

[2022] PBSA 24

Application for Set Aside by Challis

Application

1. This is an application by Challis (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated 28 November 2022 following an oral hearing on 21 November 2022. The panel made no direction for release.
2. I have considered the application on the papers. These are the decision reasons (the decision), the dossier of 481 pages which included a copy of the decision, the written application to set aside (incorrectly dated in 2021) and a Stakeholder Response Form (SHRF) sent on behalf of the Secretary of State (the Respondent) dated 6 December 2022.

Background

3. On 3 September 2015, the Applicant received a total sentence of 11 years and 8 months' imprisonment in total following conviction for rape and other sexual offences against children. His offending involved both a male and a female child. His sentence expires in August 2026.
4. The Applicant was aged 21 at the time of sentencing. He is now 28 years old.

Application to Set Aside

5. The application to set aside is dated 6 December 2021 (ought to be 2022) and has been drafted and submitted by the legal representative on behalf of the Applicant.
6. The application to set aside is made on the basis there were errors of fact in that the panel "ignored or misinterpreted" material evidence from professionals. The Applicant submits that the following errors of fact were made;
 - a) The panel's conclusion that the Applicant was evasive and circuitous in evidence, thereby dismissing the Psychologist's suggestion that this may be down to his particular diagnosis and shame.
 - b) The panel's failure to conclude that the Applicant's new found religious faith was a protective factor.
 - c) The additional work completed to address sex offending was not taken into consideration as it could not be located which led to the panel mistakenly concluding that the Applicant had not completed the necessary level of intensity of work to address sex offending.

- d) The panel's conclusion that the Applicant needed to address his intimate partner violence was a mistake of fact as the panel did not accept the Psychologist's view on this and the panel were mistaken in thinking a Programme Needs Assessment was needed or would result in eligibility for the Kaizen accredited programme.

Current Parole Review

7. This was the first review of the Applicant's case following his recall.
8. The Applicant had been released automatically as is required by law on 14 October 2020. His licence was revoked on 10 February 2022 and he was returned to custody the next day.
9. He had been recalled due to concerns about his behaviour and his mental health. This included being arrested for further offences, which later resulted in him being sentenced to 6 weeks' imprisonment for two offences of assaulting a police officer.
10. The Applicant's case was referred to the Parole Board by the Respondent to consider whether it would be appropriate to direct his re-release following the revocation of his licence. His case was considered by a Member Case Assessment (MCA) member on 22 April 2022 and it was adjourned to obtain further information. The MCA member considered his case again on 20 June 2022 and directed the case to an oral hearing.
11. An oral hearing was held on 21 November 2022 before a three member panel, including a Psychiatrist member. The panel heard evidence from the Applicant's Prison Offender Manager (POM), Community Offender Manager (COM) and a Psychologist instructed by the Applicant's legal representative. The Applicant, who was legally represented throughout, also gave evidence to the panel. The panel concluded that the Applicant did not meet the legal test for release and therefore made no direction for release.

The Relevant Law

12. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that a prisoner or the Secretary of State may apply to the Parole Board to set aside certain final decisions. Similarly, also under the Rules, the Parole Board may seek to set aside certain final decisions on its own initiative.
13. 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)).
14. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(3)(a)) **and** if one or more of the conditions in rule 28A(4) are satisfied:



- 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
 - (i) information that had not been available to the Board had been available, or
 - (ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.

15. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision if the grounds of challenge relate to there having been an error of law or fact.

The Reply from the Respondent

16. The Secretary of State (the Respondent) informed the Parole Board by way of an SHRF dated 6 December 2022 from the Public Protection Casework Section that he had no representations to make in response.

Discussion

Eligibility

17. The application concerns a panel's decision not to direct release following an oral hearing under rule 25. The decision is dated 28 November 2022. The Applicant submitted his application on 6 December 2022 which was well within 21 days of the decision. It is therefore an eligible decision which falls within the scope of rule 28A.

