

[2021] PBRA 80

## Application for Reconsideration by Jones

### Application

1. This is an application by Jones (the Applicant) for reconsideration of a decision made by an oral hearing panel dated 7 May 2021 not to direct his release.
2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.
3. I have considered the application on the papers. These are the decision letter, the dossier, and the application for reconsideration. I have also sought confirmation from HMPPS relating to the periods that the Applicant has spent in the community throughout his sentence (as set out at paragraph 5 below).

### Background

4. The Applicant is serving a sentence of imprisonment for public protection imposed on 6 July 2006 following conviction for attempted rape of a female over 16. The minimum tariff was set at three years and six months less time spent on remand and expired on 22 January 2009. At the same time, the Applicant received a concurrent determinate sentence of two years following conviction for false imprisonment (now served). This is the Applicant's eighth parole review.
5. The Applicant was most recently released on licence on 21 July 2020. His licence was revoked on 29 July 2020, eight days later, and he was returned to custody on 1 August 2020. This is his second recall on this sentence. He was first released on 16 November 2018, recalled on 26 January 2019 (71 days later) and returned to custody on 14 February 2019 (after a further 19 days unlawfully at large).
6. The Applicant was aged 28 at the time of sentencing. He is now 43 years old.

### Request for Reconsideration

7. The application for reconsideration is dated 24 May 2021 and has been submitted by solicitors acting for the Applicant.
8. It submits that the panel's decision was irrational on two grounds:
  - (a) The panel made an error of fact in calculating the time that the Applicant had spent in the community and relied on this in support of its decision not to direct his re-release; and/or



(b)The panel’s logic in relation to its fact-finding exercise concerning an allegation from the time of the Applicant’s recall was irrational.

9. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

### Current Parole Review

10.The Applicant’s case was referred to the Parole Board by the Secretary of State in August 2020 to consider whether to direct his immediate release and, if release was not directed, to advise the Secretary of State on whether the Applicant was ready to be moved to open prison conditions.

11.On 11 September 2020, the case was directed to an oral hearing. This began on 2 March 2021 (but adjourned for lack of time) and reconvened on 29 April 2021. Both hearings were held remotely by video conference (due to COVID-19 restrictions) before a panel of three members. The panel heard oral evidence from the Applicant’s Prison Offender Manager (POM), Community Offender Manager (COM) and the Applicant. At the reconvened hearing, the panel also heard evidence from a police officer who was involved with an allegation of making threats to kill which arose from the Applicant’s time in the community. The Applicant was legally represented throughout.

12.The decision indicates that both the Applicant’s POM and COM supported release. Neither could see meaningful benefit in a transfer to open conditions.

13.The panel did not direct the Applicant’s release but recommended open conditions.

### The Relevant Law

14.The panel correctly sets out the test for release in its decision letter dated 7 May 2021.

#### *Parole Board Rules 2019*

15.Under rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (rule 25(1)) or by an oral hearing panel which makes the decision on the papers (rule 21(7)).

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**.

#### *Procedural unfairness*

17.Procedural unfairness means that there was some procedural impropriety or unfairness resulting in the proceedings being fundamentally flawed and therefore,

producing a manifestly unfair, flawed or unjust result. These issues (which focus on how the decision was made) are entirely separate to the issue of irrationality which focusses on the actual decision.

18. In summary an Applicant seeking to complain of procedural unfairness under rule 28 must satisfy me that either:

- (a) express procedures laid down by law were not followed in the making of the relevant decision
- (b) they were not given a fair hearing
- (c) they were not properly informed of the case against them
- (d) they were prevented from putting their case properly; and/or
- (e) the panel was not impartial.

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

### *Irrationality*

20. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

*"The issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

21. 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.

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

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

23. The Secretary of State has submitted no representations in response to this application.

### **Discussion**

24. The first ground submits that the panel's decision erroneously states that, since being remanded into custody, the Applicant had spent approximately 19 days in the community on licence. In reliance on this erroneous calculation, the panel irrationally concluded that the Applicant's learning and coping had not been sufficiently tested in less secure conditions and, as such, the panel could not yet evidence that the proposed risk management plan could manage his risks in the community.

