

[2022] PBSA 19

Application for Set Aside in the case of O'Connor

Application

1. This is an application by O'Connor (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated the 11 August 2022 not to direct his release.
2. I have considered the application on the papers, these are:
 - a) The Decision Letter dated the 11 August 2022;
 - b) The application to Set Aside from the Applicant in the form of representations from his legal representative submitted in November 2022;
 - c) Personal representations from the Applicant, referenced by his legal representative;
 - d) The dossier, numbered to page 1416, of which the last document is a decision by a Duty Member of the Parole Board agreeing to the Applicant's request to extend the time limit for his submission of representations seeking reconsideration. The panel had a dossier numbered to page 1369;
 - e) The Applicant's application for reconsideration; and
 - f) The Reconsideration Decision in this case (PBRA 141), refusing the Applicant's request for reconsideration.

Background

3. On the 4 March 2002, the Applicant was sentenced to imprisonment for life following conviction after trial for murder. His tariff expired on the 16 May 2016 and the panel's consideration of his case was the third review by the Parole Board. At the time of the panel's review, the Applicant was in an open prison and the panel was required to consider whether it would be appropriate to direct his release.
4. An oral hearing had initially been directed following a paper review in June 2020. There followed adjournments before the substantive oral hearing was completed on the 26 July 2022. There was then further adjournment prior to the panel issuing its Decision Letter dated the 11 August 2022.
5. The panel did not direct the Applicant's release. In its Decision Letter, the panel stated:



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'...

4.9. *The Panel concluded that [the Applicant's] current personality traits demonstrably shown at the second hearing, included: rigidity, fixation, tendency for grievance thinking, inability to reflect in the moment, poor ability to take a wider perspective and a strong need to paint himself in a positive light were highly relevant to long-term risk, and his insight and techniques to manage these traits were currently under-developed and under-practiced. The Panel could not confidently separate his attitude towards the hearing, the professionals he disagrees with, licence conditions he disagrees with, treatment pathways he disagrees with and potential future risks towards a partner.*

4.10. *The Panel considered [the Applicant's] current personality traits to be offence paralleling and on that basis concluded his risks are unmanageable in the longer term in the community. The Panel fully acknowledges how hard [the Applicant] has worked and planned for his release and how disappointed he will be with this decision. Once he has had time to process the decision, the Panel encourage him to reflect with the help of professionals, and encourage him to grasp any opportunity that is offered to help him with these areas.*

...'

6. Following his receipt of the panel's decision, the Applicant applied to the Parole Board for the decision to be reconsidered on the basis that the decision was both irrational and unfair. The Applicant had submitted that evidence had been misrepresented or misinterpreted; there had been a failure to allow cross-examination; there had been a failure to consider the Applicant's written evidence; there had been a failure to consider professional recommendations; the panel's conclusion had been irrational based on the evidence; and the panel made an irrational assessment of the Applicant's body language during the hearing.
7. The application for reconsideration was considered on the 12 October 2022. The decision by the Reconsideration Member rejected the Applicant's grounds for reconsideration and did not accept that the panel's decision had been procedurally unfair or irrational.

Application to Set Aside

8. In his application to set aside, the Applicant submits that there were numerous errors of fact in this case. The Applicant believes that these errors of fact led to an unfair impact on the assessment of risk undertaken by the panel. It is submitted that if the panel's decision is not set aside then there would be a '*high risk that all future panels that rely on information presented to the Parole Board and the decision itself may continue to create precedence with information that is highly disputed and factually incorrect*'.

9. Although the Applicant's legal representative has identified the areas of the panel's Decision Letter where it is submitted that there is an error of fact, he relies on the Applicant's own personal representations for the detail of the identified error. Taking note of the headings from the legal representative and noting the detail within the Applicant's personal representations, I will address each point in turn in the Discussion below.

The Relevant Law

10. Rule 28A of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) provides that a party may apply to the Board for it to set aside a final decision.

11. 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)).

12. A final decision may be set aside if it is in the interests of justice to do so and one or more of the conditions under rule 28A(5) are met (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 made if

(i) information that was not available to the Board when the direction was given had been so available, or

(ii) a change in circumstances relating to the prisoner that occurred after the direction was given, had occurred before it was given.

The reply on behalf of the Secretary of State

13. The Secretary of State has not made any representations in response to the application being made in this case.

Discussion

14. The Applicant has referenced paragraphs of the panel's Decision Letter he considers to be relevant in his application to set aside the decision not to direct his release. I shall deal with each in turn:

Paragraph 1.3 – Error in facts of build up to the index offence. Misquoting numerous reports and evidence within the dossier.

