

[2023] PBSA 56

## Application for Set Aside by Cook

### Application

1. This is an application by Cook (the Applicant) under rule 28A(1) of the Parole Board Rules 2019 to set aside a decision of the Parole Board dated 28 June 2023 declining to release him. The decision was made following an oral hearing which commenced on 9 February 2023 and continued on 8 and 9 June 2023. The application is lodged on the ground that the decision would not have been made but for an error of fact or law and that it is in the interests of justice to set it aside.
2. Rules 28A(3) and (4) of the Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible decision (as set out in rule 28A(1)) if the decision maker is satisfied that the decision would not have been made but for an error of fact or law and that it is in the interests of justice to set aside the decision.
3. I have considered the application on the papers. These are: (1) the dossier, now running to some 968 pages including the written closing submissions of the Applicant's representative to the panel; (2) the decision letter; (3) the application to set aside supported by written submissions of the Applicant's representative dated 18 July; (4) earlier written submissions of the Applicant's representative dated 20 March in support of an application for a change of panel on the grounds that the present panel was biased; (5) the response of the panel chair dated 3 May refusing that application. In addition, I have watched and listened to video recordings of those parts of the hearing for which they are available; I will refer to these when I discuss the grounds on which the application is based.
4. As will appear below, the Applicant is serving an indeterminate sentence. The Parole Board Rules contain two processes by which a decision in such a case may be challenged. The first process is an application for reconsideration under rule 28. This process was introduced in 2019 and modified in 2022. The second process is an application to set aside under rule 28A. This process was introduced in 2022. It is the second process that the Applicant has engaged. I have caused the Parole Board set-aside team to check whether an application for reconsideration was also made; I am informed that there was none.

### Background

5. On 13 July 2007 the Applicant received a sentence of imprisonment for public protection (IPP). The minimum term was set at 4 years less time on remand. This minimum term expired on 18 October 2010. Prior to his release on licence the



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



[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)



[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)



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0203 880 0885

Applicant's progress was twice impeded by return from open to closed conditions following concerns over involvement with drugs. The Applicant was first released on licence in May 2017; he was recalled in August 2017 following concerns over his behaviour as a result of which he was given notice to leave a rehabilitation placement and absconded. The Applicant was released on licence for a second time in July 2020. He was recalled after just 8 days in circumstances which I will set out further below.

6. The Applicant received his IPP sentence for two offences. Firstly, in April 2006 he committed an offence of arson reckless as to whether life was endangered. He set a fire at his girlfriend's house following threatening phone calls to her in which he said he would kill her and her brother and petrol bomb her house and the house of her family. Secondly, in October 2006 he and another committed a robbery in which the victim, a 17-year-old moped rider, was threatened with a gun and repeatedly head-butted and struck with the gun to the extent that he required facial reconstruction. The offences were committed under the influence of alcohol. The second offence was also committed under the influence of drugs. At the time of sentence the Applicant was addicted to both alcohol and drugs.

### **The grounds of the application**

7. The grounds in support of the application argue that the panel took an approach which was wrong in law; that it was tainted by bias; and that it reached a conclusion which was wrong in principle. I consider that the main points are as follows.

#### **Bias**

8. The panel demonstrated undue bias – during the initial hearing on 9 February 2023, in subsequent written directions, and at the resumed hearing in June 2023. This bias was evinced in its handling of an allegation relating to a sex worker at the time of recall; in its handling of an allegation relating to an alleged serious assault on a prisoner in a prison yard while he was recalled to prison in August 2021; and in its approach to adjudications and security information. The panel questioned witnesses, including the Applicant, intensely in an attempt to establish the Applicant's guilt of the allegations when he had not been charged in relation to the sex worker and had actually been acquitted (the prosecution offering no evidence) in relation to the attack in the prison yard. They criticised the Applicant for declining to answer questions in interview when this was his legal right. They criticised the Applicant for being late back to approved premises at the time of recall when he was late because he had been stopped and detained by the police. The panel placed a weight on security intelligence and prior adjudications that this type of evidence could not bear. The panel chair should have accepted an application made in March 2023 for the panel to be replaced on the grounds of bias.

