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[2024] PBSA 51

Application for Set Aside by Kane

Application

1. This is an application by Kane (the Applicant) to set aside a decision not to direct his release. The decision was made by a Panel after an oral hearing on 18 June 2024. This is an eligible decision.

2. I have considered the application on the papers. These are (i) the dossier, now containing 715 pages, (ii) the oral hearing decision dated 30 June 2024 (DL) and (iii) the application for set aside made by the Applicant's solicitors dated 21 July 2024.

Background

3. On 29 October 2015 the Applicant was sentenced to 14 years imprisonment for conspiracy to supply a controlled drug of Class A contrary to section 1 (1) of the Criminal Law Act 1977 ("the index offence"). The Sentence Expiry Date (SED) is in February 2029.

4. In October and November 2013, three separate quantities of heroin totalling 3.7 kilos were intercepted by the police when being transported by the Applicant's co-conspirators. The Applicant absconded to the Netherlands where he remained until his arrest and extradition in October 2014.

5. The Trial Judge found the Applicant to be a clever, calculating man steeped in criminality who played a leading role in the conspiracy by directing or organising, buying and selling on a commercial scale and having substantial links to, and influence on, others in a chain and an expectation of substantial financial gain.

6. The Applicant has a criminal record of convictions for 40 offences since the age of 13 including s.18 wounding, ABH, battery, racially aggravated assault, affray, threats to damage property, possession of a prohibited weapon, criminal damage, possession of drugs, theft and other dishonesty, fraud, numerous offences contrary to the Proceeds of Crime Act 2002 and driving matters including dangerous driving. He has also breached, and failed to comply with, court orders, bail requirements and licence conditions.

7. The Applicant committed a further offence of possessing a mobile phone in prison in November 2021 for which he received a six month suspended sentence of imprisonment in January 2023.

8. The Applicant was aged 29 at the time of sentencing and is now 38 years old.

9. The Applicant was automatically released on 5 January 2023. His licence was revoked on 24 February 2023 and he was returned to prison the next day. This was his first parole review since his recall to prison.

Application for Set Aside

10. The application for set aside is based on what are said to be an *"extraordinary number of factual and legal errors"* which I shall address in detail below although I am unable to identify any legal errors which are relied on in the Application.

Current parole review

11. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) pursuant to s. 255C(4) Criminal Justice Act 2003 to consider whether or not the Applicant should be released.

12. The case proceeded to an oral hearing on 18 June 2024 before a two-member Panel consisting of an independent Chair and a Judicial member. The Panel heard evidence from the Applicant, his Prison Offender Manager ("POM"), his Community Offender Manager ("COM"), a security governor, a police witness and the Applicant's sister. The Applicant was legally represented throughout the hearing.

13. The Panel did not direct the Applicant's release.

The Relevant Law

14. 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.

15. 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)).

16. 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

17. The Respondent has, to date, submitted no representations in response to this application.

Discussion

18. I follow the numbering in the application in considering the errors relied on by the Applicant:

1) Confusion between offences

19. The Panel was obviously aware that the Applicant faced two separate conspiracies to supply Class A drugs at trial, of which he was convicted of one and acquitted of the other (DL 1.3). The quantities in both cases were significant, the Trial Judge finding that the three drug seizures relating to the count of which the Applicant was convicted were *"merely illustrations of what this conspiracy involved"*. Also, while the reference to p.261 of the dossier is erroneous, I note from the correct page (p.461) that 20% purity appears to be attributed to only one of the three seizures.

20. The apparent omission in DL 4.11 of the word *"alleged"* before the word *"accomplice"* hardly goes to indicate a belief in the mind of the Panel that the Applicant had been convicted of both conspiracies and is certainly not an error but for which a decision not to direct release would not have been made.

2) Minimisation and denial

21. The Panel was particularly concerned at what it found to be the Applicant's continued minimisation of his role in, and responsibility for, the index offence and some of his previous convicted offending. His wider admissions of involvement in criminal activity following his absconding to the Netherlands are noted while his admissions in relation to the proven conspiracy mirrored the view already taken about his involvement by the Trial Judge.

22. Whilst it is not clear what other *"unproven allegations"* the Panel found him to have denied, I do not find that there is an error of fact here but for which the decision not to release would not have been made.

3) The allegation of possession of a weapon and ammunition in the Netherlands

23. This allegation appears to derive (I am not provided with the exact reference) from the OASys document p.606 as follows:

"In [the Applicant's] apartment, Police discovered what appeared to be high quality cannabis, records indicating drug dealing activities, multiple mobile telephones, cash, a money-counting machine and in the basement car-park, a firearm and ammunition linked to him through DNA evidence on the firearm and his fingerprints on the accompanying box of ammunition. It is acknowledged here that [the Applicant] denies any association with firearms, and also the fact that he has not

faced prosecution based on this evidence. It is relevant in considering the risk posed by him, particularly in light of his previous conviction for possession of an offensive weapon. It is a matter of record within the CPS that these items were discovered and attributed to him."

