the Parole Board
working with others to protect the public

[2024] PBSA 19

Application for Set Aside by Roberts

Application

1. This is an application by Roberts (the Applicant) to set aside the decision (the Decision) not to direct his release. The decision was made by a MCA Panel Member after a paper hearing on 13 February 2024. This is an eligible decision.

2. I have considered the application on the papers. These are the dossier totalling 236 pages, the Decision, and the application for set aside and the response from Public Protection Casework Section (PPCS) dated 22 March 2024 stating that no representations will be made in response to the application to set aside.

Background

3. On 9 March 2018, the Applicant received extended sentence of 9 years' imprisonment with an extension of 1 year following his conviction for 4 counts of rape of a female under the age of 16 years, 3 counts of sexual assault of female by penetration and a count of sexual assault of a female child under the age of 13 years.

4. The Applicant was aged 27 years at the time of sentencing. He is now 33 years old.

5. The Applicant's Parole Eligibility Date falls in May 2024.

Application for Set Aside

6. The application for set aside has been drafted and submitted by Mr Roberts' legal representative.

7. It submits that the MCA Panel Member has committed errors of law and of fact in that.

   (a) The Member declined to grant the Applicant an oral hearing and thereby failed to comply with the Directions given by the Supreme Court in the case of **Osborn, Booth & Reilly v Parole Board** [2013 [UKSC 61; [2014] 1 AC 1115. It is contended that those Directions establish that an oral hearing should have been granted when it was fair to do so. The Panel did not comply with these principles and committed an error of law when it did not direct an oral hearing for *"a full and independent assessment of the risk to be undertaken"* and to consider whether that *"evidence led them to conclude that [the Applicant's] was or was not manageable in the community on licence".*

These and other matters showed why an oral hearing should have been ordered and why the decision not to release the Applicant should be set aside. (Ground 1)

(b) The Applicant was not given the opportunity to provide written representations through his solicitors or in person to the MCA Panel Member before the paper review took place and it was an error of law not to do so and so the decision not to release the Applicant should be set aside. (Ground 2)

The Parole Hearing

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct release.

9. Before concluding this matter on the papers, the panel stated that it had taken into consideration the principles set out in the case of **Osborn, Booth and Reilly** (supra) concerning the oral hearings, and it concluded that "t*he panel has not found any reasons to direct a hearing*". The panel had not stated what reasons they had considered before reaching that conclusion.

10. The case proceeded to a paper hearing on 13 February 2024 before a single member panel who considered a dossier of 228 pages. The Applicant was neither present nor legally represented during the paper hearing.

11. It was noted that the Applicant was continuing to maintain his innocence of the index offence even after his appeal against his conviction was dismissed. His conduct in custody has been "*varied*", and he has received various adjudications. It was a matter of concern that one adjudication in March 2021 was for unauthorised contact with a child via a pin phone and another adjudication in April 2023 was for possession of illegal substances and a positive drug test.

12. There were more recent reports showing that he has received positive reports for his work as a wing cleaner and he had engaged with keywork sessions. The Applicant had an outstanding target to complete an offence-focused programme and one programme had been recommended.

13. The Decision of Panel member records that "*positively*" the Applicant's Prison Offender Manager (POM) had indicated that the Applicant was motivated to engage with programme work and would complete the work provided that he could maintain his innocence.

14. The panel considered that his risk is not reduced and until he completes the offending behaviour programme he continues to lack insight and understanding of the triggers for offending. Significantly, the panel recorded that it is *"unclear at this stage whether [the Applicant] has sufficient internal controls".*

15. An important conclusion of the panel was that "*there was no evidence in the dossier that suggested that [the Applicant] had sufficiently addressed his risk factors to the extent that risk could be managed in the community*".

16. For those reasons, the panel concluded it was "*necessary for the protection of the public that [the Applicant] remains confined*" and the panel did not direct the Applicant's release.

The Relevant Law

17. 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.

18. 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)).

19. 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 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
- a direction for release would not have been given if information that had not been available to the Board had been available, or
- 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

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

Ground 1 - Discussion

21. This ground is that the Member declined to grant the Applicant an oral hearing and thereby failed to comply with the Directions given by the Supreme Court in the case of **Osborn, Booth & Reilly v Parole Board** [2013[UKSC 61; [2014] 1 AC 1115. It is contended that those Directions establish that an oral hearing should have been granted when it was fair to do so. The Panel did not comply with these principles and committed an error of law when it did not direct an oral hearing for *"a full and independent assessment of the risk to be undertaken"* and to consider whether that *"evidence led them to conclude that [the Applicant's] was or was not manageable in the community on licence".*

22. At the forefront of the Applicant's case is the contention that an oral hearing plays an important part in ensuring that there should be an oral hearing in all parole proceedings where it is necessary that there should be a full investigation of all the

facts which ensures that all relevant factual evidence can be adduced and can be subject to effective scrutiny.