#### **Error of fact**

9. The panel made findings on the balance of probabilities in relation to the allegations relating to the sex worker and the assault in the prison yard which were factually wrong. In particular it found that there was a sexual assault when there was no evidence of such an assault; and it found that the Applicant was involved with the prisoner who was the victim of the assault when he denied that involvement and



there was no satisfactory identification evidence (this being the reason that the prosecution offered no evidence and not guilty verdicts were entered).

### **Error of law**

10. The panel erred in law in criticising the Applicant's decision not to answer questions when interviewed by the police; it was his legal right not to answer such questions.

### **Inadequate reasons**

11. The panel differed from the conclusion of professional witnesses that his risk could be managed in the community without giving any adequate reasons for doing so.
12. I consider that the above summary will suffice for the purpose of these reasons, but I make it clear that some points are developed in detail in the submissions; I have kept the detail in mind and considered the submissions as a whole.

## **The Current Parole Review**

### **The procedure**

13. The Applicant's case was referred to the Parole Board in August 2020 following his recall to prison. Two factors delayed its progress. Firstly, there was a question whether the Applicant would be charged with an offence or offences arising from the incident with the sex worker which immediately preceded his recall. It was established at the end of November 2020 that there would be no charges, but directions had then to be given for police reports and witnesses relating to the matter. Secondly, following the assault in the prison yard in August 2021, the Applicant was actually charged with criminal offences which were sent for trial to the Crown Court. Directions were given, including a direction for a psychological risk assessment, while trial was awaited. The prosecution notified its intention to offer no evidence at the end of May 2022. The psychological risk assessment was provided in August 2022.
14. The oral hearing commenced on 9 February 2023. The chair was a judicial member of the Board. The two co-panellists were both independent members. At the first hearing the panel took evidence from four witnesses on a limited basis mainly directed to understanding what evidence there was in support of the two allegations. The case was adjourned, and directions were given for some additional reports and witnesses, including an additional security officer and prison officer. At the resumed oral hearing evidence was taken from the security manager at the prison, the prison offender manager (POM), the Applicant, the psychologist and the community offender manager (COM).

### **The circumstances of recall**

15. As noted above, the Applicant had been recalled to prison after just 6 days on licence residing in approved premises. Police had been called to a park area following calls from two members of the public describing a female shouting "help me" and "get off". A witness described going to see what was happening and hearing "please get off me, you're strangling me, you're really hurting me". The witness



described sounds of a struggle where a female was groaning. The witness described seeing a man on top of a woman in the long grass; when asked what he was doing the man got off the female who ran to the witness, visibly upset, and wrapped her arms round the witness, pleading to go home.

16. When police arrived, the female ran off and would only say to the police that a man had grabbed her by the throat as she walked through the park. She refused to give further detail and left the location. The Applicant was arrested. He said that he had just paid her for sex: "I've paid her so how can it be rape". He said he did not know why she was running away. He told the police that he was on life licence and subject to a curfew. He said that he had had "a few bevviies". He was compliant with the police and answered their questions. He was de-arrested and taken back to the approved premises.
17. The Applicant's curfew expired at 21:00. The calls to the police were at about 22:44. So, on any view the Applicant was late for his curfew before the involvement of the police. The police returned him to the hostel at 23:20. The police told the COM that there would be an investigation for possible sexual assault or attempted rape. The Applicant was recalled. However, the female did not co-operate with police attempts to investigate the matter. The Applicant was told that no charges would be brought against him, the police considering that there was no realistic prospect of a successful conviction.
18. In his accounts to professional witnesses and his evidence to the panel the Applicant gave evidence broadly in line with the account above. He did not accept that he was violent at all. He did accept that he had paid for sex, that he had kneeled down (but not got on top of her), that the female had screamed and run off, that he had been drinking and that he was in breach of curfew. Initially he had challenged whether recall was appropriate. By the time of the hearing, he did not challenge the appropriateness of recall.
19. The panel made the following findings of fact about the incident on the balance of probabilities (decision, page 22):

