[2023] PBSA 57

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Application for Set Aside by Matthews

Application

1. This is an application by Matthews (the Applicant) to set aside the decision made by an oral hearing panel dated 17 July 2023 not to direct release.

2. I have considered the application on the papers. These are the oral hearing decision, the dossier, the application for set aside (undated/unsigned) and representations from the Public Protection Casework Section on behalf of the Secretary of State for Justice (the Respondent) (dated 11 August 2023).

Background

3. The Applicant, when he was 32 years old, received a determinate sentence of 6 years and 6 months imprisonment for the offences of wounding and firearms offences. His sentence expires in August 2025.

4. The Applicant was released automatically on the 5 May 2022 but recalled back into custody on the 30 September 2022 following allegations of malicious communication towards an ex-partner and threats to kill in relation to a different ex-partner and her new partner and sister. These matters were subsequently discontinued. Other concerns were also raised at the time of recall, linked to the Applicant's behaviour within intimate relationships, sexually inappropriate behaviour, including concerns around his understanding of consent.

Application for Set Aside

5. The application for set aside has been drafted and submitted by the Applicant's legal representative.

6. The application for set aside submits that when deciding the Applicant's case there was an error of law or fact (where the proceedings were unlawful or relied on factually inaccurate information) and that the decision would not have been made were it not for the error.

7. Comprehensive legal submissions (undated/unsigned) were provided over email on 10 August 2023. These submissions outline several alleged factual inaccuracies, contained within oral evidence, the parole dossier and the Parole Board decision itself. These alleged errors of fact include:

    a) That the Applicant was recalled to prison because the "*police urgently wanted to talk to him in relation to further offences*". Those instructed

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argue that the new allegations had already been discontinued prior to recall being initiated.

b) The Community Offender Manager's (COM) oral evidence that the Applicant posed a "*risk of violence at any time*". Those instructed argue that there is no evidence to support the COM's contention and that the panel, in arriving at its decision, took this evidence "*out of context".*

c) The Applicant was reluctant to provide an address to the COM. Those instructed assert that this is untrue and say that the Applicant did provide accommodation details to a Senior Probation Officer (SPO).

8. Legal representatives also argue that the Applicant was unfairly penalised for not completing any further core risk reduction work during the review period when none was offered and that if a psychological risk assessment were needed, as suggested in the decision (paragraphs 4.8 and 4.9), consideration should have been given to adjourning the Applicant's case for this assessment rather than concluding the review. They also raise issues in relation to the Applicant's health and highlight other safeguarding provisions that are in place to monitor the Applicant's risk in relationships and towards children. (In my opinion none of these matters fall within the scope of the set aside mechanism - see below for further details).

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Applicant) to consider whether to direct his release.

10. The case proceeded to an oral hearing on the 13 July 2023 before a single member panel of the Parole Board. The panel consisted of an Independent Chair Member.

11. The panel did not direct the Applicant's release. A decision was issued on the 17 July 2023.

12. The panel held the Applicant's recall to have been appropriate.

The Relevant Law

13. Rule 28A(1)(a) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) (the Parole Board Rules) provides that a prisoner or the Secretary of State may apply to the Parole Board to set aside certain final decisions. Similarly, under rule 28A(1)(b), the Parole Board may seek to set aside certain final decisions on its own initiative.

14. The types of decisions eligible for set aside are set out in rules 28A(1). Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for set aside 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)).

15. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(3)(a)) **and** either (rule 28A(4)):

a) A direction for release (or a decision not to direct release) would not have been given or made but for an error of law or fact, or
b) A direction for release would not have been made if information that had not been available to the Board had been available, or
c) A direction for release would not have been made if a change in circumstances relating to the prisoner after the direction was given had occurred before it was given.

The reply on behalf of the Respondent

16. The Respondent provided written submissions over email on the 11 August 2023 to confirm that they had "*no comments to add*".

Discussion

Eligibility

17. The application concerns a panel's decision not to direct release following an oral hearing under rule 25(1). The Applicant argues that the condition in rules 28A(1) and 28A(4)(a) are made out. I agree with this submission. It is therefore an eligible decision which falls within the scope of rule 28A.

An Error of Law or Fact

18. As mentioned, the application notes several purported inaccuracies of fact (as set out at paragraph 7 above).

19. The application further states that the direction not to release would not have been made but for these errors of fact.

