

[2023] PBSA 76**Application for Set Aside by Stewart****Application**

1. This is an application by Stewart (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 18 September 2023. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 6 October 2023) and the application for set aside (dated 26 October 2023).

Background

3. On 30 January 2015, the Applicant received a determinate sentence of imprisonment for 11 years following conviction for possession of a firearm with intent to endanger life to which he pleaded guilty.
4. The Applicant was aged 20 at the time of sentencing. He is now 29 years old.
5. He was automatically released on licence in August 2019 but recalled in October 2020. He was re-released by the Secretary of State in June 2021, but recalled again in October 2022. His sentence ends in January 2025. This is his first parole review since his second recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by counsel acting for the Applicant.
7. It submits that there has been an error of law and, but for that error, the decision not to release the Applicant would not have been made.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.
9. The case proceeded to an oral hearing on 18 September 2023 before a three-member panel, including a psychologist specialist member. The panel heard evidence from the Applicant, his Prison Offender Manager (POM), and his Community



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Offender Manager (COM). The Applicant was legally represented throughout the hearing.

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

The Relevant Law

Eligibility for set-aside

11. 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.

12. 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)).

13. 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.

Risk period under consideration

14. In relation to the release on licence of a prisoner serving the custodial term of an extended determinate sentence the High Court held in *R (Secretary of State for Justice) v Parole Board of England and Wales* [2022] EWHC 1282 (Admin) (*Johnson*) ([29] Davis LJ and Garnham J):

"To say that risk after the expiry of the custodial term is irrelevant to the Board's consideration...ignores the fact that the statutory test has no temporal element".

15. There is no reason to suggest that the rationale in *Johnson* does not apply equally to standard determinate sentences.

16. The approach that panels should take when considering of the indefinite risk period set down in *Johnson* was further examined by the High Court in *R (Dich and Murphy) v Parole Board for England and Wales and Secretary of State for Justice* [2023] EWHC 945 (Admin). At [15], Davis LJ and Johnson J held:

"The decision in Johnson makes it clear that a risk posed by a prisoner serving an extended sentence after the expiry of the custodial term is capable of being relevant to the need for public protection. The reasoning applies equally to a risk posed after the expiry of the sentence. However, nothing in Johnson suggests that such a risk is always relevant to the statutory test. Its relevance on the facts of a particular case will depend on the question of whether the risk can be avoided or reduced by continued confinement before the sentence expiry date. There must be a causal link."

17.The matter of the causal link was reinforced for non-life sentenced prisoners at [17] and [19]:

"In a non-life case, if continued incarceration up until the sentence expiry date will do nothing to avoid or reduce the risk thereafter, then it is not necessary for the protection of the public that the offender should be confined. The position is different if continued incarceration would reduce the risk to the public after the sentence expiry date (for example, by preventing the prisoner from taking steps that are preparatory to an offence, or by facilitating rehabilitative work that might reduce the risk post release). It follows that there must be a causal link between continued detention and prevention or reduction of risk."

"The issue of a nexus or causal link ...is of critical importance where the Parole Board is concerned with risk arising outside the custodial term."

18.Following *Johnson* and *Dich and Murphy*, it is clear that, although risk must be considered over an indefinite period, there must be a causal link between continued detention and prevention or reduction of risk in order to justify that continued detention.

19.In *Sayers* [2023] PBSA 29, a decision not to direct release was set aside on the basis that a panel's failure to ask itself the question of whether there was a causal link between continued detention and risk reduction or prevention was an error of law.

The reply on behalf of the Respondent

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

Discussion

21.It is first submitted that the panel misdirected itself by stating in the part of its decision relating to the risk period under consideration:

*"Indefinite, in line with the Judgment in the case of *Johnson R v Secretary of State for Justice* [2022] EWHC 1282 (Admin), there is no temporal limit to the Parole Board's assessment of risk and the panel must now consider the "at risk period" as indefinite."*

22. I do not agree that the text in the decision's heading amounts to a misdirection or an error of law. While *Dich and Murphy* provides clarity on the way in which risk outside the custodial term should be addressed, the 'at risk' period is nonetheless indefinite, as established in *Johnson* (and affirmed in *Dich and Murphy*).

23. That said, a panel must address the crucial element of nexus or causal link as required by *Dich*. It is submitted that the panel did not do so in its conclusion, and I agree. The panel's decision did not address the existence of a causal link between continued detention and prevention or reduction of risk. While this may have been at the forefront of the panel's mind in its decision-making, it is not explicitly explained in its decision. Although I am not legally bound by *Sayers*, it is nevertheless extremely persuasive. The panel in *Sayers* did not have the benefit of the decision in *Dich* when it made its decision, yet its decision was set aside for error of law. In the present case *Dich* had been law for some five months prior to the panel's decision.

24. I therefore find that there has been an error of law.

25. It is next necessary for the Applicant to establish that the panel's decision would not have been made but for that error. In furtherance of this, the application sets out six reasons. While I am not persuaded by the argument that the panel adopted the wrong approach from the outset based on its statement of the risk period under consideration, I do find that the panel acknowledged that there could be benefit to a further period on licence before moving on to consider the risk over an indefinite term. It is entirely possible that if the panel had borne *Dich* in mind, its analysis would have taken it down a route in which release was directed, particularly as there seemed to be support from his COM, albeit cautious.

26. I therefore find that the panel's decision would not have been made but for the error of law.

27. Finally, I must consider whether it is in the interests of justice for the decision to be set aside.

28. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. A Parole Board direction for no release cannot be made without evidence that the panel has considered all that is required of it by law. Justice requires decisions (particularly ones in which an individual's liberty is at stake) to be made according to the rule of law.

Decision

29. For the reasons I have given, the application is granted, and the final decision of the panel dated 6 October 2023 is set aside.

30. I must now consider two matters under rule 28A(9). First, whether the case should be decided by the previous panel or a new panel and second, whether it should be decided on the papers or at an oral hearing.

31. The previous panel has the great benefit of having prepared and heard the case, carefully considering the evidence before it at the time, reaching and documenting its decision. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, if the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was tainted by an error of law. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.
32. The final matter is to consider whether an oral hearing is necessary under the principles from *Osborn v Parole Board* [2013] UKSC 61. A re-assessment of the Applicant's risk is self-evidently required, and fairness demands that this should take place via a fresh oral hearing.

Stefan Fafinski
10 November 2023