

[2022] PBSA 16

Application for Set Aside by Ellis

Application

1. This is an application by Ellis (the Applicant) to set aside the decision made by a panel following an oral hearing not to direct his release. The decision is dated 28 October 2022.
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, and the application for set aside.

Background

3. On 16 June 2021, the Applicant received an extended sentence comprising four years imprisonment followed by a two-year extension period after conviction for robbery to which he pleaded guilty. He also received concurrent sentences of two years for attempted robbery and 18 months for dwelling burglary with intent to steal, to which he also pleaded guilty.
4. His parole eligibility date is 3 July 2022, his conditional release date is in November 2023, and his sentence expiry date is in October 2025.
5. The Applicant was aged 30 at the time of sentencing. He is now 32 years old.

Application for Set Aside

6. The application for set aside is dated 22 November 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 October 2021 to consider whether or not it would be appropriate to direct his release. This was the Applicant's first parole review.
9. The case proceeded to an oral hearing on 27 October 2022 before a two-member panel comprising an independent member and a psychologist specialist member. The Applicant was legally represented throughout the hearing. Oral evidence was given by the Applicant, his Prisoner Offender Manager (POM), his Community



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Offender Manager (COM) and a prison psychologist. The Respondent was not represented by an advocate.

10. The panel made no direction for release.

The Relevant Law

11. 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.

12. 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)).

13. 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 the 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

14. The Respondent has offered representations dated 24 November 2022 in response to this application. These confirm the position of the Respondent in respect to matters given in evidence at the hearing, but do not seek to persuade me to determine the application either way.

Discussion

Eligibility

15. The application concerns a panel's decision not to direct release following an oral hearing under rule 25(1)(b). The set-aside rule only applies to final decisions. The decision in this case became final on the expiry of the 21-day reconsideration window provided by rule 28; that is on 18 November 2022. The application argues that a condition in rule 28A(5)(a) (error of fact) is made out. It is therefore an eligible decision which falls within the scope of rule 28A.

Error of fact

16. The application claims that the panel made an error of fact based upon the Applicant's eligibility for a particular high intensity accredited offending behaviour programme dealing with general violence (the 'programme').
17. In its decision (at para. 2.3), the panel noted:
- "[The POM] confirmed [the Applicant] has been identified as suitable to complete the [programme] and is awaiting a transfer to commence the course. However, his [risk of future violence] score has since reduced from medium to high which she stated may affect his eligibility".*
18. No issue is raised with the phrase "reduced from medium to high" which I take as meaning "reduced from high to medium".
19. The Respondent notes that the POM has subsequently confirmed that the Applicant is no longer suitable for the programme, based on the reduction in his risk of future violence score.
20. The Respondent also notes that, even though the Applicant is no longer suitable for the programme, the COM has said *"this does not alter the risk management plan or sentence plan objectives...I did explain to the [Applicant's legal representative] that if he didn't meet the criteria for [the programme] that did not mean he was not eligible to complete other offending behaviour work as this would still remain outstanding"*.
21. The Applicant argues that the panel failed to confirm his eligibility for the programme, and this amounted to an error of fact.
22. The passage from the decision referred to in the application is a recital of the evidence given by the POM. However, the panel does not state anywhere in its decision that the Applicant was, in fact, eligible for the programme, so there is nothing factually incorrect within its decision.
23. In any event, the confirmation of the Applicant's suitability for the programme came after the decision was made. As a matter of logic, a panel cannot err as to facts it does not know. There cannot be an error of fact here and the application must fail on that basis.
24. Even if there had been an error of fact I would also have had to go on to consider whether that error would have affected the panel's decision not to direct the Applicant's release.
25. The panel stated the Applicant had yet to engage in an intervention to address his past use of violence. It did not say what that intervention should have been. Even if the panel had known the Applicant was not suitable for the programme, it would not have changed the fact that the Applicant had not undertaken any intervention to address his past use of violence.

26. I do not find there to have been an error of fact on the part of the panel, but, even if there had been, I do not find that any such error would have materially affected its decision.

27. The application therefore does not establish the requirements of rule 28A.

Slip rule

28. The application also asks that the panel “*reconsider their decision in line with paragraph 30 of the Parole Board Rules 2019, namely under the slip rule*”.

29. Rule 30 does not give any mechanism by which a decision can be reconsidered. Reconsideration under rule 28 was available to the Applicant for 21 days after the provisional decision was issued and no application was made. The opportunity for reconsideration has passed.

30. The wording of Parole Board rule 30 mirrors rule 40.12 of the Civil Procedure Rules (CPR), and it is reasonable to assume principles of case law relating to CPR 40.12 apply to rule 30. As such, the slip rule cannot be used to correct findings of fact made in a decision (**Re A (a Child) [2014] EWCA Civ 871 [23-24] (Patten LJ)**) or enable a decision maker to have “*second or additional thoughts*” (**Bristol-Myers Squibb v Baker Norton Pharmaceuticals (No. 2) [2001] EWCA Civ 414 [25] (Aldous LJ)**). In short, no application of rule 30 may materially affect a decision, and any attempt to use it to do so must fail. It can only be used to correct an accidental slip or omission in a decision.

Decision

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

Stefan Fafinski
6 December 2022