offence paralleling behaviour on the part of [the Applicant] and it is of concern and relevant to risk. The panel does so having applied the Parole Board guidance on allegations and the case of Pearce and makes this finding on the balance of probabilities.*" [The case of Pearce was a decision of the Supreme Court about the approach which the board should take to allegations.]
61. The panel's finding does, I think, need careful consideration. It is fairly clear that the Applicant and his friends were participating in the altercation. It is also fairly clear, from the fact that the manager called the police, that by the time he did so the Applicant and his friends were behaving in an inappropriate and somewhat aggressive way.
62. I can see no evidence to contradict the Applicant's account of how it all started, and when I listened to the evidence which he gave at the hearing I certainly did not find it to lack credibility. What the Applicant omitted in his account was, however, that - whatever provocation there may have been from others - the response of himself and his friends was inappropriate. An offender on licence in the community ought not to have got involved in anything of that kind.

63. The panel referred in their decision to the Applicant and his friends as “*an organised group*.” The Applicant’s solicitor submits, and I agree, that that was an inaccurate and irrational description. There is no evidence that when the three men went to the warehouse they were “*an organised group*” intending to commit a crime. The altercation which occurred was clearly something which happened spontaneously.
64. A suggestion made by the police (and by probation in their request for recall, and then adopted by the panel) was that after the warehouse incident the Applicant attempted to hide the car which he had been driving by parking it some way away from the hostel where he was required to be living.
65. This suggestion was effectively rebutted by the Applicant in his evidence to the panel. he pointed out that (a) the car park at the hostel was frequently full (b) there were double yellow lines forbidding the parking of vehicles in the street near the hostel and (c) he, other residents and indeed visiting probation and police officers often had to park a little way away where it was seen after the warehouse incident. He said that that what he did on this occasion. I have seen nothing to contradict his evidence on that point.
66. The panel were certainly justified in making a finding of fact that the Applicant was behaving inappropriately and aggressively at the warehouse when the manager called the police. However I believe it was irrational (a) to reject the Applicant’s evidence about how the incident started (b) to suggest that the Applicant and his friends were an ‘organised group’ and (c) to adopt the suggestion that the Applicant was trying to hide the car after the incident. I also think that it was irrational to refer to the Applicant’s behaviour in the warehouse as ‘offence paralleling behaviour’: it was inappropriate but nothing like his behaviour in the index offence. In reaching its decision the panel must have attached some weight to its views about the warehouse incident which I have found to be irrational.
67. The solicitor criticises the panel for stating at one point that the police investigation was ‘ongoing’. This was an unfortunate and inaccurate expression: there was no ongoing investigation in progress. However, when a person is told by the police that no further action is to be taken against him it is normal to accompany that statement by a warning that if further evidence comes to light the matter may be re-opened. In this case no further evidence did come to light.

The allegations concerning the Applicant’s ex-partner Ms B

68. The panel made no findings of fact in relation to the allegations concerning Ms B. I am not surprised that they did not. Without going into too much detail there were sound reasons for questioning the truthfulness and reliability of those allegations. In particular the prison records showed that there were no calls at the material time to Ms B from the ‘pin phone’ which the Applicant was entitled to use; and, although prisoners sometimes have unlawful possession of mobile phones, the prison has a sophisticated system for searching for such phones and despite a number of searches no phones were found in the Applicant’s possession. The POM told the panel that he was confident that if the Applicant had had a phone the searches would have revealed it.
69. In February 2023, as a result of the allegations being made concerning Ms B, the then COM raised her assessment of the Applicant’s risk of serious harm to the public and

known adult from 'high' to 'very high'; and in September 2023 the new COM reduced it to its previous ('high') level. These assessments are made, usually by the COM, in a lengthy computerised report called OASys which is updated from time to time: changes can be made in the risk assessments if there is a change of circumstances.

70. The definition of a 'very high' risk of serious harm which is used by probation for the purpose of their OASys assessments is where (a) there is an imminent risk of serious harm (b) the potential event is more likely than not to happen imminently and (c) the impact would be serious (my underlining). The definition of a high risk of serious harm is where (a) there are identifiable indicators of risk of serious harm (b) the potential event could happen at any time and (c) the impact would be serious.
71. In their decision the panel, as is normal, set out the details of (a) various statistical assessments made by probation of the offender's risks of different kinds of re-offending and (b) probation's OASys assessment of the Applicant's risk of causing serious harm to various categories of people.
72. In their decision in this case the panel stated that:

"The OASys risk scores [i.e. the assessments made by probation] indicate a high risk of serious harm to children, a very high risk of serious harm to known adults, and a very high risk of serious harm to the public. The panel agrees with the dynamic risk scores provided [i.e. those assessments]."

