

**[2024] PBSA 49****Application for Set Aside by Mohamud****Application**

1. This is an application by Mohamud (the Applicant) to set aside the decision not to direct his release. The decision was made by a single member panel after an oral hearing on 4 June 2024. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, and the application for set aside.

**Background**

3. On 23 June 2023, the Applicant received a determinate sentence of 23 months imprisonment following conviction for robbery committed jointly with others on 23 October 2021. He had pleaded not guilty but was convicted by a jury after trial. Concurrent sentences of imprisonment for one day were imposed for two offences of making false representations to make a gain to which he had pleaded guilty. These offences were both committed on 20 January 2022.
4. The Applicant had previous convictions. He was fined in the Magistrates' Court on 7 February 2022 for being in possession of cannabis on 11 October 2021. On 6 December 2022 he was sentenced in the Crown Court to 6 months imprisonment for theft from the person which had been committed on 7 August 2021. No separate penalty was imposed by the Crown Court for the simultaneous offence of possessing cannabis.
5. The Applicant was aged 26 when sentenced for the robbery. He is now 27 years old.
6. He was automatically released on licence on 24 July 2023. His licence was revoked on 1 November 2023, and he was returned to custody the next day. This is his first recall under the current sentence, and his first parole review since recall.

**Application for Set Aside**

7. The application for set aside has been drafted and submitted by the Applicant's legal representatives.
8. It is submitted that there have been numerous errors of fact which are detailed below in the Discussion section.

## Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether or not to direct his release.
10. The Applicant's sentence will expire in October 2024. He had been released on 24 July 2023 under a Home Detention Curfew (HDC) but his licence was revoked on 1 November 2023 for breaching the conditions to (i) be of good behaviour and not behave in a way which undermines the purpose of the licence period and (ii) keep in touch with the supervising officer in accordance with instructions given by the supervising officer.
11. The Applicant has remained in custody since recall and the Respondent referred his case to the Parole Board to consider whether to direct his release. Release would be appropriate only if the protection of the public from serious harm required him to be confined.
12. The case proceeded to an oral hearing on 4 June 2024 before a single member panel (the Panel) which heard evidence from the Applicant, his Prison Offender Manager (POM), and his Community Offender Manager (COM). The Applicant was legally represented.
13. Whilst on licence, the Applicant had failed to attend three probation appointments and did not respond to telephone calls and compliance letters. He had breached his HDC conditions on five occasions. At the hearing, the Applicant expressed regret for his failure to comply and the Panel concluded that the recall had been justified.
14. Evidence was given that the Applicant currently has Enhanced Status under the Incentives and Earned Privileges (IEP) Scheme, and that he had completed a cannabis in-cell work pack provided by the Substance Abuse team and had engaged in one to one work with his COM and the Offender Management Unit (OMU). He had also completed Maths Level 2.
15. The COM told the Panel that video-link sessions with the Applicant usually became chaotic because he would not allow the professionals to speak. He gave differing accounts of the robbery. The sentencing judge had been satisfied that the Applicant, who had been caught on CCTV was actively involved and was searching on the ground for the victim's Rolex watch rather than his own missing mobile phone.
16. Despite expressing concerns about the superficiality of the Applicant's compliance and doubts about his openness and honesty, the development of appropriate internal controls, his risks and future compliance, the COM supported release "on balance". The POM felt unable to offer an opinion.
17. The Panel did not direct the Applicant's release. It concluded that, whilst the Risk Management Plan (RMP) included appropriate measures to manage his behaviour in the community he was unlikely to comply with them. It could not be certain that the Applicant had the necessary internal controls to underpin the external controls of

the RMP. The Panel concluded that the protection of the public from serious harm required him to be confined and therefore did not direct his release.

## The Relevant Law

18. 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.
19. The types of decision 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)).
20. 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

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

## Discussion

22. It is argued on behalf of the Applicant that there have been numerous errors of fact. These are set out in the following paragraphs and each one is followed by my comment.
23. Submission: In paragraph 1.5 of the decision it was stated that the Applicant "*was still maintaining his innocence insisting that he had not been part of a joint enterprise (until that concept was explained to him by his lawyers), minimising his involvement and only admitting that he had been in the area.*" The Applicant maintains that he did not deny that he was part of a joint enterprise. He stated he did not believe he was not (sic) part of the robbery as he did not understand his involvement at the time until this was explained to him. He accepted he was looking for the watch on the floor and later accepted full responsibility, stating he regretted participating in the robbery. As part of his victim awareness programme, he wrote a letter to his victim explaining why he was sorry including the emotional, financial, psychological and physical harm he did to them; including any stress he caused to them and their family.

