

**[2021] PBRA 121****Application for Reconsideration by the Secretary of State  
in the case of Jelley****Application**

1. This is an application by the Secretary of State (the Applicant) for reconsideration of the decision of an oral hearing panel (OHP) dated 1 July 2021. The decision was released on 12 July 2021. The OHP of the Board determined to direct the release of Jelley (the Respondent) on licence.
2. I have considered the application on the papers. These comprise of the dossier, the provisional decision letter of the panel dated 12 July 2021, the application for reconsideration dated 2 August 2021, the response by the Respondent and a response on behalf of the Respondent.

**Background**

3. The Respondent is serving concurrent indeterminate sentences for public protection. The minimum term specified by the judge was 4 years and 242 days. The sentence was imposed for three offences of wounding with intent to do grievous bodily harm. The Respondent's minimum term expired on 4 August 2013.
4. The facts of the index offences are that the Respondent attacked three men, described by the sentencing judge as innocent bystanders, after a dispute. The Respondent was with his brother and had armed himself with a knife. The Respondent inflicted serious injuries on all three victims.
5. The Respondent was 34 at the time of the index offences. He is now aged 47. The Respondent was released on licence on 10 September 2018 and recalled on 25 October 2019. This recall was based upon allegations of poor behaviour and failing to keep in touch.
6. He was released again on 24 August 2020 and recalled on 14 September 2020.
7. The most recent recall of the Respondent occurred in circumstances where he had received a number of warnings at the designated accommodation where he was staying. These warnings related to the use of heroin in his room, breaching of Covid 19 rules and drinking alcohol.
8. Specifically, on the evening of the 13 September 2020 the Respondent had been smoking heroin in his room. As a result of previous warnings, the decision was taken

to withdraw his bed space. He had no alternative address available to him and it was therefore assessed that his risk was no longer manageable in the community.

9. The general assessment of the probation service was that the Respondent's response to supervision had been poor since his release. He had also had personal difficulties in relation to bereavements. As noted, he had been using heroin at the hostel where he was living.
10. The Respondent's case was referred by the Secretary of State to the Parole Board on 27 October 2020. The Parole Board were asked to consider whether to direct immediate release. If immediate release was not directed the Parole Board were asked to consider a recommendation relating to a move to open conditions.

## The Relevant Law

11. The panel correctly sets out in its decision letter 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.
12. Rule 25 (decision by a panel at an oral hearing) and Rule 28 (reconsideration of decisions) of the Parole Board Rules 2019 apply to this case.
13. Rule 28(1) provides that applications for reconsideration may be made in eligible cases on the basis that (a) the decision is irrational and/or (b) that it is procedurally unfair. This is an eligible case.

### *Irrationality*

14. In **R (on the application of 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.*"
15. This test was set out by Lord Diplock in **CCSU -v- Minister for the Civil Service [1985] AC 374**.
16. 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.
17. 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. This strict test for irrationality is not limited to decisions whether to release; it applies to all Parole Board decisions.

### *Procedural unfairness*

18. 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.
19. 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.
20. The overriding objective is to ensure that the Applicant's case was dealt with justly

### Failure to give sufficient reasons

21. It is well established now, by decisions of the courts, that a failure by a panel to give adequate reasons for its decision is a basis on which its decision may be quashed, and reconsideration directed. Complaints of inadequate reasons have sometimes been made under the heading of irrationality and sometimes under the heading of procedural unfairness: whatever the label, the principle is the same.
22. The reason for requiring adequate reasons had been explained in a number of decisions including:
- a. **R v Secretary of State for the Home Department ex parte Doody (1994) 1 WLR 242;**
  - b. **R (Wells) v Parole Board (2009) EWHC 2710 (Admin);**
  - c. **R (PL) v Parole Board and Secretary of State for Justice (2019) EWHC 306;** and
  - d. **R (Stokes) v Parole Board and Secretary of State for Justice (2020) EWHC 1885 (Admin).**
23. The principal reason for the duty to give reasons is said to be the need to reveal any error which would entitle the court to intervene without knowing the panel's reasons the court would be unable to identify any such error and the prisoner's right to challenge the decision by judicial review would not be an effective one. In **Wells** Mr Justice Saini pointed out that the duty to give reasons is heightened when a panel of the Board is rejecting expert evidence.

