

[2023] PBSA 71

Application for Set Aside by Bariana

Application

1. This is an application by Bariana (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated 21 August 2023 following an oral hearing on 14 August 2023. The panel made no direction for release.
2. I have considered the application on the papers. These are the dossier of 263 pages, which included the oral hearing decision reasons (the decision), the application for set aside, clarification of one of the grounds by the legal representative in an email dated 10 October 2023, and an email sent on behalf of the Secretary of State (the Respondent) indicating that no representations in response to the application were to be made. In addition, I listened to the recording of the hearing and had sight of the stakeholder response form from the Applicant dated 11 August 2023 and an email response from the Panel Chair on that same date.

Background

3. On 18 June 2018, the Applicant received a total determinate sentence of seven years and six months imprisonment following conviction for modern slavery offences and being concerned in the supply of Class C drugs. His sentence expires in October 2025.
4. The index offence involved the exploitation of four vulnerable victims with forced labour at the Applicant's takeaway premises. There was violence involved including slaps and causing a victim to fall down the stairs. The Applicant bullied the victims and exploited their vulnerability by way of addiction. A Slavery and Trafficking Prevention Order was imposed at sentence. The drug supply matter concerned diazepam.
5. The Applicant has previous convictions. He was aged 46 at the time of sentencing. He is now 52 years old.

Application to Set Aside

6. The application to set aside is dated 9 September 2023 and has been drafted and submitted by the Applicant's legal representative. It consists of 11 pages, although the paragraph numbering stops part way through and so references made below will reflect that.
7. The Applicant makes various submissions in the application regarding perceived procedural failures. However, the application to set aside is made on the basis there



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were errors of law and fact. The Applicant submits that the following errors were made:

- (a) The panel denied the Applicant the opportunity to put forward information which meant the panel did not have the opportunity to consider relevant facts in its decision making.
- (b) The sentence referenced in paragraph 1.1 of the decision was the sentence imposed after appeal and not the original sentence.
- (c) The Applicant had not been convicted of any domestic violence offending, nor was he convicted of any threats to blow up a caravan as stated at paragraph 1.5 of the decision (this was later clarified by the Applicant's legal representative in that he accepted he had been convicted of the threats but denied the same).
- (d) The evidence in relation to bank account use was misinterpreted.
- (e) The panel failed to take into account that the logs from the designated accommodation supported the fact he was not drinking alcohol.
- (f) The panel failed to give appropriate consideration to a number of facts relating to his time in the community.
- (g) The panel did not take into account the factual evidence supplied regarding the Applicant's conduct after recall.
- (h) The panel failed to explore the evidence relating to the good relationship between the Applicant and his wife.
- (i) The panel erred in finding the Applicant could not be managed.
- (j) The panel erred in concluding that the Applicant would not engage in further risk reduction work.

Current Parole Review

8. This was the Applicant's first review following his recall.
9. On 17 November 2022, the Applicant was released at the automatic release point in his sentence as is required by the law. His licence was revoked and he was recalled to custody on 6 December 2022 as a result of issues arising at his designated accommodation.
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.
11. A member of the Parole Board considered the Applicant's case on 10 March 2023 and directed his case to an oral hearing. The case then proceeded to an oral hearing on 14 August 2023 before a single member panel. The Applicant was legally represented by Counsel. Oral evidence was given by the Applicant's Prison Offender Manager (POM) and his Community Offender Manager (COM). Following the oral hearing, further documentation was received and added to the dossier.
12. The panel made no direction for release.

The Relevant Law

13. 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.
14. 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)).
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 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 was not available to the Board when the direction was given had been so available, or
 - ii) a change in circumstances relating to the prisoner after the direction was given, had occurred before it was given.
16. Under Rule 28A(5) an application to set aside a decision must be made within 21 days of the decision. However, if the application relies on 28A(4)(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

17. The Respondent informed the Parole Board by way of an email dated 12 September 2023 from the Public Protection Casework Section that he had no representations to make in response.

