

[2024] PBSA 68**Application for Set Aside by Phillips****Application**

1. This is an application by Phillips (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 3 September 2024. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 3 September 2024), and the application for set aside (dated 9 October 2024).

Background

3. On 13 October 2022, the Applicant received a sentence of 3 years following a guilty plea to an offence of attempted robbery. He was on the same occasion sentenced to concurrent sentences for 19 other offences of assaults, theft, possession of cannabis, public order, criminal damage, racially aggravated harassment and failing to comply with the requirements of a community order.
4. The Applicant was aged 25 at the time of sentencing. He is now 27 years old.
5. He was automatically released on licence on 27 September 2023. His licence was revoked on 3 November 2023 and he was returned to custody on 6 December 2023. This is his first recall on this sentence, and his first parole review since recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by the Applicant with assistance from his mother. It submits that there has been errors of fact and errors of law in the decision.

Current parole review

7. The Applicant's case was referred to the Parole Board by the Secretary of State (**the Respondent**) to consider whether to direct his release.
8. The case proceeded to an oral hearing on 3 September 2024 before a single independent member. The panel heard evidence from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing.



9. The panel did not direct the Applicant's release.

The Relevant Law

10. 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.

11. The types of decisions eligible for set aside are set out in rule 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)).

12. 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 given if information that had not been available to the Board had been available, or
- c) a direction for release would not have been given 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

13. The Respondent has offered no representations in response to this application.

Discussion

14. It is argued on behalf of the Applicant that there have been errors of fact and errors of law in the panel's decision. Taking each of his submissions in order I find as follows.

15. **Ground 1** – Failure to conduct mandatory drug testing. It was not necessary for the COM to conduct a mandatory drug test before concluding that the Applicant appeared under the influence when he presented with glazed eyes, slurred speech, unsteadiness on his feet and inability to focus. His observations supported his conclusion that the Applicant continues to use drugs. The panel was entitled to accept the evidence of the COM of continued drug use, even in the absence of a mandatory test. The reasoned decision as to the acceptance of the evidence of the COM does not amount to an error of fact or law. The panel's conclusion that the Applicant cannot be safely managed in the community is based on a number of factors, his continued use of drugs being only one factor. There is no error of fact or law in this analysis.

16. **Ground 2** – Failure to consider cognitive and social impairments. The Applicant submits that there was a breach of duty to make reasonable adjustments in the light of his mental health conditions and there was a misunderstanding in the interpretation of his behaviours. The Mental Health In-reach Team notes that the Applicant will have a legal representative to help him understand and cope with the hearing and states that it is *"unlikely that he will require adjustments in order for his case to be dealt with fairly and justly"*. The application does not identify the adjustments it is said were not made. The Applicant was represented throughout the hearing and no concerns or complaints were raised at the start of or during the hearing or in the written closing submissions about failure to make reasonable adjustments.
17. The panel was aware of the Applicant's mental health challenges, the COM references it and his mother also does so in her letter to the panel. There was no medical, psychological or psychiatric report in the dossier or drawn to the panel's attention or persuasively argued to support the interpretation of the behaviours of the Applicant as being due to his cognitive impairment.
18. I do not find any errors of law or fact in respect of this ground.
19. **Ground 3** – Flawed OASys risk assessment. The Applicant submits that the risk assessment did not consider his cognitive limitations. The Applicant does not provide any further medical evidence to support his conclusions regarding the extent of his cognitive limitations. The COM was entitled to and did rely on the professional evidence provided by the In-reach Team and all the other evidence presented in the dossier regarding the Applicant's mental health. There is no error of law or fact in that approach or the conclusions reached.
20. **Ground 4** – Failure to properly evaluate post-release risk management. The panel did not consider that the risk management plan was robust enough to manage the risks posed by the Applicant. However, the panel noted the improvement in some of the Applicant's behaviour, his compliance with his medication and the increased input from his keywork and neurodiversity teams. The panel's conclusion, based on oral and written evidence, was that the level of support and monitoring the Applicant would receive in the community would not be sufficient. The panel also noted that he had not previously coped with the requirements of previous orders and had re-offended. There is no error of law or fact in this reasoned evaluation of the post-release management.
21. **Ground 5** – Misinterpretation of the Applicant's insight into substance misuse. The panel was aware of the courses attended by the Applicant, recording that he had not engaged in any offence focused work during the course of his sentence. The COM noted in his part C report completed shortly before the hearing in July 2024, that the Applicant would benefit from engaging with substance misuse intervention to address relapse prevention. The Applicant's claim to have completed substance misuse intervention (he does not say where or when) which was not adequately communicated or acknowledged does not amount to an error of fact or law. The suggestion from the POM does not exclude the possibility that the Applicant would benefit from doing the course again. He gave evidence at the oral hearing and was represented by an advocate who was able to question the witnesses. In addition,

the panel received further written representations post hearing from his representative which it considered. There is no identified error of fact or law in this ground.

22. **Ground 6** – Inadequate consideration of the Applicant’s prison support. Whilst the application submits that the assessment of support received by the Applicant in custody was factually inaccurate no further details are given. The panel took into account the evidence from both the POM and the COM regarding the custodial support received by the Applicant and has noted that the level of support is greater than that provided in the risk management plan. In the absence of any further details in the application I cannot find any error of fact in this ground.

23. **Ground 7** – Impact on the Applicant’s family and housing. The Applicant submits that his release is critical to prevent homelessness which would exacerbate his mental health issues. No error of fact or law arises from this ground. The panel acknowledges the cost of the Applicant’s accommodation which is being met by his mother and also considered all the further submissions made on his behalf in the letter from his mother. The panel applied the correct legal test and gave reasons for its conclusions. I am satisfied that there has been no error of law and this ground fails.

Decision

24. For the reasons I have given, the application for set aside is refused.

Barbara Mensah
25 October 2024