20. Certain other matters are also raised but as mentioned above at paragraph 8 above I do not consider these issues to be errors of fact, new information, nor a change in circumstances. As such they do not fall within the scope of the set aside mechanism in my opinion and will not be addressed further, other than to highlight:

a) It is a matter of fact that the Applicant has not completed any further core risk reduction work during the review period. Whilst this may not be the Applicant's fault, it is nevertheless an accurate representation of the situation at the time, in my assessment, and was not novel information or a change in circumstances.
b) It is the panel's prerogative whether to adjourn for a Psychological Risk Assessment (PRA) or not. In this case it is clear from the decision that the panel did not find the Applicant to meet the test for release on the evidence before them at that time. The panel did not need a PRA to assist their analysis, but rather recommended one for "*the benefit*" of a "*future panel*"' (Paragraph 4.8).
c) In relation to the non-molestation order and other safeguarding measures referred to in the application, I am satisfied, on the evidence before me that the panel was aware of these provisions at the time of its decision. There is mention of "*victim related conditions*"

within the decision itself (paragraph 3.1). Again, I do not consider this information constitutes as error or fact, new information, nor a change in circumstances.

The test for set aside

21. In determining the application for set aside, I must consider the impact of the purported errors of fact cited at paragraph 7 above on the panel's decision not to release the Applicant. This is a two stage process - (i) do I find there to be an error of fact, and (ii) if so but for that error, would the panel have made an alternative decision.

22. Turning now to the first purported error of fact, that the Applicant was recalled back to prison because the "*police urgently wanted to speak to him about further offences*". This comment is found in the Part A report written by Probation. Those instructed argue that the allegations had been already discontinued prior to recall, and as such this comment is inaccurate.

23. Having reviewed all of the evidence before me, I have concluded that it is impossible to say with certainty if this comment is factually accurate or not, due to inconsistencies in the evidence provided. The decision itself refers to the matters being dismissed "*since recall*" which suggests that the panel may have relied on the Part A report.

24. As such in fairness to the Applicant I have concluded that the panel may have relied on an error of fact. However, even if the panel did rely on this error of fact, I do not consider that this error would have led to an alternative outcome. There is no evidence that the panel placed any weight on the exact circumstances/nature of the Applicant's recall when making its decision, whether it was for urgent police questioning or not. The decision sets out in terms that the allegations made were just one of many other matters under consideration when considering the Applicant's case, including concerns around inappropriate sexual behaviour, poor insight, minimisation and also issues within relationships more broadly. All of these matters led to the panel finding the recall to have been appropriate (paragraphs 4.2, 4.4 and 4.5). Therefore, in my assessment even if this fact is erroneous it would not have led to an alternative outcome.

25. The Applicant further argues that the COM made an error of fact by stating that the Applicant "*posed a risk of violence at any time*". It is suggested that this statement is factually inaccurate, that there is no evidence to support it and that the panel has taken this comment out of context. Again, I do not accept this proposition. In my assessment this comment is an expression of opinion, and not a statement of fact, based on the COM's experience of the case, their risk assessments and knowledge of the Applicant. In my opinion the COM is perfectly entitled to give such an opinion and the panel is also entitled to place weight on it, as it sees fit. Whilst the COM did support release, she also noted that there "*would not necessarily be warning signs before risk escalates*" (paragraph 2.25) and emphasised reliance on external controls and the Applicant's own willingness to engage (paragraph 2.25 and 2.26).

26. I further note that although the panel refer to the COM's opinion within its decision, again this is just one of multiple reasons provided not to support re-release as set out in great detail in paragraphs 4.4 and 4.5 of the decision. Accordingly, even if the COM's comment could be held to be an error of fact, which I do not so find, I am not persuaded that it would have led to an alternative outcome in any event.

27. Finally, the Applicant asserts that it was an error of fact to say that the Applicant "*was reluctant to provide the address of where he would be staying in the community to his offender manager*". Those instructed assert that this is untrue. They say that the Applicant did provide accommodation details to the SPO. Legal representatives are said to have seen screenshots of text messages confirming the same. Whilst those instructed have not produced this further evidence relied upon within their application, I am prepared to accept that the Applicant may have provided the information requested to the SPO (if not his COM) and that, the comment may constitute an error of fact. However, again I do not find that this error of fact would have led to an alternative outcome. The panel's decision not to release the Applicant is set out in great detail in paragraph 4 of the decision. This analysis focusses on multiple concerns, including issues linked to the Applicant's assessed outstanding treatment needs, his poor insight into key risk factors and minimisation. The panel does not rely on this purported error of fact in its decision; indeed, it is not even mentioned. There is no significant discussion around the Applicant's likely compliance/engagement with his past or present COM either and so I must assume that the panel placed little, if any weight, on this error of fact when arriving at its decision.

28. Having decided that the panel's decision not to direct release would not have been affected by these purported errors of fact, I must finally consider whether it is in the interests of justice for its decision to be set aside.

29. I am not so satisfied. The interest of justice would not be served directing the release of a prisoner who appears to have outstanding treatment needs, and limited insight into assessed key risk factors.

Decision

30. For the reasons I have given, the application is dismissed, and the decision of the panel on the 17 July 2023 should not be set aside.

Heidi Leavesley
12 September 2023