### Request for reconsideration

24. In support of the application the Secretary of state has enumerated a number of grounds of complaint. It appears to me that the fundamental criticism by the Secretary of State in this case is a failure to explain the basis upon which the decision was reached. The individual grounds are summarised as follows:

## **Ground 1- Procedural Unfairness: Failing to cross examine the Community Offender Manager (COM).**

25. The Secretary of State argues that *"the COM should have been cross-examined after the panel heard from the offender"*.
26. In this case a decision had been made to call the COM first which would not be the usual order of witnesses. There appears to have been no objection to this decision. The rationale is not explained in the decision letter, however in representations by the legal representative acting for the Respondent the decision appears to have been based upon the fact that the COM had not provided an updated report prior to the hearing and the Respondent therefore was not aware of the up-to-date position of the COM in terms of recommendation.
27. There is no procedural rule relating to order of witnesses in Parole Board hearings. The usual procedure would be for a panel Chair to advise the parties of the suggested order and invite comments. It is not clear whether this procedure was adopted in this hearing, however, there is no indication that any objection was raised by the Applicant or his legal representative during the oral hearing about the order of witnesses.
28. The role of the Parole Board panel, in an oral hearing, is to assess and adjudicate upon the evidence presented by the parties in an objective manner. A Parole Board panel cannot be seen to be taking the position of either party to the hearing. The oral hearing process of the Parole Board is a hybrid of inquisitorial and adversarial systems. Accordingly, a panel may seek further information (including ordering reports). However, the panel's role is not to buttress the position of one or other of the parties. The panel must act fairly towards each party. I therefore reject the contention of the Secretary of State that the panel in this case had any duty to intervene and re-examine the COM in support of the Applicant's case. The Secretary of State chooses not to be legally represented in the majority of cases before Parole Board panels. Panels are flexible in their approach to the admission of evidence. If requested, the panel would almost certainly have allowed the COM to address the panel and correct or add to the evidence. There is no evidence that such a request was made by the COM. I therefore reject the contention that the role of the panel was to intervene in this case, in the manner suggested by the Secretary of State. Indeed, such an intervention would be highly likely to be procedurally unfair.

## **Ground 2 - Irrationality: Unfair weighting being applied to the evidence provided by the COM.**

29. The Secretary of State argues that inappropriate weighting had been applied to the Respondent's *"self-report"*. Namely that alcohol was the key risk factor in his violent offending. The Secretary of State argues that a failure to cross examine the COM about the Respondent's self-report was irrational.
30. The dossier makes it clear that the trial judge in the sentencing remarks relating to the index offence said that the Respondent was *"drunk"* when he committed the index offence. The trial judge also mentions the fact that the Respondent may have taken drugs. There was therefore evidence independent of the Respondent that

alcohol was a potential risk factor in relation to the index offence. Again, for the reasons set out above, I reject the contention that the panel had a duty to examine the COM in the way suggested by the Secretary of State.

31. The Secretary of State also argues that the view of the COM as to concerns about the Respondent's future engagement with the probation service on licence was not explored more fully with the COM - I deal with this issue below.
32. The Secretary of State further argues that the panel failed to consider the view of the COM regarding the imminence of risk.
33. In the panel's decision, the panel set out the static risk factors as reflected in the probation service assessment report. The panel indicated that the probation service assessment report placed the Respondent as someone with (a) a high risk of reconviction; (b) a very high risk of non-violent offending; and (c) a medium risk of violent reoffending. Also cited is a high risk of serious harm to members of the public. It is unclear whether the panel in fact adopted the risk scores as set out in the probation service assessment report. Within the decision the panel indicate as follows "*the panel is satisfied that the risk [the Respondent] pose[s] of committing an offence that could cause serious harm is no more than minimal*". The panel do not explain the meaning of the word 'minimal', in particular whether the word 'minimal' meant the probation service assessment report scoring of a *medium* risk of violent offending and a high risk of serious harm was adopted or not.
34. Equally the evidence attributed to the COM that the risk of serious harm was 'imminent' is at odds with the probation service's assessment of the risk of violent offending being at the level of 'medium'. It would be expected that an offender whose risk of offending violently was imminent, would be assessed as being of high or very high risk of violent offending neither of which were the evidence of the COM.