*"That there was no evidence that anyone other than [the Applicant] was involved in the incident with the female, that during a paid for sexual encounter, he went to the floor, that she screamed and passers-by were so concerned that they rang the Police, fearing for the woman's safety and that the woman ran off and, later, when contacted, declined to co-operate with the Police."*

### **The assault in the prison yard**

20. On 11 August 2021 in the yard of the prison where the Applicant was on recall a prisoner was the subject of a serious assault where he was stabbed to the right side of the neck with an improvised weapon. His injury required 14 stitches and left lasting scarring. CCTV showed the incident. The perpetrator put the improvised weapon down a drain; it was recovered from there. The Applicant was identified by a female prison officer as the perpetrator shown on CCTV. He was arrested and answered no comment to questions in interview. He was charged with wounding with intent and with being in possession of an improvised blade inside a prison. He



pleaded not guilty to these charges. His legal representative submitted a defence statement denying that he knew the prisoner and disputing identification.

21. As noted above, the Crown Prosecution Service decided to offer no evidence. The reason given was that there was no clear identification of the perpetrator. There was, in particular, no statement from the member of staff who had identified the Applicant on the CCTV, nor was the prisoner able to identify the perpetrator.
22. The panel received evidence from prison officers relating to the incident, but not from the female officer allegedly able to make an identification from the CCTV. The panel did, however, have other evidence implicating the Applicant as the perpetrator. The POM gave evidence that he had discussed the matter with the Applicant and that the Applicant had admitted that he was the perpetrator, blaming his mental state and also alleging that the prisoner had touched him inappropriately. The panel also heard that there had been security information prior to the incident suggesting that the Applicant would attack the prisoner; but it found that it was unable to make an assessment of the reliability of that information. In his evidence the Applicant denied that he was the perpetrator of the assault. He said that he could not remember the discussions with his POM, pointing out that he had mental health problems at the time.
23. The panel made the following findings of fact about this incident.

*"That [the Applicant] was present in the exercise yard close to where [the prisoner] was injured and that, within a matter of minutes, he had been identified on CCTV by a prison officer, on duty in the yard, as the man close to [the prisoner] at the time he was injured and as responsible for depositing, in a yard drain, an improvised weapon. The Panel further finds that, on three separate occasions, [the Applicant] made, to his POM, admissions as to his involvement in the incidents. It further finds that intelligence warnings had been received linking [the Applicant] to an expected attack but it is unable to form a view as to the reliability of that information or whether that intelligence was available to yard staff at the time the incident took place."*

### **The panel's overall conclusions**

24. In its conclusions the panel said that the focus of the hearings had inevitably been on the two incidents which I have described above. But it noted that it had received evidence of other poor and negative behaviour, interspersed by better conduct which on occasion attracted favourable comment. The negative behaviour included instances in 2023 where he had been found in possession of 'hooch' (March) and where he had refused a direct order (May). There had been a recent incident where he produced an improvised blade which he had explained as a cry for help.
25. The panel set out its reasoning for refusing release in considerable detail. It noted that the three professional witnesses had all recommended release. It set out its concerns with the reasoning of each of these witnesses. The POM, it found, had placed considerable weight on his own good, pastoral, relationship with the Applicant, whereas his prison conduct generally had been problematic. The psychologist had placed considerable weight on the opinion of the POM and the COM and had limited interaction with the Applicant herself.



26. Two paragraphs of the panel's reasons bear quoting in full. The first deals with the recommendation of the COM for release. The second deals with the panel's own assessment of the Applicant.