23. It is not every case which will benefit from having an oral hearing, and Lord Reed has explained in the **Osborn** case some of the circumstances in which an oral hearing will be necessary and those circumstances include some factors found in the Applicant's case, such as that:

    (a) "*where facts which appear to the Board to be important are in dispute ...the Board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation*";

    (b) "*when it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable the prisoner or his representatives to put their case effectively or to test those who have dealt with him";*

    (c) "*the Board's decision...is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any aspect of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behavior work which is required) which will in practice have a significant impact on his management in prison or on future reviews";*

    (d) *"the Board should guard against any temptation to refuse oral hearings as a means of saving time, trouble and expense";*

    (e) "*in order to justify the holding of an oral hearing, the prisoner does not have to demonstrate that the paper decision was wrong, or even that it may have been wrong; what he has to persuade the Board is that an oral hearing is appropriate"; and*

    (f) "*in applying the guidance, it will be prudent for the Board to allow an oral hearing if it is in doubt whether to do so or not*".

24. Having taken into account all the principles set out by the Supreme Court in the Osborn case, I have concluded that the panel below (who did not have the benefit of receiving the detailed submissions which I received) acted in a procedurally unfair manner when it did not hold that there should have been an oral hearing directed. I have reached that conclusion for the following four reasons.

25. First, there are several issues on this parole application in relation to which a panel would find it necessary to hear and appraise oral evidence relating to the Applicant's past and present conduct. This would enable the prisoner or his representative as well as the professionals to put their cases effectively and/or to test the evidence of those who have given evidence on such issues. Such issues include whether the Applicant has sufficient internal controls bearing in mind that the panel said that it is "*unclear at this stage whether [the Applicant] has sufficient internal controls*". This

important exercise would include considering whether the Applicant is likely to repeat his conduct which led to him receiving an adjudication for unauthorised contact with a child via a pin phone and another adjudication for possession of illegal substances and a positive drug test. To determine these issues, the panel would need to know not only what the Applicant and the professionals say on these matters but how they respond to questioning.

26. Secondly, an oral hearing would have allowed the panel to question the Applicant and the professional witnesses, to be able to reach conclusions on whether the Applicant will be able to complete the offence-focused programme and one programme had been recommended. The Decision records that "*positively*" the Applicant's POM had indicated that the Applicant was motivated to engage with programme work and would complete the work provided that he could maintain his innocence. The panel would be able to appraise the evidence in order to decide whether the Applicant would be able to complete this work and how, if at all, this would reduce his risk.

27. Third, an oral hearing would have enabled the panel to carry out effectively its important duty to give comments on the Applicant's treatment needs or required offending behavior work which would have a significant impact on his future management. An oral hearing would have enabled the panel to hear and to appraise the evidence and reach conclusions on these issues.

28. Fourth, it is probable that this will not be a clear case for not having an oral hearing and, as was explained in the **Osborn** case, this means that it is *"prudent to allow [there to be] an oral hearing."*

29. For all those reasons whether considered individually or cumulatively and after taking account of all the guidance in the Supreme Court's judgment in the **Osborn** case I have concluded that it was an error of law not to have had an oral hearing, but that raises the issue of whether the decision not to release the Applicant can be set aside.

30. Rule 28 (A) of the Parole Board Rules provides insofar as is relevant that a final decision may be set aside under paragraph (1) by a decision maker if it is in the interests of justice to do so; and one or more of the conditions in paragraph (4) are satisfied.

31. The only relevant condition of Rule 28(A) (4) is that *"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".*

32. This exercise entails considering what would have happened if there had been an oral hearing and the Applicant had been able to give written submissions. I have considered the material available and have concluded that in those circumstances the decision not to direct release would not have been given and so the decision not to release the Applicant must be set aside.

Discussion – Ground 2

33. This ground is that the Applicant was not given the opportunity to provide written representations through his solicitors or in person to the MCA Panel Member before the paper review took place and it was an error of law not to do so and so the decision not to release the Applicant should be set aside. As I have concluded that it was an error of law not to have an oral hearing, it is unnecessary to deal with this ground.

Decision

34. The application for set aside is accepted.

Sir Stephen Silber
11 April 2024