

**[2024] PBRA 73**

## Application for Reconsideration by Dempsey

### Application

1. This is an application by Dempsey (the Applicant) for reconsideration of a decision of a panel of the Parole Board dated 5 March 2024 not to release the Applicant but to recommend that he is transferred to open conditions.
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 the decision is irrational and/or (c) that it is procedurally unfair.
3. I have considered the application on the papers. These are the decision of the panel; the application for reconsideration and the dossier.

### Background

4. On 10 May 2004 the Applicant was convicted of murder and sentenced to life imprisonment with a tariff of 12 years and 9 months taking into account time spent on remand. The Applicant was convicted as a secondary party. The Applicant has been released on licence and recalled on three occasions since 5 December 2016.

### Request for Reconsideration

5. The application for reconsideration is dated 26 March 2024.
6. The ground for seeking a reconsideration is that the decision not to release was irrational.

### Current parole review

7. This was the first referral to the Parole Board following the Applicant's recall on 28 August 2022 and his return to custody following that recall on 25 February 2023.
8. The hearing of this referral was on 5 March 2024 and the panel heard evidence from the Applicant, the Community Offender Manager (COM) and the Prison Offender Manager (POM).


### The Relevant Law

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9. The panel correctly sets out in its decision letter dated 8 March 2024 the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

*Parole Board Rules 2019 (as amended)*

10. 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)). This application is eligible for reconsideration.

*Irrationality*

11. 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."*

12. This applies the Wednesbury irrationality test to parole hearings. The Wednesbury irrationality test is that the decision was so unreasonable that no reasonable tribunal could have reached that decision on the evidence.
13. 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.

**The reply on behalf of the Secretary of State (the Respondent).**

14. The Respondent has made no submissions in response to this application.

**Discussion**

15. Both the COM and the POM concluded that the Applicant met the test for release. The Applicant argues that in the light of their evidence and the progress that the Applicant had made since his return to custody it was irrational for the panel not to direct release.
16. It is not for me to substitute my view for that of the panel. They saw and heard the witnesses and in particular they heard the evidence of the Applicant. I have to

decide whether any reasonable panel could have reached the decision that they did on the evidence that they heard.

17. In my view they could. The Applicant having been released on licence has been recalled three times and, while the matters leading to the previous recalls may not have been that serious, it was arguable that his behaviour resulting in the last recall led to an increase in risk. The Applicant had reverted to consuming drugs which is one of his risk factors.
18. The Applicant after his recall was unlawfully at large for 6 or 7 months.
19. While the Applicant has made progress since his return to custody; has worked with the substance abuse team and has gained enhanced status, that accords with the Applicant's behaviour generally in custody.
20. The Applicant says that he has learnt a lesson from his recalls and is motivated to comply in the future. The panel point out that he has said that in the past but nevertheless his behaviour on licence has led to recall.
21. The Applicant points out that he has not committed offences of violence leading to recall. While that may be true, his index offence was extremely serious and he does still present a risk of violent re-offending which is increased when he takes drugs.
22. The panel concluded that the Applicant was not safe to be released. In my judgment they were entitled to come to that conclusion on the evidence that they heard and their decision cannot be described as irrational in the terms that I have defined it.
23. The panel considered that the Applicant would stand a better chance of meeting the test for release and remaining on licence if he first served a period in open conditions. Again in my judgment they were entitled to reach that conclusion on the evidence.
24. The panel was not bound to follow the recommendations of the professionals to release. It was their decision to make taking into account all the evidence they heard and their views of the evidence of the witnesses. What the panel was bound to do was to explain why they had disagreed with the professionals' views in their decision. In my view they have done that.

## Decision

25. For the reasons I have given, I do not consider that the decision was irrational and accordingly the application for reconsideration is refused.

**John Saunders**  
**15 April 2024**