*"[The COM] gave no indication of any doubt in relation to her recommendations. [The Applicant] had not been convicted for the serious incidents and in general terms, she appeared willing to accept his interpretation of events and his explanations for his behaviour – even matters such as the recent production of a blade in the exercise yard as no more than a cry for help and her "sense" that his problems were potentially worse from being in prison, did not appear to raise, for her, real concerns as to risks to others in the community. Clearly aware of past difficulties in his dealings with Probation, she appeared eager to accept, despite comparatively little contact with him, his assurances that he would continue to be open with her in the community. All in all, the Panel did not accept her recommendation as an objective and measured assessment even accepting her assurance that the RMP, in providing external controls did so incorporating the risks levels applicable had there been criminal convictions."*

*"The Panel, itself, did not find [the Applicant's] own evidence to be, in any way, compelling. It detected a long-standing pattern of manipulative behaviour, of frequently justification of poor conduct by minimisation and blaming of others. His attitude towards Probation had long been hostile and his assurances of change both in that relationship and his attitudes towards others had yet to be justified. In particular, the Panel did not believe his versions both in relation to the sex worker assault and his involvement with MR on the day of the exercise yard incident nor that he genuinely could not remember his various admissions to his POM. His blaming of mental instability is not borne out by the recent mental health report. So far as his attitude in general and his readiness for release, the Panel found particularly significant the comment from [the COM] that she considered [the Applicant] to be giving Probation "one last chance to repair the relationship." He has a long history of poor co-operation with authority and continuing breaches and poor behaviour until very recent times, notwithstanding the approach of this hearing. The Panel, in its duty to consider risk to the public, cannot rely on general verbal assurances which his conduct indicates are unlikely to be fulfilled. It further finds that his claim of complete co-operation with the Police in relation to the MR enquiries not to be justified, noting that, as was his legal right, he made "no comment" to all relevant questions and his Defence Case statement, too, was largely limited to requests for additional information."*

### The relevant law

27. The decision not to release the Applicant was taken under rule 25(1)(b) of the Parole Board Rules. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) of the Parole Board Rules.
28. An application under rule 28A(1) must be brought within 21 days of the decision: see rule 28A(5)(a). That requirement has been satisfied in this case.



29. Rule 28A(3) provides that the decision maker may set aside such a decision if satisfied that (1) one of the conditions in rule 28A(4) is applicable and (2) it is in the interests of justice to do so.

30. The condition on which the Applicant relies is set out in rule 28A(4)(a) which so far as relevant provides:

*"(a) the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law or fact."*

31. As I have noted above, this application is an application for set aside, made under rule 28A which was introduced in 2022. The case would have been eligible for an application for reconsideration under rule 28, introduced in 2019. Under rule 28 in its present iteration the grounds on which an application can be brought expressly include error of law, irrationality and procedural unfairness.

32. The grounds on which an application for set aside may be made do not expressly include procedural unfairness. However, I am satisfied that the category of error of law in rule 28A includes procedural unfairness: it is an error of law to take a decision in a manner which is procedurally unfair. It is commonplace in the UK legal system for an appeal to be limited to a question of law: see, for example, section 11(1) of the Tribunals Courts and Enforcement Act 2007 (the Upper Tribunal) and section 11(1) of the Employment Tribunals Act 1996 (the Employment Appeal Tribunal). There is no doubt that an appeal will lie to either of these bodies on the ground that the hearing below was procedurally unfair. I am satisfied that the concept of "error of law" should be applied in the same way in rule 28A(4).

33. A decision will be procedurally unfair if it is infected by actual or apparent bias. The approach to be taken to this question is as follows. First, it is necessary to ascertain all the circumstances which have a bearing on the suggestion that the panel or a member of the panel was biased. Then it is necessary to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. See **Magill v Porter** [2002] 2 AC 357, especially at paragraphs 102-103.

34. It is important also to keep in mind that bias is concerned with an actual or apparent disposition to pre-judge the outcome of a case. At the end of a case the panel will have to take a decision, and this may involve forming an adverse view of a party or of a party's case on a particular issue. Forming a judgment at the end of a case is of course not unlawful bias: it is an essential part of the panel's lawful task.