25. Insofar as the calculation is concerned, relevant extracts from the panel's decision are:

*"[The Applicant was] remanded into custody...in May 2005 and since that time, [he has] spent approximately 19 days in the community on licence*

*[The Applicant has] been recalled twice during this sentence...[O]n the first occasion [he was] on licence for a period of 11 days and on the second occasion for eight days..."*

26. Having read the dossier with careful attention to documented dates, I agree that the Applicant spent eight days in the community on his second (and most recent) release prior to recall. However, he spent 71 days in the community on his first release. In these calculations, I am discounting any further time spent unlawfully at large in the community.

27. The panel has clearly erred in its calculation. I speculate that this may have arisen from a misreading of the Secretary of State's Proforma Case Summary. This records the period served on the first recall as 11 days. However, a closer reading of the Case Summary shows this 11-day calculation was based on the date of the Applicant's *second* release and the date of his *return to custody* (even though this is labelled 'Date of Recall'). The Secretary of State's calculation which may have been adopted by the panel is based not only on the wrong recall but also the wrong dates.

28. It is a well-established ground for judicial review that the tribunal has taken into account information which it is accepted is inaccurate. The grounds for reconsideration mirror those for judicial review and therefore it is also a ground for reconsideration. I accept that it is capable of being both irrational and procedurally unfair to take into account inaccurate factual information in making a decision. It is important that decisions are not only fair but are also seen to be made according to a fair procedure. If incorrect information is included in the decision, the fairness of the procedure is called into question.

29. However, it will not invariably follow that if there is an inaccurate fact or facts in the decision that an application for reconsideration will automatically be granted. Reconsideration, like judicial review, is a discretionary remedy and, if I am satisfied that the incorrect fact did not affect the decision then the application is likely to be refused.

30. The first question to address is 'did the miscalculation affect the decision?'

31. In answering that question, I note particularly the following passages from the decision:

*"[The Applicant has] been recalled twice during this sentence...[O]n the first occasion [he was] on licence for a period of 11 days and on the second occasion for eight days only...indicating that [he] very quickly resort to 'old me' behaviours*

*[T]he two short periods [the Applicant had] spent in the community on licence suggest that [he is] unable to sustain [his] behaviour when [he is] in conditions of less security."*

32. In referring to 'two short periods' in the community as being indicative of further testing being required, I am satisfied that the miscalculation did have a material bearing on the panel's decision.

33. This would be sufficient for me to make a finding of procedural unfairness. However, the application for reconsideration is founded on irrationality and, as I have already said, taking inaccurate factual information into account in making a decision is capable of being both irrational and procedurally unfair. The two bases for reconsideration are not necessarily mutually exclusive.

34. If the correct period of 71 days is substituted into the panel's decision, it would read as follows:

*"...[O]n the first occasion [the Applicant was] on licence for a period of 71 days and on the second occasion for eight days only...indicating that [he] very quickly resort to 'old me' behaviours".*

35. If the Applicant had only had a single eight-day stint on licence prior to recall, it would have been perfectly logical for a panel to conclude that he very quickly resorted to 'old me' behaviours.

36. Similarly, if the Applicant had eleven days in the community before a first recall followed by eight days before a second recall, the panel's 'very quickly' conclusion would be just as logical. Therefore, on the facts as the panel believed them to be (insofar as can be ascertained from the decision), its conclusion is not an irrational one. It is thorough and cannot be faulted.

37. However, the decision also clearly states that the Applicant "*was released on licence in November 2018 and recalled in January 2019*". Even without the precise dates, it is illogical for the panel to say that the Applicant only spent 11 days in the community on his first release when it also documents a period of up to three calendar months.

38. I cannot say whether the panel would have concluded as it did if it had been armed with the correct figures. The extent of community testing is one of several factors the panel has weighed in making its decision. However, if a (hypothetical) sensible person applied themselves to the ascertainable facts, the conclusion that the Applicant's conduct very quickly deteriorated in the community twice would not be logical.

39. I therefore find that the test for irrationality is met, and having done so, do not need to deal with the second ground advanced on behalf of the Applicant.

## Decision

40. Accordingly, applying the test as defined in case law, I find the decision not to release the Applicant to be irrational. I do so solely for the reasons set out above. The

application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

**Stefan Fafinski**  
**17 June 2021**