- 24.Comment: The Panel referred, in its decision, to the differing contradictory accounts which the Applicant has provided both at the trial and subsequently. The POM gave evidence that the Applicant was unwilling to talk in detail about the index offence and that it was difficult to say whether he accepted full responsibility. The COM referred to the differing accounts given by the Applicant. The panel was entitled to reach its own judgement on all the evidence about the Applicant's many inconsistent accounts.
- 25.Submission: At paragraph 1.7 of the decision, in relation to the Applicant's conviction in December 2022, it was stated that "*the victim in that offence also had their Rolex watch stolen.*" The Applicant maintains that this is factually untrue as no watch was taken and police intervened prior to the theft being committed. The Applicant therefore challenges the panel's conclusion that he "*along with a gang has or is persistently engaged in stealing high value watches.*"
- 26.Comment: In his sentencing remarks relating to the index offence, the trial judge referred to the Applicant's previous conviction two months prior to the index offence for attempted theft of a Rolex watch by pulling it from the victim's wrist. The judge referred to this as particularly concerning. In my judgment it was not an error of fact for the panel to express the view in its decision that "*it is difficult not to conclude that [the Applicant] has not been engaged in stealing high value watches*".
- 27.Submission: At paragraph 4.3, the panel concluded that "*the index offence evidences a persistent pattern of similar offending behaviour.*" The Applicant maintains that the characterisation of a persistent pattern of similar offending behaviour does not hold weight with the fact that he has only been convicted for the theft of one watch.
- 28.Comment: This is a conclusion from a fact or facts and not in itself an incorrectly stated fact.
- 29.Submission: It is further submitted that the panel goes on to state, at 1.7 of the decision, that "*a previous term of imprisonment does not appear to have had any desistence effect on [the Applicant]*" and this inaccuracy was repeated at 4.6 where the panel concluded "*[the Applicant] has gone on to reoffend following release from a custodial sentence*". The Applicant maintains that this is factually untrue as the attempted theft offence was committed on 7 August 2021 and the robbery was committed on 23 October 2021. However sentencing for the attempted theft did not take place until 6 December 2022 and therefore both offences were in fact committed prior to the Applicant's sentence and he had not received a custodial sentence prior to the commission of the second offence.
- 30.Comment: The submission correctly sets out the chronology of events and the panel did make an error of fact in stating that the Applicant had committed the index offence following release from a custodial sentence. However, this was not a significant error.
- 31.Submission: At 1.9, it was asserted that the Applicant "*had not permitted EMS to fit a GPS tag as directed by probation as part of his licence conditions and later had*

received a warning letter from EMS for removal of his tag which he stated was accidental." The Applicant denies that he did not permit EMS to fit the GPS tag as at the time the GPS condition was not actually part of his licence conditions. It was clarified during his oral hearing that he did not refuse to allow the EMS to install the equipment but requested that he wished to speak to probation and to his legal representatives first.