Discussion

Eligibility

18. The application concerns a panel's decision not to direct release following an oral hearing under rule 25(1)(a). The application was dated 9 September 2023 and received on 10 September 2023 and was therefore in time. It is therefore an eligible decision which falls within the scope of rule 28A.

Error of Fact or law

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

20. Furthermore, I have to be satisfied that there was an error of fact or law and also that the decision not to direct release of the Applicant would not have been made but for that error. In essence, the detailed submissions of the Applicant relate solely to errors of fact and so I will focus on those and take each matter in turn. However, it is important to highlight that 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.

Grounds (a) and (b)

21. Firstly, the Applicant argues that he was denied the right to put information before the panel which would have enabled the panel to consider further factual information. This appears to be based on the fact that there was information put forward very shortly before the hearing via a Stake Holder Response Form (SHRF) dated 11 August 2023. The Panel Chair correctly pointed out when it was received that this was out of time to be added to the dossier under the Parole Board Rules. However, the documents did end up being in the dossier and considered by the panel in any event. The panel allowed documents to be received after the hearing and those included the two letters he tried to put forward in the SHRF (both dated 7 August 2023 and relating to legal matters). The panel also referenced these documents on the front of its decision as being received after the hearing (although I concede that the panel did not provide a new dossier page count as a result). It is also important to point out that, having listened to the hearing and read the decision, the Applicant was able to talk about some of these issues in the hearing in his evidence and Counsel for the Applicant could have raised any issues at any point.

22. In addition to the above, the Panel Chair when refusing to initially add the documents prior to the hearing also noted that it did not appear to be relevant. The information was described as relating to the Applicant's ongoing appeal case and litigation. It is long established that panels of the Parole Board assume the correctness of a conviction. The Applicant argued in that SHRF that he should have been allowed to put documents forward because the Court of Appeal decision on his appeal was in the dossier. It is a common occurrence for dossiers to include Court of Appeal decisions where sentences are varied and I do not see any unfairness in including this document at all. This links to point (b) raised by the Applicant where the panel has cited his sentence imposed by the Court of Appeal rather than the original term. This would in fact be legally correct as the previous sentence was quashed by the higher court.

Ground (c)

23. The Applicant argued further inaccuracies in paragraph 1.5 of the panel's decision. As noted above, the Applicant later conceded that part of his submission was incorrect in saying he had not been convicted of threats when he had. As also noted above, the panel assumes the correctness of a conviction as a matter of law and so his dispute about this cannot be said to be a mistake. With regards to domestic violence, the panel correctly included the fact that there have been domestic violence call outs in the past. The panel would be failing in its duty to not consider

all areas of risk and any other allegations. The panel did not say they were convictions and so the Applicant's submission on this point is his own misinterpretation of the contents of the decision.

Grounds (d), (e) and (f)

24. The Applicant makes submissions about factual mistakes and failures to give consideration to certain facts as part of the recall but these appear to be submissions based on the Applicant wanting the panel to have concluded differently rather than any proven factual mistake. As noted in the decision, and confirmed by my listening of the recording, matters were explored in detail by the panel. The panel's decision is not a full note of the hearing, nor should it be. The decision is intended to provide the reasons for the decision. The panel concluded his account of the recall circumstances was "*troubling*". The panel said it was troubled by his account of interactions with other residents in the designated accommodation including the bank account use. I note the Applicant did not dispute using the account but gave an account of the reasons for it. The panel further noted that he had been "*present when others are using alcohol*" but did not conclude the Applicant had done so. The Applicant argues that the panel failed to take into account the detail in the designated accommodation logs which he said supported the fact he was not drinking alcohol. I have had access to those logs and can see entries stating: 28/11/22 a resident reporting that the Applicant was supplying residents with alcohol; 2/12/22 an entry stating the Applicant told a member of staff that he was 'having a drink that night'; the entry from 3/12/22 when staff entered the toilets and found the Applicant and others in the bath cubicle with the door locked and there were open cans of alcohol. I can also see in the decision that the Applicant accepted he had been present but simply denied using alcohol or other substances himself and the COM described this as a "*high risk scenario*" irrespective of whether he had used alcohol himself. I therefore do not accept that the panel's comment that he was present when others used alcohol as anything other than correct and fair given the other evidence linking him to alcohol. The panel did not conclude that he had been using alcohol, although on the evidence I must say it would have been open to the panel to do so. There was no requirement for the panel to reference the logs within its decision as it made clear that it took into consideration the documentation, the Applicant's challenge to recall and the oral evidence.