73. That was a misstatement of probation's assessments. The current COM had, in the recent OASys, reduced the assessment of the Applicant's risk of serious harm to the public and any known adult to 'high' rather than 'very high'; she had explained her reasons for that reduction in her lengthy and obviously carefully considered report to the Board in September 2023 (in which she had recommended that the Applicant could be safely re-released on licence); and she had adhered to that assessment in her oral evidence to the panel. Her assessment and recommendation had been endorsed by her line manager, a Senior Probation Officer ('SPO').
74. The COM's explanation for the change in her assessment of the Applicant's risk of serious harm to a known adult (Ms B) was as follows:

"Accepted that there are concerns within this relationship and allegations were made in 2022 of threatening behaviours through the use of a mobile phone whilst in Custody, however, there has been no evidence to support these allegations and all investigations have been closed. There have been no reported concerns throughout 2023 which would indicate that the risk is not imminent currently. [The Applicant and Ms B] are not currently in a relationship and he has not expressed any recent intention to resume the relationship. Risk reduced to HIGH - to be reviewed if concerns are raised in the future."

75. Her explanation for the change in her assessment of the Applicant's risk of serious harm to the public was as follows:

"The risk is deemed greatest if he enters a new relationship, if the relationship ends, if he is experiencing feelings of abandonment, if he feels he is being disrespected by partner, and if partners do not meet his needs (sexual, emotional, lifestyle, financial). Not currently in a relationship so risk is not assessed as imminent – HIGH."

76. She gave similar explanations in her evidence in answer to the Applicant's solicitor, and adhered to her recommendation that the Applicant could safely be released into the community.
77. The panel were mindful of the fact that - despite the Applicant's evidence that he had no intention of resuming his relationship with Ms B and no immediate intention of entering into a new intimate relationship - he was likely to be at some stage in another intimate relationship. The panel were also mindful of their obligation to consider the long term future as well as the short-term one. They clearly (and rightly) felt that the Applicant would pose a significant risk to any future intimate partners.
78. What was inappropriate and unreasonable was to misstate probation's OASys assessment and effectively to attribute to probation their own view that that risk would be 'very high'.
79. Probation's view was, I think, entirely reasonable. It was correct to say, as probation did, that whilst there was certainly likely to be a high risk to Ms B or any other intimate partner in the future, it was not an imminent one and did therefore not qualify for a 'very high' OASys assessment. If the Applicant did resume his relationship with Mr B or enter into a new one, he would have to disclose it to probation. All the professional witnesses were satisfied that he would comply with that and his other licence conditions. The relationship would be monitored and, if probation thought the circumstances warranted it, the 'high risk' assessment could be raised again to 'very high'.
80. This point is of some importance. It is rarely if ever appropriate to direct the release of a prisoner who is assessed as posing a 'very high' (i.e. imminent) risk of serious harm, but it is quite common to direct the release (with a robust risk management plan) of a prisoner who is assessed as posing a 'high' risk.

The evidence of the professional witnesses

81. There is a surprising conflict between what the panel wrote (in their decision) and what the Applicant's solicitor has written (in her representations in support of this application) about the evidence given by the professional witnesses at the second hearing. The solicitor states that at the second hearing all three professional witnesses supported the Applicant's re-release on licence. The panel in the 'decision' section of their decision appeared to suggest that that was not the case. They referred to *'the treatment and interventions that professionals working with [the Applicant] indicate are required to address risk in [the Applicant's] case should he decide to engage with them, which he has not yet done.'* This suggested that the professional witnesses were saying that the work needed to be done before the Applicant was released on licence.
82. I have listened carefully to the recordings of both hearings. On doing so it was clear to me that, whilst the professionals recommended that certain treatment and interventions should be carried out, they agreed that they could and should be carried out in the community and that the Applicant did not need to be detained in prison to undertake them. The solicitor was therefore right in stating that all three professional witnesses supported the Applicant's re-release on licence.

83. I will now briefly summarise the evidence of the three professional witnesses.

The psychologist's evidence

84. The psychologist was faced by a familiar difficulty: if there is an allegation against the prisoner which he denies and of which he has not been convicted by a court, how are the professionals to deal with that in making their risk assessments? The psychologist in this case very sensibly adopted the approach of (a) making her recommendation on the basis that any allegations against the Applicant remained unproved and should therefore not be taken into account but (b) recognising that the panel might make a finding of fact that any of the allegation(s) was true, in which case her recommendation might need to be revised.

85. She, therefore, in her report, assessed the Applicant's risk as being manageable on licence in the community, but with the proviso that that assessment would need to be reconsidered and might have to be changed if the panel made a finding or findings of fact adverse to the Applicant. That was the position which she adopted at the start of her evidence.

86. According to the panel's decision she changed her position during her evidence. The panel wrote:

'She stated that she had not made any changes to her assessment, but opined that if there were evidence that [the Applicant] caused the damage to [Ms B's car] she would assess that a more robust risk management plan (RMP) was needed because the current RMP did not take that into account. The panel notes that the risk of harm to a known adult is now assessed as very high by the Probation Service, an assessment with which the panel agrees. [The psychologist] stated that in the light of the risk to a known adult being assessed as being very high, [the Applicant] would need to revisit relationships more intensively. She assesses that this should be done in closed prison conditions, not whilst on licence. As a result she changed her recommendation from release as stated in 2021 to a recommendation that [the Applicant] remains in closed custody.' (My underlining again).

