

[2024] PBSA 27

Application for Set Aside by Newell

Application

1. This is an application by Newell (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 20 February 2024.
2. I have considered the application on the papers. These are the dossier of 438 pages which includes the oral hearing decision and the application for set aside dated 28 March 2024. In addition, I listened to the recording of the hearing and had sight of the stakeholder response form from the Secretary of State (the Respondent) dated 12 April 2024.

Background

3. On 6 February 2007, the Applicant received a sentence of detention for public protection (DPP) following a guilty plea to an offence of arson being reckless as to whether life was endangered. The tariff was set at 30 months and expired on 12 March 2009.
4. The index offence involved setting fire to a wheelie bin which was placed close to the door of the flat of his former girlfriend's father. The Applicant had previous convictions. He was convicted in June 2021, whilst on licence, of offences under the Malicious Communications Act 1988 in respect of an ex-girlfriend and received a sentence of 16 months imprisonment.
5. The Applicant was aged 17 at the time of sentencing for his index offence. He is now 35 years old.
6. He was released on licence in March 2016. His licence was revoked and he was recalled on 20 April 2016. He was again released on licence on 2 May 2019 and that licence was revoked on 30 August 2019. This is his second recall on this sentence, and his second parole review since recall.

Application for Set Aside

7. The application for set aside has been drafted and submitted by the Applicant himself and is dated 28 March 2024.
8. It submits (1) that there has been an error of fact regarding the nature of the offences recorded, (2) that a statement made by the Panel Chair was irrational and

unfair, (3) that the evidence presented should have led to a different conclusion and (4) that insufficient regard was given to his health conditions.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Respondent to consider whether to direct the Applicant's release.
10. The case proceeded to an oral hearing on 20 February 2024 before a 3-member panel, which included a psychologist specialist member. The panel heard evidence from the Applicant, his Prison Offender Manager (**POM**), his Community Offender Manager (**COM**) and an HMPPS psychologist. The Applicant was legally represented throughout the hearing.
11. The hearing was opened on 26 October 2023 but adjourned for completion of a programme needs and suitability assessment and updated reports including from the prison healthcare team. The reports were received and the hearing was resumed on 20 February 2024.
12. The panel did not direct the Applicant's release.

The Relevant Law

13. 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.
14. 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)).
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 (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

16. The Respondent has offered representations in response to this application. The Respondent does not accept that there is an error regarding the identification of the

Applicant's previous convictions. The Respondent notes the differing opinions of the witnesses but does not conclude that necessitates the decision being set aside.

Discussion

17. In order to set aside this decision, I have to be satisfied that it is in the interests of justice to do so. Furthermore, I have to be satisfied that there was an error of fact or law and that the decision not to direct release of the Applicant would not have been made but for that error. The sole matter the Applicant raises is that the panel stated that he had been convicted of a number of matters for which he was not convicted. He does not go on to offer particulars of the matters which they may have erroneously concluded. On carefully considering the decision the panel have clearly noted the correct offences. The PNC record on the dossier makes clear that the Applicant was convicted of two counts under s.1 of the Malicious Communications Act, sending a communication conveying a threatening message. The panel had regard to that conviction and has not misinterpreted it or taken into account other matters. In his basis of plea (dossier p.238) dated 10 August 2021, the Applicant accepts that he *"used language which could be considered threatening"* and that *"his actions constituted an offence under s.1 Malicious Communications Act 1988"*. While the exact words of his ex-girlfriend were not agreed, the panel was entitled to note that there had been threats made and there was no error of fact regarding the offences recorded. This ground therefore fails.
18. The Applicant submits that the Panel Chair made an irrational statement by stating that bases of plea *"were not worth the paper they are written on"*. I have listened carefully to the recording and the Panel Chair does not make any such comment. In the context of questions about threats made by the Applicant, the Applicant states that there were no text messages saying he would harm or burn down the house and that a basis of plea had been agreed and acted upon by the sentencing judge. The Panel Chair comments that sometimes *"bases of plea are submitted to avoid the length and expense of a trial and it means that you end up with a compromise solution that both sides are happy to prosecute and defend without a trial. It's not actually to do with the absolute truth"*. The Applicant explained that was not the position in his case. When he was examined by his own representative, the Applicant made it clear the basis on which he had submitted a basis of plea and the dossier (p.238) also includes the details of the basis agreed with the prosecution and set out by the Applicant's representative. There is no evidence that the panel rejected the basis of plea that had been accepted at trial and on which the Applicant had been sentenced, nor any evidence that the reasoning or decision of the panel ignored the stated basis or treated the offences more seriously than that recorded. The comment that was made by the Panel Chair, whilst unnecessary in the light of the explanation set out in the dossier, was not irrational nor did it lead to any unfairness either in the hearing or in the reasoning in the decision letter. The comment does not provide any basis for the decision to be set aside, this ground therefore fails.
19. The Applicant complains that the brief meeting with his former partner did not amount to an intimate relationship, that he had completed relevant courses and that the COM had suddenly without justification increased his risk assessment. All the matters set out in his written application were raised at the hearing and have been argued in the written submissions sent to the panel. The panel was presented with

different opinions by the professionals. It was clear from the recording of the hearing that all the witnesses were carefully and thoroughly questioned by the panel and in particular that the Applicant was questioned about what he understood by the term "*intimate relationship*", questioned about the courses he had undertaken and those it was suggested he undertake. The Applicant's representative made written submissions at the end of the hearing. The application makes the same submissions as have been already made at the hearing and in the written submissions. In the light of the disagreement between the professional witnesses the panel made a decision and gave reasons as to why they preferred the position of the COM and psychologist. The current version of the Spousal Arousal Risk Assessment (SARA) allowed for a fuller assessment, including more information and additional time. As a consequence the psychologist had come to a different conclusion now assessing the Applicant as "*high risk*". The panel acknowledged the work already undertaken by the Applicant but "*did not consider it of sufficient intensity to address his risks*". The panel in the decision letter set out the reasons why, in preferring the evidence of the COM and psychologist, the additional course was necessary. That was a decision open to the panel which was neither unfair nor irrational. The Applicant is no doubt disappointed and disagrees with the decision preferring the panel to have decided differently. Disagreeing with a decision is not grounds for set aside nor does it provide grounds to establish irrationality or unfairness in law.

20. With regard to the Applicant's health, whilst it was not dealt with in the decision letter, it is clear from the recording that the Panel dealt very sympathetically with that when it was raised at the end of the hearing. The weight to be attached to the Applicant's medical condition and compliance with local dispensation of medication as a protective factor is entirely a matter for the panel. Even if more weight were given to that as a protective factor the decision letter makes clear that there are many other risk factors leading the panel to conclude that the Applicant's risk has not reduced sufficiently and is not manageable in the community. This ground must therefore also fail.

Decision

21. For the reasons explained above none of the matters put forward by the Applicant can succeed and I am unable to find that there was any irrationality or unfairness in the panel's decision. This application for set aside is refused.

Barbara Mensah
07 May 2024