

[2025] PBRA 42

## Application for Reconsideration by Molden

### Application

1. This is an application by Molden (the Applicant) for reconsideration of a decision dated 23 January 2025 not to direct his release. The decision was made by a panel after an oral hearing.
2. Rule 28(1) of the Parole Board Rules 2019 (as amended) (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 papers. These are the paper decision, the dossier (consisting of 350 numbered pages), and the application for reconsideration.

### Background

4. The Applicant received a sentence of imprisonment for public protection (IPP) on 17 April 2009 following conviction for wounding with intent to do grievous bodily harm to which he pleaded guilty. On the same occasion he was also convicted of doing a series of acts tending and intended to pervert the course of public justice, to which he also pleaded guilty and received no separate penalty. His tariff expired in December 2011.
5. The Applicant was 22 years old at the time of sentencing and is now 38 years old.
6. The Applicant has been released and recalled twice on this sentence, on both occasions after a hearing before the Parole Board. He was most recently released in January 2020. His licence was revoked in July 2020, but he was not returned to custody until April 2021 after a period of around nine months unlawfully at large.

### Request for Reconsideration

7. The application for reconsideration has been submitted by the Applicant and argues that the decision contained an error of law, that it was irrational, and that it was procedurally unfair.
8. These grounds are supplemented by written arguments to which reference will be made in the **Discussion** section below.

### Current Parole Review



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9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 20 June 2023 to consider whether or not it would be appropriate to direct his release. This is the Applicant's second parole review since his second recall.
10. An oral hearing was held on 7 January 2025 before a two-member panel. The panel heard evidence from the Applicant, his Prison Offender Manager (POM), Community Offender Manager (COM) and an HMPPS forensic psychologist. The Applicant was legally represented throughout the hearing (although not so for this reconsideration matter); the Respondent was not legally represented. None of the professional witnesses supported release.
11. The panel made no direction for release.

### The Relevant Law

12. The Parole Board will direct release if it is no longer necessary for the protection of the public that the prisoner should be confined.

#### *Parole Board Rules 2019 (as amended)*

13. Rule 28(1) of the Parole Board Rules provides the types of decision which are eligible for reconsideration. Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for reconsideration whether 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)).
14. 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)).
15. 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*

16. 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 from the issue of irrationality which focusses on the actual decision.
17. To establish procedural unfairness under rule 28, the Applicant must demonstrate 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.

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

### *Irrationality*

19. The power of the courts to interfere with a decision of a competent tribunal on the ground of irrationality was defined in *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) by Lord Greene in these words: "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*". The same test applies to a reconsideration panel when determining an application on the basis of irrationality.

20. In *R(DSD and others) v Parole Board* [2018] EWHC 694 (Admin) the Divisional Court applied this test to Parole Board hearings in these words (at [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. In *R(Wells) v Parole Board* [2019] EWHC 2710 (Admin) Saini J set out what he described as a more nuanced approach in modern public law which was "*to test the decision maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied*". This test was adopted by the Divisional Court in *R(Secretary of State for Justice) v Parole Board* [2022] EWHC 1282 (Admin).

22. As was made clear by Saini J in *Wells*, this is not a different test to the *Wednesbury* test. The interpretation of and application of the *Wednesbury* test in parole hearings as explained in *DSD* was binding on Saini J.

23. It follows from those principles that in considering an application for reconsideration the reconsideration panel will not substitute its view of the evidence for that of the panel who heard the witnesses.

24. Further while the views of the professional witnesses must be properly considered by a panel deciding on release, the panel is not bound to accept their assessment. The panel must however make clear in its reasons why it is disagreeing with the assessment of the witnesses.

### *Error of law*

25. 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.

26. 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.

### **The reply on behalf of the Respondent**

27. The Respondent has advised that no representations will be submitted in response to this application.

### **Discussion**

28. The Applicant did not have the benefit of legal representation for this application. I have therefore read his submissions very carefully to determine whether there is anything within them that could give rise to an arguable case for reconsideration whether it is based on error of law, irrationality or procedural unfairness.

29. Although the Applicant is understandably dissatisfied with the panel's decision and its implications, I find no basis within the legal framework for reconsideration on the grounds of error of law, irrationality, or procedural unfairness.

### **Decision**

30. For the reasons set out above, the application for reconsideration is refused.

**Stefan Fafinski**  
**25 February 2025**