Ground (g)

25. The Applicant argues that there were factual mistakes regarding his conduct after recall. I note from the decision that the panel took into account the Applicant's version of events regarding an incident with a pool ball. The panel did not appear to make any adverse finding or place too much weight upon that, other than to set out the POM's evidence as well as the Applicant's and to also correctly point out that it led to him being removed from the Therapeutic Community. Counsel for the Applicant did not ask any questions of the POM about this incident. The panel also set out the POM's overall view that there were "*few concerns*" regarding the Applicant's custodial behaviour. The only issue therefore is the fact the panel highlighted a concern regarding a refusal to attend work and did not then detail that the Incentives and Earned Privilege (IEP) warning for that was rescinded due to him having a legitimate reason. I note firstly that the panel did not use that as

the only example regarding concerns raised and this was not something highlighted as an issue within the oral hearing, which is the time when the Applicant or his Counsel had ample opportunity to correct any mistakes in the dossier. In any event, this issue is not highlighted by the panel in the decision conclusion as a significant reason for its decision not to direct release.

Ground (h)

26. The Applicant states that there was evidence of a good relationship between him and his wife, including letters he had received but this was not explored directly with the Applicant. From the hearing, it is apparent that the panel was aware the Applicant was receiving visits from his wife. The panel did not base its decision on the relationship the Applicant has with his wife. The Applicant was given opportunity to put everything forward that he wanted to, including questioning witnesses, giving his own evidence and providing information after the hearing. The Applicant was legally represented at the hearing and any issues he wanted to explore could be done so through his representative. I do not accept there was any error of fact related to this submission.

Ground (i)

27. The panel set out the salient points from the COM's evidence in its decision, which included the COM's view that their working relationship was "difficult". The Applicant's ability to work with professionals, particularly the COM, is highly relevant to its assessment of the Applicant's manageability on licence. From the recording and the decision, it is clear that the COM did not just base this on the issues raised about the Applicant's time in designated accommodation, although I am certain from listening to the recording that the Applicant was given plenty of opportunity to raise and discuss all the difficulties he encountered in the community. I am not sure what the Applicant meant in his submissions that "*it does not appear that the panel engaged and sought factual confirmation of the evidence advanced by the Applicant over how he was being treated in the [designated accommodation]*". The panel tried to obtain video footage but it was not available, however it had access to the logs and the information put forward by the Applicant. If the Applicant considered there to be a need to obtain any further information then he could have supplied it himself, asked for directions to be made prior to the hearing and/or asked for an adjournment after the hearing. There was no mistake of fact or law here, the Applicant simply does not agree with his COM's evidence and the conclusion the panel came to.

Ground (j)

28. The paragraph of the decision cited in his application to support this ground (2.20) related to the panel reporting the evidence of the COM. It was the COM who said that the Applicant had refused to complete risk reduction work. The panel had already set out the POM's evidence that the Applicant had not been assessed by the programmes team but, "*because he maintains his innocence, it is unlikely he will be found suitable for anything*" (paragraph 2.7). Having balanced all of the evidence, the panel concluded that there was core risk reduction work to be completed (paragraph 4.3). This cannot be said to be a mistake of fact.

29. In light of the above, I am not satisfied that there were any mistakes of fact or law and, even if there were, I am not satisfied that the decision would not have been made but for that supposed error. I am not satisfied that this application was anything more than the Applicant wishing the panel had made a different decision. 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

30. For the reasons I have given, there is nothing in the lengthy submissions received which persuades me that there is any arguable basis on which this decision should be set aside.

Cassie Williams
19 October 2023