

**[2022] PBSA 12****Application for Set Aside by Bowery****Application**

1. This is an application by Bowery (the Applicant) to set aside the decision made by a panel on the papers (the Member Case Assessment (MCA) decision, dated 25 August 2022) not to direct his release.
2. I have considered the application on the papers. These are the paper decision (dated 25 August 2022) the dossier, the decision of a Duty Member (dated 6 October 2022) and the application for set aside.

**Background**

3. On 28 April 2020, the Applicant received an extended sentence comprising four years and three months imprisonment followed by a three-year extension period after conviction for sexual activity with a female child under 16 (no penetration).
4. His parole eligibility date is 10 February 2023, his conditional release date is in July 2024, and his sentence expiry date is in July 2027.
5. The Applicant was aged 35 at the time of sentencing. He is now 38 years old.

**Application for Set Aside**

6. The application for set aside is dated 31 October 2022 and has been drafted and submitted by solicitors acting for the Applicant.
7. It submits that there has been an error of fact.

**Current Parole Review**

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in April 2022 to consider whether or not it would be appropriate to direct his release. This was the Applicant's first parole review.
9. On 25 August 2022, the case was reviewed by a single member panel on the papers (the MCA panel). That panel did not direct the Applicant's release.
10. On 22 September 2022, the Applicant's legal representative made an application in writing for the case to be considered by a panel at an oral hearing.



3rd Floor, 10 South Colonnade, London E14 4PU

[www.gov.uk/government/organisations/parole-board](http://www.gov.uk/government/organisations/parole-board)[info@paroleboard.gov.uk](mailto:info@paroleboard.gov.uk)

@Parole\_Board



0203 880 0885

11. On 6 October 2022, a Duty Member dismissed the oral hearing application.

### The Relevant Law

12. Rule 28A(1) 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(2), the Parole Board may seek to set aside certain final decisions on its own initiative.

13. The types of decisions eligible for set aside are set out in rules 28A(1) and 28A(2). 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)).

14. A final decision may be set aside if it is in the interests of justice to do so (rule 28A(4)(a)) **and** either (rule 28A(5)):

- 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 made if information that had not been available to Board had been available, or
- c) a direction for release would not have been made 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

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

### Discussion

16. Before considering the application in detail, it will be helpful to set out the mechanism by which paper decisions become final.

17. Consideration of a case on the papers is governed by rule 19. Under rule 19(1), the MCA panel must decide either that the prisoner is suitable for release, the prisoner is unsuitable for release, or the case should be directed to an oral hearing.

18. In this case, the MCA panel decided that the prisoner was unsuitable for release (rule 19(1)(b)).

19. By operation of rule 19(6), that decision was provisional.

20. The procedure after a provisional decision on the papers is governed by rule 20. Rule 20(1) allows a prisoner who has received a negative decision to apply in writing for a panel at an oral hearing to determine the case. By rule 20(2), any such application must be served on the Board and the Respondent within 28 days of receipt of the decision.

21. The MCA decision was issued to the parties by email on 25 August 2022. Therefore, any application for an oral hearing needed to be served on the Board and the Respondent on or before 22 September 2022.
22. On 22 September 2022 at 1.12 p.m., the Applicant's legal representative emailed a request for an oral hearing to the Parole Board Case Manager. It was not sent to the Public Protection Casework Section (PPCS) which acts on behalf of the Respondent in these proceedings. The PPCS has since confirmed that it never received a request for an oral hearing.
23. The request for an oral hearing was therefore not properly served in accordance with rule 20.
24. I could, therefore, dismiss the application for set-aside which relies on the Duty Member's treatment of the request for an oral hearing, since that request was never properly served.
25. I am, however, reminded of the words of Lord Diplock in **Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses Ltd [1981] AC 617 (HL)** who said (at 644E):

*"It would, in my view, be a grave lacuna in our system of public law if a [party] were prevented by...technical rules...from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."*