87. As explained above it was inaccurate to say that the risk of harm to a known adult was now assessed as very high by the Probation Service. It was also inaccurate to state that the psychologist had changed her recommendation. On listening (twice) to the recording of the psychologist's evidence, I could detect no mention at any stage of any change of recommendation on her part. On the contrary the psychologist repeated several times (including when she was asked further questions at the end of the hearing after she had heard the rest of the evidence) that her recommendation was unchanged but might have to be revised if the panel made a finding of fact indicating an increase in the Applicant's risk in future intimate relationships.

88. The panel did not make any finding of fact about the allegations involving Ms B so they remained unproved, and there would therefore have been no reason for the psychologist to change her view about the Applicant's risk to intimate partners.

89. The panel did make findings about the recall incident (in parts justified and in parts not, as I have explained) but I have no means of knowing whether the recall incident

(if properly understood) would have caused the psychologist to change her recommendation for re-release on licence.

The POM's evidence

90. It was apparent that at the first hearing the POM would have liked to recommend re-release on licence, but was prohibited from doing so by the then Secretary of State's unlawful policy.
91. At the second hearing he was free to make a recommendation, and did make a very clear one that with the proposed robust risk management plan in place the Applicant's risk could be managed safely in the community.

The COM's evidence

92. By the time of the second hearing the new COM had taken over from the previous one. In her report dated 25 September 2023, in which she recommended the Applicant's re-release on licence, she explained that recommendation as follows:

"It is noted that the incident that led to recall has since been closed by the Police with no further action being taken. During [the Applicant's] time in custody, he has displayed negative behaviours which raises concerns in regards to his willingness to comply and engage with instructions. However, it is evident that [the Applicant] made positive changes to his behaviour and there was a period from late 2022 to May 2023 where no concerns were raised.

[The Applicant] attended an Oral Hearing in March 2023 which appeared to be positive, with professionals supporting release into the Community. Unfortunately, the case was adjourned on multiple occasions following completion of the hearing and a decision was not given by the Parole Board due to the multiple adjournments.

In May 2023 [the Applicant] experienced a significant deterioration in his Mental Health which was triggered by the slow progress his case was making through the Parole process; it is accepted that the behaviour that followed was extremely unacceptable and there is no justification for this. However, [the Applicant] has since engaged with services to improve his mental health which has also seen an improvement in his behaviour within the Prison establishment, further supporting the assessment that his negative behaviour was likely to be linked to the difficulties that he was experiencing at the time.

It is a concern that [the Applicant] failed to utilise the skills he has previously learnt throughout multiple interventions, to deal with the situation in a more appropriate manner and consideration has been given to whether he is in a position to effectively implement these skills if he were to be released into the community. However, it is assessed that this breakdown in [the Applicant's] abilities was specific to his experience with the parole process and being subject to an IPP sentence; it is understood that this type of sentence can often have a significant detriment on an individual's mental health.

[The Applicant] continues to show that he has the ability to implement the skills he has learnt within other areas of his daily life which is evident through the time spent

previously of good behaviour and the ongoing lack of reported incidents since his mental health has improved. As such, it is assessed that he has the skills available to manage his behaviour on a daily basis; [the Applicant] also appears motivated to engage and comply with all relevant services at this time. Therefore, it is my assessment that his risk is manageable within the Community with the proposed RMP."

93. The COM maintained that position in her evidence at the hearing. I have already explained how she maintained her assessment of the Applicant's risk of serious harm to a known adult (Ms B) and to the public.

Decision

94. I cannot find any evidence of procedural unfairness in this case. The delays in the progress of the review were regrettable but I do not believe that they amounted to procedural unfairness. Their relevance is that they caused the deterioration in the Applicant's mental health which in turn caused the deterioration in his custodial behaviour. The deterioration in his behaviour, if unexplained, might well have made it necessary for him to remain in prison.
95. Whilst I cannot find any evidence of procedural unfairness, it will be apparent from the above discussion that I am satisfied that the panel's decision can properly be regarded as irrational. There were significant errors in (a) the panel's findings about the warehouse incident and the parking of the car away from the hostel (b) misstating probation's assessment of the Applicant's risk of serious harm to the public and a known adult and (c) their misunderstanding/misstatement of the evidence of the professional witnesses about the Applicant's suitability for re-release on licence. If these errors had not been made, the panel's decision might well have been different.
96. **I must therefore allow this application and direct that this case should be reconsidered.**
97. This has been a long decision and - given the conclusions which I have reached above - I have not needed to address all the other points made by the solicitor in her extensive representations. I agree with some of them but not others. It is unnecessary to go through them all.
98. I should finally make it clear that this is simply a decision as to whether the criteria for reconsideration are met. I have therefore focussed on the evidence relating to those of the solicitor's criticisms which I believe are clearly valid and lead to the conclusion that this case must be reconsidered. There is a great deal of other evidence in the case about which I need not make any comments. It will be for the next panel to decide (on the whole of the evidence) whether the test for re-release is met. It is not for me to express any view about that.

Jeremy Roberts
18 January 2024