Error of Fact

18. In order to set aside this decision, I have to be satisfied that it is in the interests of justice to do so.

19. I also have to be satisfied that there was an error of fact and also that the decision not to direct release of the Applicant would not have been made but for that error.

20. The mistake of fact must be an established mistake, not just a matter in which the Applicant would have preferred the panel to have concluded differently. The provisions for setting aside are not an opportunity to have a 'second bite of the cherry' as it were.

21. I remind myself that panels of the Parole Board are not obliged to adopt the opinions of professional witnesses. It is their responsibility to make their own risk assessments and to evaluate the likely effectiveness of any risk management plan proposed. They must make up their own minds on the totality of the evidence that they hear, including any evidence from the Applicant. A panel would be failing in their duty to protect the public from serious harm (while also protecting the prisoner from unnecessary incarceration) if it failed to do just that.

22. The Applicant is correct that the panel came to the conclusion that the Applicant was *"somewhat evasive and circuitous in evidence"*. The panel did not assess this as

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3rd Floor, 10 South Colonnade, London E14 4PU



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something to be attributed to his particular diagnosis but rather *"his desire to speak on topics about which he was more comfortable"*. The Applicant does not appear to challenge the panel's opinion of his evidence in the hearing, more the reasoning for it. The panel was entitled, using its specialist skills including that of a psychiatrist member, to draw this conclusion and to disagree with the witness. The panel did not dismiss the psychologist's evidence, it considered it and chose not to agree with it. That does not make it a mistake of fact.

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23. The Applicant's next point is that it was a mistake of fact that the panel did not consider his religious faith to be protective. The panel clearly carefully considered this matter. At paragraph 2.18 of the decision, the panel included the Applicant's faith as a protective factor identified by professionals. The panel then went on, at paragraph 4.8 to state that faith can be a protective factor but in this case the panel did not consider that reliance could be placed on it to manage risk on licence. I do not read that as the panel concluding it was definitely not a protective factor, more that the panel decided that, in this particular case, if it was a protective factor, it was not one which was sufficiently strong enough to counter the risk or prevent further offending.
24. The Applicant submits that his additional work completed to address sex offending was not taken into consideration as it could not be located, which led to the panel mistakenly concluding that the Applicant had not completed the necessary level of intensity of work to address sex offending. This related to an accredited programme completed in the community. The panel had access to a report about his work and engagement on that programme. The Applicant submitted that he did additional work not mentioned within that report. From the evidence heard by the panel, none of the professionals had seen this work. The Applicant did not produce it for the hearing, which he was entitled to do. The panel cannot be criticised for failing to take account of something which was not available to it at the time (and indeed is not available now). This is not a matter which can amount to a mistake. The panel considered the evidence available which included a full report about the accredited programme including concerns raised, as well as the Applicant's evidence and the evidence related to his behaviour in the community and concluded that the Applicant had not completed sufficient work to address his particular risks.
25. The final mistake of fact which the Applicant raises is the panel's conclusion that the Applicant needed to address his intimate partner violence. The Applicant again submits that this was a mistake of fact due to the panel not accepting the Psychologist's view on this, and the panel was mistaken in thinking a Programme Needs Assessment (PNA) was needed or would result in eligibility for the Kaizen accredited programme. As noted above, simply disagreeing with a witness does not make something a mistake of fact. The panel relied on ample evidence as detailed in its conclusion (specifically paragraph 4.9) that this area of risk still required addressing. The panel raised the issue that a PNA did not appear to have been considered. There is no suggestion that this was a material part of its decision given the other detail contained within the conclusion. The panel is not tasked with deciding on how risk ought to be addressed, instead it looks solely at whether it needs to be addressed before release can be directed.
26. In light of the above, I am not satisfied that there was a mistake of fact and, even if there were, I am not satisfied that the decision would not have been made but for



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that supposed error. Given those conclusions, and taking into account all matters raised in the application, I am not satisfied that it is in the interests of justice to set aside this decision.

Decision

27. For the reasons I have given, the application is refused, and the decision of the panel dated 28 November 2022 remains final.

Cassie Williams
21 December 2022