24. The Panel considered all the evidence relating to this issue, including that of the Applicant, and was obviously aware that the allegation was that the Applicant's DNA was found on a firearm and his fingerprints on an *"accompanying"* box of ammunition in a car parking area beneath the flat which he rented.

25. While making a finding (DL 4.11) in relation to his lifestyle in the Netherlands, the Panel notes the evidence on this point and was unconvinced by the Applicant's account in relation to the forensic findings. This, of course, is a matter for the judgement of the Panel having heard the relevant evidence and does not, in my view, constitute an error of fact but for which the decision not to direct release would not have been made.

4) Possession of a second mobile phone

26. The issue of mobile phones was clearly a central consideration in the Panel's assessment of risk in the light of the Trial Judge's comments about the Applicant's regular changing of mobile phones in order to avoid detection and to facilitate his ongoing criminal activities together with his conviction for the possession of a mobile phone whilst in prison in November 2021.

27. When he was arrested upon his recall, the Applicant was further arrested for breaching a term of his Serious Crime Prevention Order (SCPO) by being in possession of a second mobile phone in addition to the one he was permitted to have.

28. In May 2024 the Applicant received, upon his guilty plea, a sentence of 20 weeks imprisonment in relation to this matter which was said to have been committed in breach of the suspended sentence of imprisonment imposed for the November 2021 offence.

29. The Panel took time to consider the issue in detail and heard the Applicant's evidence and his explanation in relation to the second phone which it records (DL 2.10 and 2.11) including that he specifically denied possession of the second phone in his evidence to the Panel. The Panel also noted the various similarities between the two phones involved.

30. Having, as it records, examined the issue in detail the Panel made its findings, rejecting the Applicant's accounts, which again was a matter peculiarly for the Panel in its own judgement.

5) Disguised compliance

31. This would appear to be a finding of the Panel upon consideration of all the evidence, oral and written. It is a conclusion drawn by the Panel and, as such, does not amount,

in my view, to an error of fact but for which a decision not to release the Applicant would not have been made.

6) Other breaches of licence

32. This submission is said to relate to the Panel's finding that the Applicant *"did not demonstrate an understanding of the importance of fully complying with his licence conditions, including managing mobile phones".* It is accepted that there was some questioning of the Applicant and the COM in relation to this issue and the Panel had the benefit of the contents of the dossier and such other oral evidence as they deemed to be relevant. Again, this is a conclusion reached by the Panel in its judgement and, in my view, cannot be said to amount to an error of fact.

7) Passport

33. The licence condition relating to the passport is as follows: *"to surrender your passport to your supervising officer and to notify your supervising officer of any intention to apply for a new passport."*

34. This is another important issue given the Applicant's proven criminal activities, his flight to the Netherlands and his return following the issue and execution of a European Arrest Warrant.

35. The Panel seems to have given this matter detailed consideration and at DL 4.12 it sets out its findings at some length. It could not find to the requisite standard of proof that the Applicant had not disclosed to probation his intention, with his sister's assistance, to apply for a passport but the view that the Panel formed of the Applicant left it doubtful whether, had he not been recalled to prison, he would have gone on to comply with that part of the condition which required him to surrender his passport since Probation would have only known that he received it as and when he chose to tell them.

36. In addition, the Panel is factually correct in describing the address to which any new passport was to be sent as his *"mother's",* whether or not it was also his own home address.

37. The Applicant's solicitor variously suggests that the Panel's approach here was unfair, not in accordance with law and legally perverse. These are bold submissions which are, I find, completely without merit.

8) Miscellaneous Errors

38. I can deal with these points shortly since they are properly described as, and simply amount to, a miscellany of complaints which are said to undermine the reliability and fairness of the decision and the hearing which, of course, is not the test for me in an application of this sort.

39. None of these matters, I find, whether individually or cumulatively, amount to errors of fact but for which the decision not to release would not have been made but it is worthy of note that as to (ii) it is accepted practice to allow the prisoner to *"have*

the last word" at the hearing and, if this was not, as submitted, permitted, then it was open to the Applicant's solicitor to make appropriate representations.

40. In addition, the Applicant's solicitor acknowledges that point (vi) is not significant, as quite clearly is point (ix).

41. It is submitted on the Applicant's behalf that, without the errors, the only basis on which the Panel could have refused release was possession of the second phone. Upon a careful consideration of the DL, this is clearly not the case since the Panel's decision would appear to be the result of a thorough consideration of a significant amount of evidence, with the Panel recording in appropriate detail that which it had heard and read. The DL sets out the Panel's findings in coming to the conclusion that, in its judgement, the public protection test for release was not met and that the risk of harm which the Applicant continues to present is currently unmanageable in the community on the basis of the proposed risk management plan.

42. The Panel has exercised its judgement in this case, and I can find no errors of fact made by the Panel but for which the decision not to direct release would not have been made.

Decision

43. I have carefully considered the application and, for the reasons I have given, I find that the Applicant is unable to demonstrate that the Panel fell into error as to fact and the application to set aside is refused.

PETER H.F. JONES
08 August 2024