### Ground 3 - Irrationality: Failure to administer the test for release in full

35. The panel's decision correctly reflects the wording of the test for release. The Secretary of State indicates that "*there are other factors of the test that have not been applied in full*".
36. The role of the Parole Board panel is to receive and thereafter assess the evidence relating to risk and to apply the Parole Board panel's assessment to the test. I am satisfied on the basis of the decision letter that the panel fully understood the nature of the test and the nature of the evidence which should be assessed in relation to applying that test. The complaint of the Applicant under this head is unclear. However, I understand that it may be addressing the fact the OHP did not explain how it applied its determinations, made within the hearing, to the test.
37. **The Secretary of State submits that the panel failed to cite risk factors which had been suggested by the COM in the probation service assessment report.** Again, the role of the panel is not to repeat and accept all evidence as presented. The role of the panel is to assess and reach a judgement as to evidence which is accepted and evidence which is rejected. I do not therefore accept that the panel had any obligation to adopt all the risk factors which were being suggested

by the probation service assessment report. However, I deal below with the argument underpinning this complaint, namely a failure to explain why risk factors were rejected.

38. **The panel failed to adopt a holistic approach.** The Secretary of State argues that there are elements within the Respondent's behaviour which were not addressed in the decision and which were of importance. Again, I deal with this matter below.
39. **The panel did not provide a clear rationale as to why they consider the assessments of risk assessments to be inaccurate.** Again, I deal with this matter below.
40. **The decision letter does not make it clear why the panel accepted the change in position of the Prison Offender Manager (POM) from not supporting release, to supporting either release or open conditions.** Again, I deal with this matter below.
41. **The panel were obliged to assess the risk management plan (RMP) and fully consider possible ways to strengthen it.** I do not recognise this as a duty of the Parole Board panel. The duty of a COM is to frame a risk management plan on the basis that a Parole Board panel may decide to recommend release into the community. It is frequently the case that a COM does not recommend release but is expected to draft a full and substantial risk management plan in any event. Parole Board panels will always investigate the plan and may make suggestions. The role of the Parole Board, however, is not to draft or redraft a risk management plan. The role of the Board is to expect a robust risk management plan from the COM regardless of recommendation. I therefore reject the contention that the panel were obliged to suggest ways to 'strengthen' the RMP.
42. **The panel's view of the Respondent's likelihood of being recalled a further time is contradictory.** The panel did not adequately explain this wording. The comment was likely to have been based on the fact that prisoners can be recalled in breach of licence, in circumstances where the risk of serious harm is not necessarily imminent. Examples might be circumstances where a prisoner fails to keep in contact with the COM, or the prisoner is repeatedly involved in the taking of illicit substances, or the prisoner may become homeless. Whilst this may have been the rationale behind the comments by the panel, if this was the rationale, it was not clearly explained.

### Representations by and on behalf of the Respondent

43. The Respondent made representations directly and through his legal representative. The representations can be summarised as follows:
- a. That the application for reconsideration was out of date;
  - b. That the probation service office dealing with the Respondent was incompetent on the basis that the probation service failed to organise bereavement counselling;
  - c. That the Respondent was unprepared for release on the first occasion of his release on licence;



- d. That the decision to apply for reconsideration was disrespectful towards the Parole Board panel; and
- e. The Respondent took the view that imprisonment for public protection sentences were arbitrary and inhumane.