26. Although **Inland Revenue Commissioners** concerned technical rules of standing in judicial review, it nonetheless illustrates an important point of fairness in public law which I consider also applies in the current case. The application for set-aside is challenging the lawfulness of a decision made by the Parole Board. It relies upon an error of fact that it says the Parole Board has made. The set-aside rule exists to further the interests of justice: it would be contrary to its purpose to dismiss an application to review an alleged error of fact by the Parole Board on the sole basis that there was an earlier (and relatively minor by comparison) procedural error by the Applicant's legal representative: particularly as the liberty of the Applicant is at stake (**R v Gould [1968] 2 QB 65 (CA) 69A (Lord Diplock)**).
27. In the interests of fairness, I am treating the application for an oral hearing as if it had been served on the Respondent as well as the Parole Board. In practice, this makes little difference, as it would be exceptionally rare for the Respondent to contest a request for an oral hearing. In any event, rule 29 provides that any procedural error does not invalidate proceedings unless directed otherwise, and I do not find the error to have invalidated proceedings.
28. Rule 20(5) goes on to say that applications for an oral hearing must be determined by a Duty Member (who was not part of the original MCA panel).
29. On 6 October 2022, the application for an oral hearing was considered by a Duty Member who refused the application for two reasons.

30. First, the Duty Member stated:

*"A Duty Member has considered a dossier of 242 pages, which concludes with Legal Representations (22/09/22) which challenge the negative decision issued on the papers on 25/08/22. Whilst [the Applicant's] reasons for wanting an oral hearing are understood, the request is not approved for the following reasons:*

*- This application is being made outside of the clearly specified timescale for requesting an oral hearing under Rule 20. As stated on pg. 235, applications with reasons for wanting an oral hearing should be served within 28 days of the decision being sent to the parties. This application should therefore have reached the Parole Board for consideration by 22/09/22."*

31. This is plainly wrong. The Duty Member notes that representations within the dossier were dated 22 September 2022 but goes on to say that they were out of time as they should have been received by 22 September 2022. They were received in time and the Duty Member's conclusion is not sound.

32. If, as the Duty Member wrongly concluded, the application for an oral hearing was out of time, then that should have been the end of the matter.

33. However, the Duty Member inexplicably goes on to give a second reason why an oral hearing was not necessary, agreeing with the MCA panel's view that the Applicant had core risk reduction work that needed to be completed in custody. In doing so, the Duty Member acknowledges understanding the Applicant's reasons for wanting an oral hearing and carefully considering the provisional paper decision.

34. Having refused the application for an oral hearing, the Duty Member decision concludes with the statement:

*"[The Applicant's] paper decision is therefore final, and his current review is now concluded in accordance with the Parole Board Rules."*

35. Rule 20(6)(a) says that if a Duty Member decides not to grant an oral hearing, then the decision remains provisional if it is eligible for reconsideration under rule 28. The Applicant is serving an extended determinate sentence which, by rule 28(2)(b), makes it eligible for reconsideration. The Duty Member's closing statement is also wrong.

36. The MCA decision becomes final if no application for reconsideration is received within the period specified by rule 28. This period is set out in rule 28(3) as no later than 21 days after the decision has been provided to the parties. The Duty Member decision was provided to the parties on 11 October 2022 and therefore the reconsideration window closed on 1 November 2022.

37. In fact, notwithstanding the Duty Member's incorrect statement of finality, an application under rule 28 was made on 31 October 2022. This was correctly rejected

as it challenged the decision of the Duty Member as being procedurally unfair and irrational, and refusal to grant an oral hearing falls outside rule 28(1).

38. The current application for set-aside was also made on 31 October 2022. At the time the set-aside application was made, the MCA decision was not final (as it became final from 2 November 2022). The set-aside mechanism only applies to final decisions.
39. The application for set-aside could be dismissed on the basis that it was submitted prematurely. However, the analysis adopted earlier in paragraph 26 also applies here, as does rule 29. Moreover, by the time the application was sent for determination, the decision had become final.
40. In the interests of fairness, I am considering the application for set-aside on the basis that all prerequisites had been complied with. To do otherwise would defeat the purpose of rule 28A in the particular circumstances of this case.
41. The application submits there was an error of fact on behalf of the Parole Board in refusing the application for an oral hearing and this error had a significant impact on the outcome of the case.
42. The submission conflates two decisions, both of which were made on behalf of the Parole Board. The first being the MCA decision and the second being the decision of the Duty Member.
43. Rule 28A only applies to the final MCA decision (the decision made under rule 19(1)(b)) and there are no submissions regarding an error of fact by the MCA panel.
44. Even if I were to broaden my considerations to include the self-evident error of fact made by the Duty Member, I am not satisfied that the decision not to release the Applicant would not have been made but for that error. There is no certainty that an oral hearing would inexorably have led to a release decision.

## Decision

45. For the reasons I have given, the application for set-aside is refused.

**Stefan Fafinski**  
**30 November 2022**