

Application for Set Aside by Daley

Application

1. This is an application by Daley (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 20 March 2023), and the application for set aside (10 April 2023).

Background

3. On 15 August 2018, the Applicant received a determinate sentence of detention for seven years in total following conviction for aggravated burglary in a dwelling, violent disorder, possessing an offensive weapon in a public place, possessing an imitation firearm with intent to cause fear of violence, and attempted criminal damage. He pleaded guilty to all charges. He was further convicted on 30 August 2018 of possessing a specified item in prison without authority and received a concurrent sentence of detention for six months. He also pleaded guilty to this further offence. His sentence expires in June 2025.
4. The Applicant was aged 20 at the time of sentencing. He is now 25 years old.
5. The Applicant was automatically released on licence on 31 December 2021. His licence was revoked on 3 March 2022, and he was returned to custody the same day. This is his first recall on this sentence and his first parole review since recall.
6. The circumstances of the recall are relevant to the application, and it is therefore necessary to set them out in more detail than would be usual in an application for set aside:
 - a) 31 December 2021: the Applicant was released to designated accommodation.
 - b) 4 February 2022: the Applicant moved to share a flat with a family member.
 - c) 8 February 2022: police received intelligence (graded 'reliable, known directly') which suggested the Applicant (and others) were to be involved in a gun fight at 7pm that evening at a specific location. Threat to life disruption notices were issued to others and police specialist firearms officers attended the location at the appointed time. This passed without incident. The police were unable to locate the Applicant beforehand.

- d) 10 February 2022: the Applicant was retrospectively issued with a threat to life disruption notice by the police.
- e) 14 February 2022: a licence variation was completed, and a curfew to the Applicant's home was added to his licence.
- f) 2 March 2022: the Applicant's Community Offender Manager (**COM**) was advised that police had seen him driving a van. He was directed to stop but drove off. The van was later found parked, and four males ran off. The Applicant was to be summonsed for driving otherwise than in accordance with a licence and driving without insurance. Recall was initiated.
- g) 3 March 2022: the Applicant's licence was revoked. The Secretary of State was satisfied that the Applicant has breached the condition of his licence requiring him to "*be of good behaviour and not behave in a way which undermines the purpose of the licence period*". The Applicant was returned to custody.
- h) 23 March 2022: the Applicant received a postal requisition (summons) in respect of the recall allegations. He pleaded guilty to both offences by post.
- i) 19 May 2022: the Applicant was convicted and received a fine and an endorsement of penalty points on his licence. No further custodial sentence was imposed.

Application for Set Aside

- 7. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.
- 8. It submits that there has been an error of law and/or fact.

Current Parole Review

- 9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.
- 10. It was directed to an oral hearing, which was listed for 19 January 2023. In advance of the hearing, Panel Chair Directions (**PCDs**) were made on 30 December 2022. These noted that there was little information in the dossier concerning the threat to life notice or the police intelligence that suggested the Applicant was going to be involved in a violent incident, and directions were set for disclosure. A police witness had already been directed to attend.
- 11. An oral hearing took place on 19 January 2023 before a two-member panel. Oral evidence was taken from the police witness (a Detective Constable, **DC**), the Applicant's Prison Offender Manager (**POM**) and the Applicant. The Applicant was legally represented throughout the hearing. The hearing was adjourned for lack of time and reconvened on 13 March 2023. Oral evidence was heard from the COM and

the Applicant. The Applicant was legally represented throughout the hearing. Closing submissions on behalf of the Applicant were made in writing.

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

The Relevant Law

13. Rule 28A(1) of 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(2), 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 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)).

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 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

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

Discussion

17. It is first argued that the panel "*did not apply the balance of probability test*". This relates to a submission that the panel "*laid all weight on the decision to refuse [the Applicant's] release based solely upon intelligence without any finding of evidence or fact*". The intelligence in question here is the evidence of the DC who told the panel that the Applicant was "*relatively high up the chain of drug dealing*" and his criminal behaviour was "*predominantly drug supply*" and linked to violence.

18. The application goes on to argue that if the panel had applied the test correctly, it would have concluded that the Applicant was not a person likely to be involved in the supply of drugs, since he only has one previous conviction from 2016 for possession of Class A drugs.

19. The argument here, then, appears to be that the panel must have applied the test incorrectly; otherwise, it would have reached a different conclusion. Of course, it is

equally possible that the panel applied the test correctly but reached a different conclusion than that for which the Applicant's legal representative was arguing.

20. The panel heard the evidence from the DC and gave it weight: as far as the police were concerned, the Applicant was significantly involved in drug dealing and potential violence. While the Applicant may only have a historic drug-related conviction, it does not follow that the police intelligence must consequently be (more likely than not) false, particularly when a police officer gave oral evidence that suggested otherwise.

21. It is submitted that, applying **Pearce [2020] EWHC 3437 (Admin)** the decision to refuse release on unsubstantiated evidence is wrong in law.

22. The panel did not refuse release on the sole basis that the Applicant was involved in drug dealing. The panel's conclusion does not mention drug dealing. It cannot therefore be said that the panel reached its conclusion based on unsubstantiated evidence. The panel noted the efforts of the police in taking steps to issue a threat to life notice which suggested that concerns relating to risk of violence were real and serious.

23. Although the Applicant's legal representative argued that there was no immediate threat, the panel disagreed. It was entitled to do so.

24. The next matter raised in the application concerns attendance at the reconvened hearing. It is noted that the DC did not attend the reconvened hearing, despite being named on the timetable. It is argued that the panel was consequently in breach of rule 13(5) of the Parole Board Rules.

25. Rule 13(5) provides that "*The panel chair or duty member who determines the application under paragraph (4) must give reasons in writing for any refusal to call a witness*".

26. This argument is wholly misconceived. Rule 13 relates to the procedure by which a party to proceedings (that is, the Secretary of State or the prisoner) may make an application to call a witness. It does not appear that the Applicant made an application for the DC to attend the reconvened hearing (either in writing or orally when the hearing reconvened) and so there was nothing for the panel chair to refuse or otherwise. The rule relied upon is not applicable to the situation.

27. The application goes on to discuss various risk assessments within the dossier. It is argued that the risk assessments were not accurate or a true reflection of the Applicant's risk of harm to the public. The panel's decision notes carefully that the Applicant's legal representative challenged the assessments both at the hearing and in closing submissions. The panel reached its own independent assessment of risk having heard all the oral evidence and considered the various assessments within the dossier as well as the legal representations. That is its job. The fact that this differs from that of the Applicant's legal representative is irrelevant. The panel gives clear reasons for its assessment of risk, including the admission of past non-

convicted violence and the concerns raised on licence (such as the police issuing a threat to life notice). There is no error of fact here.

28. The next part of the application relates to security intelligence within the prison. It is argued that the panel has relied on unsubstantiated information to refuse release. There is nothing in the panel's decision that suggest that it has relied on the prison security information in such a way.

29. The remainder of the application does not set out anything that could amount to an error of law or fact. It essentially re-argues the Applicant's case for release which is irrelevant as far as the set aside process is concerned.

30. In closing, the application submits that the panel has not applied the correct test for release. I disagree. It also argues that correct procedures have not been followed. That is not a basis upon which a decision can be set aside. The Applicant and his legal representative may not like the panel's decision; it is clear that they disagree with it. But there is nothing in the application that amounts to an error of law or fact.

31. Even if there was, there are no arguments put forward that persuade me that the panel's decision would have been different but for any such error, nor that it would be in the interests of justice for its decision to be set aside.

Decision

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

Stefan Fafinski
28 April 2023