

[2024] PBSA 57**Application for Set Aside by O'Connor****Application**

1. This is an application by O'Connor (the Applicant) to set aside the decision not to direct his release. The decision was made by a single member panel after an oral hearing on 14 May 2024. It is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, and the application for set aside.

Background

3. On 1 April 2022, the Applicant was sentenced to concurrent determinate periods of imprisonment for 63 months for two offences of being concerned in the supply of Class A drugs (heroin and cocaine). These offences were committed between December 2018 and March 2020 with four other males as part of a street gang.
4. The Applicant was aged 29 when sentenced and is now 31. He had many previous convictions dating from 2011, including convictions for failing to stop after an accident, possessing a knife in a public place, affray, possessing Class A and B drugs with intent to supply, assault occasioning actual bodily harm, possession of an offensive weapon, criminal damage, battery, and unauthorised possession of a knife in prison.
5. On 1 November 2021, whilst on remand, the Applicant assaulted a prison officer by holding him by the neck. For the offence of assaulting an emergency worker, he was sentenced on 9 August 2022 to 10 weeks imprisonment. This has now expired by effluxion of time.
6. He was automatically released on licence on 1 March 2023. His licence was revoked on 12 July 2023, and after a period of being unlawfully at large, he was arrested and returned to custody on 2 October 2023. This was his first recall under the current sentence, and his first parole review since recall.

Application for Set Aside

7. The application for set aside has been drafted and submitted by the Applicant's legal representative.

8. It is submitted that there have been errors of fact which are detailed below in the Discussion section.

Current parole review

9. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether or not to direct his release.
10. The Applicant's sentence will expire in January 2026. He had been released on 1 March 2023 but his licence was revoked on 12 July 2023 for breaching the following conditions (i) to be of good behaviour and not behave in a way which undermines the purpose of the licence period (ii) to reside permanently at an address approved by the supervising officer for any stay of one or more nights at a different address (iii) not to reside, (not even to stay for one night) in the same household as any child under the age of 18 without the prior approval of your supervising officer and (iv) not to enter the area of Location A as defined by the plan attached to the licence without the prior approval of the supervising officer.
11. The Applicant has remained in custody since recall and the Respondent referred his case to the Parole Board to consider whether to direct his release. Release would be appropriate only if the protection of the public from serious harm required him to be confined.
12. The case proceeded to an oral hearing on 14 May 2024 before a single member panel (the Panel) which heard evidence from the Applicant, his former Prison Offender Manager (POM) at his previous location, a Prison Officer standing in for his POM at his current location and his Community Offender Manager (COM). The Applicant was legally represented.
13. The Applicant had been released on licence with a requirement initially to reside at designated probation approved premises and subsequently to a hostel followed by an 84 night accommodation placement.
14. On 29 June 2023 when the Applicant attended a supervision appointment he was found to have two mobile phones with him, in breach of one of the licence conditions. When this was pointed out to him, he explained that one of them belonged to a friend.
15. On 10 July 2023 the Applicant's COM received information that he was living at an address in Location A with a woman and a 6 year old child. This was in breach of the licence conditions to reside permanently only at an approved address, not to live in the same address as a child under 18 and not to enter a designated exclusion area. Two days later, he was captured on a police video getting into a vehicle outside the address with the woman who owns the property.
16. The Applicant's licence was revoked on 12 July but he remained unlawfully at large until arrested at an address in Location A on 30 September 2023. In the meantime, the COM had been informed by the Applicant's mother that he had wanted to hand himself in but he did not in fact do so.

17. The Panel did not accept the Applicant's explanation that the woman in question had been known to him as a friend for 15 years, that she had visited him whilst he was out in the community and that she happened to live next door to his brother whose address he went to as his mother was there. The Panel found the recall had been justified and that finding has not been challenged.
18. Following recall, the Applicant was held initially and remained at his previous location. He was placed in the segregation unit as a result of his verbal abuse towards staff and for other poor behaviour. Evidence by his POM that it was probable he had been involved in the illicit economy was challenged by the Applicant. He described the description of his behaviour as "*a whole heap of lies*".
19. As a consequence of the Applicant's perceived involvement in wrongdoing, the Applicant was transferred to his current location on 13 February 2024 and his behaviour there was reported to be much better. He attained Enhanced Status under the Incentives and Earned Privileges Scheme (IEP) and completed work on pro-social modelling, thinking skills and victim awareness.
20. The COM told the Panel that in her assessment there was a strong likelihood of the Applicant re-engaging with known adult associates and gang activity as soon as he returned to the community. The Panel concluded that he would accordingly pose more than a minimal risk of serious harm if released now. It agreed with the OASys assessments of a high risk of serious harm to the public in the event of any re-offending in the community and a medium risk to a known adult, to children and to staff. The Panel considered that the assessments of the likelihood of further general convictions as low and convictions for violence as medium were underestimated.
21. The Risk Management Plan (RMP) involved release in the first instance to the closely monitored and disciplined environment of designated premises run by the probation service. There would be other external protective factors including the imposition of licence conditions. There was limited family support.
22. The Applicant's POM was unable to attend the hearing and evidence was given by a Prison Officer standing in for them. The Panel adjourned the case for further information, particularly in respect of security entries and after a further adjournment this was provided. Closing submissions were provided by the Applicant's legal representative by letter dated 7 June 2024. The Panel issued a further adjournment notice dated 13 June 2024 seeking clarification in respect of apparently inconsistent security entries and directing any further legal representations. Clarification was provided and the legal representative confirmed by email dated 3 July 2024 that, having spoken to the Applicant, she had no further submissions to make.
23. Both the POM and the stand-in officer recommended release. The COM did not. The Panel decided that the recall had been appropriate. It considered the opposing recommendations and concluded that despite the Applicant's improved behaviour there remained multiple medium graded security entries. It was not persuaded that he had moved away from his former lifestyle or that he would be able to maintain any motivation to do so in the community. The Panel concluded that it was still

necessary for the protection of the public that the Applicant remain confined and declined to direct his release.

The Relevant Law

24. 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.
25. The types of decision 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)).
26. 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

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

Discussion

28. It is argued on behalf of the Applicant that *"information was not provided by the POM as a stand-in took part in the hearing"* and were *"unable to comment on the further information requested by the Parole Board and therefore unable to set out clearly why the Prison Offender Manager was supportive of release and provide further details"*. *"Had the Prison Offender Manager been present and able to answer all the questions put to them, [the Applicant] believes it may have been possible for the outcome to have been different"*.
29. Despite the opportunity for the Applicant's legal representative to make further representations having been expressly given by the Panel, none were made. Such representations could have included a request for the oral hearing to resume so that the POM could attend in order to provide further evidence.
30. No specific error of fact has been alleged. A failure to provide evidence and an inability to comment do not amount to an error of fact.

Decision

31.I have concluded that, in the absence of any identified error of fact, the test for setting aside the decision by reference to rule 28A(4) sub paragraph (a) has not been met. Sub paragraph (b), which refers to the position if information not available to the Board had been available, is restricted to cases where a direction for release had been made.

32.The application for set aside is accordingly refused.

HH Judge Graham White
29 August 2024