### **The reply on behalf of the Secretary of State for Justice (the Respondent)**

35. The Respondent did not submit any representations in respect of this application.

### **Discussion**

#### **Bias**



36. I will first address the question whether the decision is procedurally unfair by reason of bias on the part of the panel or any member of the panel.
37. It is first important to keep in mind that, where the panel is aware of an allegation against a prisoner which is potentially relevant to the assessment of that prisoner's risk, it has a duty to consider that allegation and to consider what enquiries it is reasonable for the panel to direct in order to assess it. The existence of this duty was thrown into sharp relief by the *Worboys* case (**R(D) v Parole Board** [2019] QB 285). This case led to the Parole Board publishing guidance on allegations. The lawfulness of that guidance has recently been considered by the Supreme Court in **R (Pearce and another) v Parole Board** [2023] UKSC 13: see, for a summary of the position, especially paragraph 87. The panel's power and duty to enquire into an allegation which bears upon the prisoner's risk does not depend on whether the prisoner was prosecuted for the allegation or whether the prosecution was dropped for want of evidence which would satisfy the criminal burden of proof; the *Worboys* case was indeed a case where the panel should have given some consideration to alleged offences for which he was not (then) prosecuted.
38. It is therefore not at all surprising, and not at all indicative of bias, that the panel should have sought further information about the allegations leading to recall and the allegations concerning the assault in the prison yard. These were allegations plainly relevant to the Applicant's risk. The panel could not have ignored them; and the informed observer, understanding the role of the panel, would not have expected the panel to do so.
39. In my view the application made to the panel for a fresh panel to be appointed rested on a misunderstanding of the panel's role. The panel chair was correct to refuse the application. The reasons he gave set out the correct position succinctly.
40. I have watched and listened to those parts of the oral hearing which the staff of the Parole Board have been able to locate: they amount to a little over 4½ hours of the hearings on 8 and 9 June, including the evidence of the security manager, the POM and most of the evidence of the psychologist and the COM. The remainder of the evidence (after an adjournment on 8 June and again between two adjournments on 9 June) is not available to me, and I note that on 9 June the panel chair said that he had had difficulty with the recording. The parts I have listened to consist of fair questioning of the witnesses to an appropriate level of detail given the panel's duty to enquire into the allegations. I am not satisfied that there was any unduly intense or unfair questioning. I conclude that the criticism of "*intensive*" questioning is made through the lens of a belief that the panel should not have been investigating the allegations as it did – a belief which to my mind stems from an error of law.
41. The panel expressly recognised the right of the Applicant to remain silent when interviewed: see the last sentence of the quotation from the panel's reasons which I have set out above. The panel's point is that the Applicant, having declined to answer the questions of the police, could not legitimately say that he had completely co-operated with them. That is a fair point for the panel to make and it is not indicative of bias.
42. I see nothing indicative of bias in the panel's approach to security information and prior adjudications.





43. Having carefully examined the allegation of bias, I am satisfied that it is groundless.

**Error of fact**

44. I have set out above the findings of the panel relating to the circumstances of recall and the assault in the prison yard. I am not satisfied that there is any error of fact in these findings. They appear to me to be careful and restrained findings grounded in the evidence which the panel had heard, which I have summarised above.

**Error of law**

45. The error of law alleged relates to the treatment of the Applicant's refusal to answer questions in police interview. As I have already explained, the panel made no such error; it expressly recognised the Applicant's legal right not to answer questions in interview.

**Inadequate reasons**

46. It is incumbent upon a panel which disagrees with the view of professional witnesses to give reasons in its decision. The panel did so, dealing separately with each witness. I have summarised above the reasons given in respect of the POM and the psychologist; and I have set out the reasons given in respect of the COM. These were sufficient reasons to explain the panel's decision.

**Decision**

47. For the reasons I have given I do not accept that there was any error of law or fact in the panel's decision. That being the case, the application must be dismissed.

**David Richardson**  
**31 August 2023**