44. Representations were also received from the legal representative acting for the Respondent.

- a. The legal representative also indicated that he believed that the application was out of time;
- b. The legal representative submitted that he rejected the contention that there was any unfairness relating to the order of evidence called at the OH. The Respondent's legal representative explained that he had asked the panel to hear from the COM before other evidence was called. This was because no report had been provided by the COM in advance of the hearing, as was required, and the prisoner had a right to understand what the probation service were recommending;
- c. The legal representative submitted that the COM was given a full opportunity to make comments upon the evidence that was adduced during the course of the oral hearing. The COM did not make any application for a deferral to enable her to adduce further evidence or submit further conditions relating to the risk management plan;
- d. The legal representative submitted that it was not accepted that there was an imminence of the risk of harm and that the evidence did not support the contention that there was an imminent risk of harm;
- e. The legal representative submitted that there was evidence adduced in the oral hearing that the Respondent did not receive bereavement counselling in the community despite assurances from the probation service that he would; and
- f. The legal representative for the Respondent further submitted that the hearing was conducted thoroughly and fairly and that all witnesses were given an opportunity to speak freely.

### **Response to representations by the Respondent**

45. Before turning to the fundamental issue in this case I deal briefly with the various submissions by the Respondent.

46. So far as time is concerned although this is not strictly an issue for me to adjudicate upon. Rule 28 (3) of the Parole Board Rules 2019 deal with the question of time limits. An application for a provisional decision to be reconsidered under paragraph (1) must be made and served on the other party no later than 21 days after the written decision recorded under the rules is provided to the parties. The notice period is therefore 21 days. By rule 11 (1) where a party or other person is required to serve documents on the Board or parties under these rules the documents must be served by being sent to a secure electronic address where one has been provided by the Board and/or a party.

47. I am advised that the decision letter was issued on the 12 July 2021. No exact timing as to receipt is available. It is appropriately deemed by the Parole Board to be at least midnight on the day of issue. The calculation period is therefore from

the 13 July 2021. The Secretary of State's application was transmitted on 2 August 2021 and received at 4 pm. I am satisfied that the application was in time.

48. Dealing with the further representations made by the Respondent himself. None of the representations set out by the Respondent are relevant to the issues relating to reconsideration and therefore I am not able to respond to them.

### Legal Representative's representations

49. So far as the submissions from the legal representative are concerned:
- a. I have dealt below with the issue of the order of calling witnesses at this hearing.
  - b. I have also dealt below with the opportunity for the COM to respond.
  - c. I have dealt below with the question of whether the evidence supporting the contention that risk was imminent was fully assessed in this case.
  - d. The issue of the availability of bereavement counselling is not one which is relevant to a reconsideration decision and therefore I do not address it.
  - e. I have also addressed below the question of whether the hearing was fair in all the circumstances. The legal representative for the Respondent argues that he was satisfied that a fair hearing was conducted.

### Discussion

50. It is convenient to set out the reasons given by the OHP for their decision to direct release:

*"The panel considers that your antecedents and behaviour during two periods of licence, indicates that there is an elevated risk that you will be recalled for a third time but that this is likely to be for non-compliance and not because you have committed a further offence that causes serious harm. In consequence the panel is satisfied that you meet the release test."*

*"After considering the dossier and hearing the oral evidence, the panel is satisfied that the risk you pose of committing an offence that could cause serious harm is no more than minimal and that this level of risk is such that it can, with the proposed risk management plan, be managed safely in the community and is satisfied that it is no longer necessary for the protection of the public that you remain confined. The panel is satisfied that it is likely that you will comply with your release licence. In consequence, the panel directs your release."*

51. As indicated above, the fundamental criticism by the Secretary of State in this case is a failure to explain the basis upon which the decision was reached.

52. As noted above the OHP indicated in its concluding remarks that it was satisfied that the risk posed of committing an offence which would cause serious harm was no more than minimal. Within the body of the decision letter itself the panel recite the risk scores set out in the probation service assessment report. The scoring in relation to proven violent offending is cited as medium. Also cited is a high risk of serious harm to members of the public.



