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[2022] PBSA 14

Application for Set Aside by Rasab

Application

1. This is an application by Rasab (the Applicant) to set aside the decision made by a panel of the Parole Board dated 20 October 2022 to not direct his release.

2. The case was heard at an oral hearing on 4 October 2022.

3. I have considered the application on the papers. These are the dossier of 589 pages (including the decision letter dated 2 October 2022), the submissions submitted after the oral hearing, and the application for set aside dated 20 October 2022 that consists of four pages. This is the applicant's first review since recall.

Background

4. On 31 October 2011, the Respondent received a sentence of imprisonment for public protection for attempted grievous bodily harm under section 18 of the offences against the persons act 1861 and having a firearm with intent to commit an indictable offence.

5. The tariff was set at 5 years and expired on 26 September 2016. The Applicant was released in July 2019 and recalled in September 2020. He was released again on 1 June 2021 but recalled two days later after not returning to the Probation Hostel (in circumstances that were in dispute) which is the subject of this application.

Application to Set Aside

6. The application to set aside was received on 4 November 2022 and has been drafted and submitted by the legal representative acting on behalf of the Applicant.

7. The application to set aside sets out a number of alleged factual errors in the decision letter. These are set out in a narrative format and so are hard to break down into specific instances.

8. It is also alleged that the psychologist panel member overstepped the mark of proper questioning during the evidence of one of the witnesses.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) on 5 July 2021 to consider whether it would be appropriate to direct his re-release following the revocation of his licence.

10. His case was considered by a Member Case Assessment (MCA) member on 3 August 2021 and an oral hearing was directed. This was due to be heard on 24 January 2022, but was adjourned on the day of the hearing due to there having been non-compliance with previous directions and the Panel's assessment that a psychological risk assessment was required.

11. The case was due to be heard on 7 June 2022, but was adjourned again due to further information being directed by the Parole Board, and for the Applicant to instruct his own psychologist to prepare a risk assessment.

12. The hearing then proceeded on 4 October 2022 where full evidence was taken. Subsequently, written submissions were provided by the Applicant and the decision letter was issued on 21 October 2022.

13. No direction for release or recommendation for a move to open conditions was made.

The Relevant Law

14. 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, under rule 28A(2), the Parole Board may seek to set aside certain final decisions on its own initiative.

15. The types of decisions eligible for set aside are set out in rules 28A(1) and 28A(2). 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)).

16. A final decision *may* be set aside if it is in the interests of justice to do so (rule 28A(4)(a)) **and** either (rule 28A(5)):

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

17. Under Rule 28A(6) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(5)(b) (i.e it relates to new information or a change in circumstances) then it must be made before the prisoner is released.

The Reply from the Respondent

18. In accordance with the rules, the Respondent was asked if he had any representations to make within 7 days.

19. Perhaps surprisingly, given the nature of the application, the Respondent stated that he did not wish to make any representations.

Discussion

Eligibility

20. The decision not to release the Applicant was taken under rule 25(1)(b) of the Rules. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) and (4) of the Rules. I have been appointed as decision maker for the purposes of this application. I may decide the application for myself or I may delegate the role of decision maker to the chair of the panel which made the decision: see rule 28A(12).

21. An application under rule 28A(1) must be brought within 21 days of the decision: see rule 28A(6)(b). That requirement has been satisfied in this case.

22. Rule 28A(4) provides that the decision maker may set aside such a decision if satisfied that (1) one of the conditions in rule 28A(5) is applicable and (2) it is in the interests of justice to do so.

23. The condition on which the Applicant relies is set out in rule 28A(5)(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 …."*

24. The Parole Board Rules do not contain any definition of the phrase "error of law". In this case the type of error alleged is procedural unfairness. I am satisfied that it is an error of law for the Parole Board 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).

25. I have mentioned this point specifically because rule 28 of the Parole Board Rules, which deals with the right to apply for a reconsideration as amended in 2022 sets out three separate grounds for reconsideration: error of law, procedural unfairness

and irrationality. In my view procedural unfairness and irrationality are types of error of law; they were, until 2022, the only grounds for reconsideration; and the reference separately to error of law in rule 28 is explained by its addition as a ground in 2022.

26. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair or the panel lacked impartiality. The concept applies only if a procedural error results in unfairness. If an error did not result in unfairness (for example, if it was corrected or not of any real importance) then the concept does not apply.

27. The question of when an error of law can amount to an error of fact is not a straightforward one. However, in the circumstances of this case it is one that need not be addressed.

Change in circumstances and the test for setting aside

(1) Reference to the Applicant's brother

28. Firstly, I note that the grounds contain nothing about what was said at the hearing other than a bare assertion. No evidence has been provided by the Applicant's solicitor (for example a witness statement, annexing his notes of the hearing), and there has not been any application for a transcript of the hearing.

29. I consider that this is sufficient to conclude this ground. The Panel could not proceed on an assertion unsupported by evidence.

30. I also note that whatever the origin of the disputed sentence at para 1.1 of the Decision Letter, the dossier records that when the Applicant was arrested his property was searched where firearms, ammunition and drugs were found. The Applicant's brother was convicted of PWITS Class A relating to that. In those circumstances, it would not appear to be incorrect to say that the Applicant's brother *'was an associate in carrying out the index offence'*.

(2) Evidence of the Applicant's cognitive difficulties

31. Again, this ground is unsupported by evidence, and the issue has not been put to a relevant witness for comment.

32. It is unclear what the actual error alleged is. It seems that the Applicant adduced a letter from healthcare and a care plan which the Applicant considers could have made a difference to the Panel's decision.

33. There does not appear to have been an application under r18 for the admission of this evidence. However, leaving that aside, whilst it is correct that the Panel were provided with the care plan there was no suggestion that the Panel should specifically take any action as a result. In addition, it was stated that the Applicant did not wish to defer his hearing.

(3) Association with 'B'

34. Criticism is made of a factual error in relation to how the Applicant knew an associate of his.

35. Again, no evidence in support of this has been put forward.

36. In any event, it does not appear that any error as to how long he knew the associate, if one was made, would have made any difference.

(4) The Applicant's use of drugs

37. There is a point of 'clarification' made. It does not appear that this takes matters any further even if this were evidence that was in an admissible format and there was a good reason for admitting it at this stage (none has been suggested).

The questioning at the hearing

38. Complaint is made about the approach to questioning by the specialist psychologist member.

39. However, no evidence has been put forward in support of this. Again, no request for the panel to listen to the recording has been made. Further, there was no mention of this in the closing submissions after the hearing, and no suggestion that this had made the hearing unfair.

40. In any event, the complaint relates to one question asked of one witness, where the Panellist asked the psychologist instructed by the Applicant if she had carried out a 'malingering assessment' on him.

41. That seems to me to be a proper question to ask, particularly in the context of inquisitorial Parole Board proceedings. It is not suggested (let alone evidenced) that this was asked in a hostile or inappropriate way. No objection was made at the time or subsequently. The role of the Panel is to ask questions such as that one, in order to assess what evidence can be relied on.

42. In those circumstances, there would be nothing in this ground, even if it was properly evidenced.

Conclusion

43. For the above reasons it does not seem to me that any of the grounds are made out.

Decision

44. For the reasons I have given, the application is refused, and the final decision of the panel dated 20 October 2022 stands.

Daniel Bunting
2 December 2022