- 32.Comment: Paragraph 19 of the decision refers to breaches of Home Detention Curfew (HDC) conditions on multiple occasions throughout September and October 2023. The only condition or conditions referred to relate to the fitting and maintained charging of a tag. There appears to be no dispute that the Applicant refused to allow EMS to fit the tag and that it had not been charged for 8 days in October. The decision also refers to the COM having accepted that there had been an error and that the tag had to be changed. The Applicant said that he reported the charging issues many times. The decision refers to the Applicant having failed to bring the charger in for the matter to be dealt with.
33. Notwithstanding the mistake referred to by the COM the Panel was entitled, having considered all the evidence in the light of the Applicant's admitted non-compliance generally, to conclude that he had deliberately not permitted EMS to fit a tag as directed. I do not consider there to have been an error of fact by the panel.
- 34.Submission: At 2.1 of the decision, in relation to the IEP scheme it was stated that the Applicant had *"been on 'Basic' since his recall, and until May 22 2024."* It is a factual error that the client had been on 'Basic' since his recall as he had been on standard regime since his recall and had only been placed on 'Basic' regime twice for one continuous period of between two to three weeks.
- 35.Comment: There has been an error of fact in paragraph 2.1 of the decision. The Applicant held Standard status under the Incentives and Earned Privileges Scheme for most of his time in custody since recall and he was reduced to Basic status twice. The decision goes on to confirm that there have been no proved adjudications and that the panel attached little weight to other reported instances of negative behaviour.
- 36.Submission: At 2.14 of the decision, it was stated that *"the oral hearing was the first occasion on which [his COM] had heard him articulate any coping strategies and she has not had the opportunity to talk to him about those."* This inaccuracy was repeated in 4.7 of the decision when the panel concluded that the Applicant *"has chosen not to share [his coping mechanisms] earlier with his POM and COM, which reinforces the panel's opinion about his likely impression management to it"* and that *"in the panel's view, there has been no obvious reduction in risk."*
- 37.Comment: The Applicant disputes the accuracy of these statements and maintains that both his POM and COM were aware of the positive coping strategies and mechanisms such as working out, reading and employment because he did discuss it with them. He maintains they were aware of his engagement with mental health services as well as his work on substance misuse and victim awareness. Similarly, they were informed of the support from his family and his external careers orientated

courses such as the IT engineering and slinger construction courses. As such, the Applicant challenges the factual basis of the assessment that there has been no obvious reduction in risk. He states he wrote a letter to his victim as part of an activity during the victim awareness course and explained why he was remorseful and had regrets.

38. The decision specifically refers to difficulties which the COM described at the hearing in obtaining the Applicant's positive involvement in discussions with her and other professionals. He was described as being fixated on issues of his own choosing, speaking over others and shouting. The matters referred to in the submissions may well have been known to the POM and the COM and to the panel. However, the statement that the hearing was the first occasion when the COM had heard the Applicant articulate any coping strategies and that she had not had the opportunity to talk about these with him cannot be properly described as an error of fact.
39. Submission: At 3.2 of the decision, the panel states that the Applicant presents "a high risk of serious harm to the public; a low risk of serious harm to known adults; to children, a low risk; to prisoners, low and staff, medium." The Applicant disputes ever being categorised as medium risk to staff. He only has one identified Risk of Serious Harm (ROSH) which is High risk in relation to the public.
40. Comment: In her 10 April 2024 Part C Report, the COM classifies the Applicant as posing a medium risk of serious harm to staff. That would include probation staff. In any event, the assessment of the Applicant's risks is a matter for the judgement of the panel which agreed the COM's assessments.
41. Submission: At 4.7 of the decision, the Panel concluded that the "work [the Applicant] has undertaken was limited." The Applicant maintains that he has gone above and beyond in relation to risk reduction work, completing all work available to him at his present establishment. His Sentence Plan referenced the need to complete work on victim awareness, thinking skills and decision making. The client has successfully completed the Sycamore Tree victim awareness course but has been told he is not eligible for the combined Thinking Skills Programme (TSP) course on thinking skills and decision making. He has completed in cell packs on victim awareness, victim empathy and substance misuse (cannabis and lean) and engaged with the mental health services. He has also completed educational courses covering English, Maths level 2, construction as well as a distance learning Open University course in accounting.
42. In the light of the above and the fact that the Applicant has persistently made enquiries regarding his risk, the Applicant challenges the factual accuracy of the conclusion at 4.7 of the decision that he "appears both to minimise his risks and his offending and that it has been impossible for the professionals to talk to him about his risks. There is no clear evidence that he has insight into them." His COM confirmed she had explained the Applicant's risk to him in detail but the Applicant maintains he did not have sufficient understanding and insight into how it was calculated so that he could be more aware in the future.
43. Comment: The conclusion of the Panel in paragraph 4.7 is not an error of fact. It is a judgment on facts which were not themselves disputed.

## Decision

44.I have concluded that there were in total only three specific errors of fact in the decision letter out of the large number alleged. None of these individually or collectively meets the level required for me to conclude that the direction not to release the Applicant would not have been given had these three errors not been made.

45.Furthermore, this is not a case where any error of law, lack of available information or change of circumstance after the hearing applies. Nor looking at the clear indications from all the evidence considered by the panel would it be in the interests of justice to set aside the decision not to release the Applicant.

46.The application for set aside is accordingly refused.

**HH Judge Graham White**  
**29 July 2024**