53. Two issues arise in relation to the assessment of risk scores. The first is that the OHP merely repeated assessments as recorded in the probation service assessment report. The panel failed to indicate whether they adopted the levels of risk as recorded or not. It is therefore unclear whether the risk assessments as recorded in the dossier were adopted by the panel or not. The panel did not therefore make clear in their decision, the level of risk which they determined was attributable to the Respondent (beyond indicating it was 'minimal').
54. The second issue which arises in relation to levels of risk is the use of the word 'minimal'. In the light of the wording of the risk levels as set out by the COM, the panel failed to adequately explain the use of the word "minimal" and failed to explain their own conclusions and findings in the light of the probation service assessment report scorings. The OHP indicated that it took the view that on the basis of the risk management plan the Respondents risk could be safely managed in the community. Within the decision letter itself the oral hearing panel confirmed the view of the COM in this case namely *"She did not support your release because she considered that you were expressing in your interview with her a lot of grievance thinking in respect of probation and was concerned about your level of engagement in the community. She stated that she did not consider that you were presenting as someone ready for release. She was concerned that you lack the skills to self-manage in the community. She agreed that you have had a period of relative stability during 2021 and considered that there could be merit in considering a transfer to open conditions. She considered that risk would increase when you felt out of control or threatened. She considered that risk would be imminent if you are released and said that she didn't get the feeling that you recognised why probation have concerns about you."*
55. Despite these indications within the decision letter, the OHP failed to explain whether it accepted or rejected the representations of the COM relating to grievance thinking, level of engagement, self-management, the danger of increased risk when out of control or threatened, the fact that the risk would be imminent and the fact that the Respondent did not in her view understand the reasons for probation's concerns.
56. It may well be that the oral hearing panel had considered these various issues which were adduced in evidence by the COM and had reached a conclusion upon them. However, it is clear on the basis of the various decisions relating to the giving of sufficient reasons (cited above) that the panel failed in this case to engage with the issues clearly raised by the COM and failed to explain the basis of this decision. In particular it failed to explain why they rejected (if they rejected) the evidence of the COM in relation to these issues. In cases where there is contested evidence it is incumbent on the panel to go beyond indicating that it was satisfied that the test was met. The panel's duty is to give reasons why it was so satisfied and to engage with the representations of those witnesses who gave contrary evidence.
57. I am therefore satisfied in this case that the decision was irrational because the panel failed to adequately explain the basis upon which it reached its decision. In particular the panel failed to engage with the evidence contrary to that which led to the final decision.

58. It should also be said that the panel appropriately and correctly primarily addressed the question of release. However, where professional witnesses are arguing for the consideration of open conditions, the panel as a matter of good practice, in my view, should consider briefly setting out the reasons why they had rejected any proposal relating to open conditions. By doing so the decision would be better understood by those parties who are considering the basis upon which the decision has been reached.
59. As indicated above, a number of the complaints by the Applicant are incorporated within the conclusion I have reached. The complaints by the Applicant as set out above are that the panel failed to address the various behaviour issues which formed part of the concerns of the COM, the panel failed to explain why it rejected (if they were rejected) the risk assessments and factors which were set out in the probation service assessment report and cited by the COM. The OHP also failed to explain the basis upon which it adopted the changed position of the POM who had originally not supported release but who subsequently supported release.
60. It should be emphasised that I accept that a decision letter is unlikely to address in detail each and every contested issue within the hearing. The role of the oral hearing panel is to distil the important and relevant factors relating to risk and to address those factors within the decision letter.
61. It remains important however to ensure that when rejecting evidence, that a rationale is indicated for such rejection, so that parties can properly understand the basis upon which a decision is reached.

## Decision

62. It follows from the above that this application must succeed, following the principles established in the cases cited in paragraph 21 above, on the grounds that inadequate reasons were given by the OHP for their decision which must therefore be treated as irrational. This case must therefore be reconsidered.

**HH Stephen Dawson**  
**31 August 2021**