15. The Applicant suggests that there is an error of fact in terms of the panel's reference to his relationship with the victim prior to his commission of the Index Offence. In his view, the panel has either misinterpreted evidence or has failed to consider his account of events.
16. There is a difference between an established error of fact and a difference of opinion. Much of what the Applicant says is simply his disagreement with the panel's review of his case. The panel had set out the background to the Index Offence and his relationship with the victim and, in fairness to the Applicant, his own account of events was recorded by the panel in its Decision Letter. The detail referred to by the panel is set out in the dossier, with much of the initial information coming from the sentencing Judge's report to the Home Secretary and the sentencing remarks. I am not persuaded that there is an error of fact.

Paragraph 1.7 – Inaccurate information regarding the Applicant's family

17. Paragraph 1.7 of the Decision Letter records information about the Applicant's family and the panel refers to the post sentence report within the dossier. The Applicant identifies that this information is incorrect because no mention is made of his sister who later died or of his sister-in-law who had also sadly died. However, the panel did refer to his sister at a later point in its Decision Letter and the Applicant accepts that he spoke about her at the oral hearing. It was not necessary for the panel to identify every member of the Applicant's family in its Decision Letter and this does not establish an error of fact. Much of the Applicant's complaint focusses on his view of proposed licence conditions and his belief that the panel did not consider this to his satisfaction in its assessment of the case. That complaint does not establish an error of fact.

Paragraphs 1.8, 1.10, 1.11 and 1.12 – Error of fact in assessment of risk factors. The panel arrived selectively at vague, misleading and inaccurate risk factors.

18. The Applicant's argument is more focussed on his disagreement with the panel's assessment rather than any established error of fact. In my view, he has misunderstood what the panel said about him and believes that the panel has discounted efforts he has made to reduce his level of risk.
19. Within the paragraphs the Applicant is complaining about, the panel was detailing risk factors that had been identified in his case and concerns that the panel considered may exist in terms of his level of risk. I am not persuaded that there is any error of fact and the panel addressed the Applicant's efforts in addressing his risk factors elsewhere in its Decision Letter, together with a review of assessments of ongoing areas of risk.

Paragraphs 1.13 and 1.14 – Error of Fact – the panel relied on an erroneous report and failed to take into account a review by the Parole Board in 2016.

20. The Applicant's disagreement with the report he refers to is documented in the dossier, there is extensive material in the dossier from the Applicant detailing his disagreement with the facts of his case or the reports that have been produced about him. Again, much of what he says in his submission seeks to argue why he

disagrees with the report and the panel's review of him. I am not persuaded that there is an error of fact.

Paragraph 1.25 – The panel misquoted the Applicant in relation to his feeling at the time of the Index Offence

21.Paragraph 1.25 is a record by the panel of a part of what the Applicant said in his oral evidence about his commission of the Index Offence. His complaint in his application is that he has said other things to professionals during his sentence. Having considered the Applicant's submission, I am not persuaded that there is any error of fact. Notwithstanding that the panel was simply recording his evidence, the general view of emotional difficulties and their link to the Index Offence were a relevant consideration. It may assist the Applicant to consider the entire Decision Letter when he evaluates what the panel said about him. The Decision Letter is extensive and provides a lot of information about the Applicant and his evidence to the panel about the Index Offence.

Paragraph 2.2 – Incorrect information about course completion

22.The panel records at paragraph 2.2 work that the Applicant has completed in custody to address identified risk factors. It is, in my view, a summary of key aspects of work and is not a complete list of every piece of work undertaken by the Applicant. Panel's are not required to set out in a Decision Letter every detail of every piece of work undertaken. The Applicant's complaint is that the absence of any record of the entirety of his efforts means that the panel failed to accurately assess his progress. I disagree and am not persuaded that there is evidence of an error of fact.

Paragraph 2.3 – Incorrect information regarding legal challenges

23.Paragraph 2.3 of the Decision Letter refers to an earlier review by the Parole Board. The Applicant submits that this is in error because it does not reflect properly what was said. The Applicant states that the Parole Board in 2018 had noted his pursuit of legal remedies and that this had raised concerns about him being obsessive and fixated with issues and that this may have been considered to be offence paralleling behaviour. The Applicant notes that the Parole Board in 2018 referred to a review in 2016 which identified the Applicant relentlessly pursuing complaints.

24.I accept that paragraph 2.3 perhaps would have benefited from a more detailed account of events in terms of the Applicant's complaints in custody, particularly because there has been reference to many of those complaints being justified. However, when reading the Decision Letter in its entirety, it is not a point that was the deciding factor in the decision not to direct his release. I am not persuaded that an improved account by the panel would have led to it deciding to direct the Applicant's release.

Paragraph 2.6 – False accusation with no evidence

25.The panel refer in this paragraph to reports of 'animosity' towards a prison psychologist. The Applicant says that this is an error because he has never behaved this way towards a psychologist. Page 161 of the dossier references the Applicant's



animosity towards a psychologist's recommendation that he had disagreed with. Pages 709-713 are a copy of the Applicant's own evaluation of a report by the psychologist, identifying areas he disagreed with. It may be that the panel could have clarified the comment about animosity but it is not, in my view, an error of fact that would have led to a different decision being made in his case.

Paragraph 2.10 – Incorrect facts relating to Enhanced Behaviour Monitoring (EBM)

26. EBM is a process in some open prisons allowing for additional monitoring and support of a prisoner's progress. The panel had recorded information detailed in the dossier about the Applicant's time in the open estate and the proposal for him to engage with EBM. The Applicant's complaint focusses more on the EBM process and his view that he did not need to be subject to EBM. The panel's record of events is, in my view, reasonable. I do not accept that there is an error of fact.

Paragraph 2.10 – The Applicant has held Enhanced IEP status since 2005 and the panel recorded that the POM had stated he had been Enhanced since 2009

27. I accept that this may be an error, however, the panel reflected in detail the progress in custody and the positive aspects of the Applicant's behaviour. Even if the Applicant had only held Enhanced IEP status from 2009, this would still be a significant achievement and therefore the absence of recognition of the years between 2005 and 2009 would not have made a material difference to the decision in this case. If it assists the Applicant, in my experience, the official recording of the length of Enhanced status is not clear in many cases where that status has been held for many years. This is because of the change to digital working some years ago in the prison estate.

Paragraph 2.14 – Incorrect information regarding 'joint working'

28. The Applicant submits that there was an 'undermined account' by the panel of the 'joint working' he did with professionals in custody. In my view, the panel fairly recorded, in paragraph 2.14 and subsequent paragraphs, the events that had taken place. I do not accept that it was an 'undermined account', it was simply a summary of events. I am not persuaded that there was an error of fact.

Paragraph 2.64 – The panel incorrectly assessed that the Applicant could not identify a risk factor of jealousy

29. The Applicant disputes the panel's evaluation of jealousy being a risk factor that he could not identify. His dispute is not, in my view, evidence of an error of fact. The panel was entitled to reach its own assessment of his case and to discuss insight into jealousy in its questioning of witnesses. The Applicant may well have had some knowledge of jealousy as a risk factor but the panel was entitled to consider his level of insight and this was the critical concern. Even if the absence of his identification of jealousy as a risk factor was an error, it was not the key issue and, when reading the Decision Letter in its entirety, was unlikely to have been a deciding factor in the decision not to direct his release.

Paragraph 3.41 – The panel was in error and misquoted him

30. The Applicant said that he stated it would be possible for him to prevent the emotions of jealousy whereas the panel recorded that he said he would not be able to do so. He also disputes saying that if he felt uncomfortable with a future partner having male colleagues or friends he would discuss this with his Probation Officer. If the Applicant is correct on this point, I am not persuaded that the error would have affected the panel's decision. The Applicant views paragraph 3.41 in a negative light, however, I believe it to be a balanced, fair and a generally positive reflection of the progress made by the Applicant.

Paragraph 3.60 – The panel's view on the Applicant's comments about a 3pm sign-in licence condition was misleading and incorrect

31. The panel had recorded that the Applicant was unhappy with proposed licence conditions. The Applicant's complaint is that he was 'referring to the bespoke licence conditions'. It seems therefore that his disagreement is about what he had been unhappy with in terms of the licence conditions being proposed. In reviewing the evidence, it seems that he was unhappy with much of what was proposed and I am not persuaded that there was evidence of an error of fact.

32. Having reviewed the dossier, the Applicant's application and the Decision Letter, I am not persuaded by the Applicant's submissions. I note the Applicant's concerns about future panels being influenced by the panel's evaluation of his case and the evidence he disputes within the dossier. However, the panel's review was a fair assessment of his case. I can see that the Applicant has submitted numerous written responses to areas of the evidence that he disagrees with and that this information was before the panel. He will be at liberty to submit his own evidence at his next review and therefore any future panel will be in no doubt about his concerns.

Decision

33. For the reasons I have given, I am not persuaded that the final decision of the panel dated the 11 August 2022 should be set aside. The application is refused.

Robert McKeon
14 December 2022