the Parole Board

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[2022] PBSA 21

Application for Set Aside by Hussain

Application

1. This is an application by Hussain (the Applicant) to set aside the decision made by a panel following an oral hearing not to direct his release.

2. I have considered the application on the papers. These are the dossier, the oral hearing decision (21 November 2022), and the application for set aside (2 December 2022).

Background

3. On 11 April 2019, the Applicant received a determinate sentence of six years imprisonment in total following conviction on five counts of harassment (breach of restraining order) and one count of intimidating a witness with intent to obstruct, pervert or interfere with justice.

4. His sentence expiry date is in November 2024.

5. He was automatically released on licence on 19 November 2021. His licence was revoked 12 days later on 1 December 2021, and he was returned to custody the following day. This was his first recall on this sentence.

6. The Applicant was aged 28 at the time of sentencing. He is now 32 years old.

Application for Set Aside

7. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.

8. It submits that there have been six errors of fact and one error of law.

9. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release. This was the Applicant's first parole review since recall.

11. The case proceeded to an oral hearing on 2 November 2022 before a three-member panel comprising a judicial chair, 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 Offender Manager (COM) and a prison psychologist. The Respondent was not represented by an advocate.

12. The panel made no direction for release.

The Relevant Law

13. 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.

14. 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)).

15. 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.

Error of law

16. An administrative decision is unlawful under the broad heading of illegality if the panel:

    a) misinterprets a legal instrument relevant to the function being performed;
    b) has no legal authority to make the decision;
    c) fails to fulfil a legal duty;
    d) exercises discretionary power for an extraneous purpose;
    e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
    f) improperly delegates decision-making power.

17. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, or associated

legislation, but it may also be an enunciated policy, or some other common law power.

The reply on behalf of the Respondent

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

Discussion

Eligibility

19. The application concerns a panel's decision not to direct release following an oral hearing under rule 25(1)(b). The application argues that both conditions in rule 28A(5)(a) (error of fact and error of law) are made out. It is therefore an eligible decision which falls within the scope of rule 28A.

Errors of fact

20. Many of the errors of fact put forward in the application are related so I will deal with them together, after first considering the unrelated matters.

21. It is submitted that there is an error of fact in para. 4.9 of the decision which states "*[The Applicant] did not seem to fully appreciate the extreme psychological harm he has caused [the victim] over several years, which demonstrates a lack of insight into the effects of his behaviour on her and how it must then impact on the children to see her distress"*. It is argued that this is erroneous as the Applicant was extremely vocal during the hearing regarding the psychological harm he has caused his ex-partner and the impact it has had on their children.

22. While the Applicant might disagree with the panel's view, the panel's statement is not one of fact. It describes the panel's interpretation of the evidence which, unlike me, it had the benefit of hearing. There is no error of fact here.

23. It is also submitted that there is an error of fact in para. 4.11. The Applicant says he was *"unequivocally clear during the hearing that he would seek the appropriate legal channels to establish contact with his children"*. There is nothing in para. 4.11 which differs from this view. The panel simply states that any contact must be arranged properly. In this sense the panel and the Applicant agree, so there can be no error of fact here.

24. It is also submitted that there is an error of fact in para. 4.7. This paragraph sets out the panel's account of the evidence which resulted in the Applicant's recall to custody. It begins "*The panel examined the evidence which led to recall".* It then describes an incident which involved the sending of a parcel. The Applicant says the incident which led to recall was separate from the parcel incident. The parcel incident occurred while the Applicant was in custody and not while he was on licence. My reading of the dossier concurs with the Applicant's view, and I find the panel has mistakenly attributed the evidence relating to the parcel with the evidence relating to the recall.

25. The test for set aside requires that I must be satisfied that the panel would have made a different decision but for any error. This sets a high threshold, which is not met here. In other words, would the decision have been different if para. 4.7 began "*The panel examined the evidence relating to another incident following recall"*? I cannot see how it would have been and therefore am not satisfied that this error in timing materially changed the panel's decision.

26. The remaining submissions deal with the panel's treatments of the allegations surrounding contact with the victim while in the community.

27. Turning first to para. 4.4, it is submitted that the panel's statement that "*there was evidence of a developing increased risk of harm to [the victim]"* is an error of fact. A reading of para. 4.4 in its entirety shows that the panel was, at this point in its decision, considering the appropriateness of the recall: a task which it is required to do following **R (Calder) v Secretary of State for Justice [2014] EWHC 4138 (Admin)**.

28. This requires the panel to consider whether the Secretary of State was reasonably entitled to conclude that the Applicant was in breach of his licence conditions. At that time, information had been received to advise that the Applicant had breached his licence by contacting the victim of the index offence. In the view of the Probation Service at the time, the evidence received demonstrated ongoing offence paralleling behaviour and noted the Applicant was assessed as posing a very high risk of serious harm towards the identified victim. Alternatives to recall had also been considered but in the light of that evidence, recall was initiated, and the panel found this appropriate.

29. The panel has made no error of fact here. At the time recall was initiated there was evidence to suggest increasing risk. The fact that the police took no further action is irrelevant in the context in which the panel made the statement in para. 4.4.

30. The final two points of contention are raised in para. 4.3 and para. 4.12.

31. Para. 4.3 states *"[The Applicant] also contacted his [victim] whilst on licence*".

32. Para. 4.12 states "*It is correct that there was no police action leading to prosecution following the complaints, but the panel had no reason to doubt the validity of the statements".*

33. It is submitted that there is no evidence within the dossier, or any evidence presented during the hearing which proves that the Applicant contacted his victim while on licence. It is argued that this was a malicious allegation and that, as no further action was taken by police, this confirmed that there was insufficient evidence to prove guilt. Moreover, it is argued that, as no further action was taken, the panel did have reason to doubt the validity of the statements.

34. A note in the dossier (13 October 2022) indeed confirmed that the police took no further action as the matter did not meet the evidential threshold.

35. The evidential threshold is set out in para. 4.6 of the **Code for Crown Prosecutors** (October 2018) as follows:

> *"Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge."*

36. In response to this, the panel directed details of the allegation and the dossier contains the police logs related to the alleged breaches of restraining order.

37. The decision (para. 2.9) notes the Applicant's insistence that he had not contacted the victim while he was on licence and also carefully notes that the matters were allegations and that the police had taken no subsequent action.

38. It was open to the panel to make an explicit finding of fact in relation to the allegations. It did not do so. However, it was also open to the panel instead to assess the allegation and, if it was relevant to the parole review, decide how much weight to assign to it.

39. There was clear evidence that the Applicant attempted to contact his victim while he was on licence. This evidence was sufficiently compelling for the probation service to decide (after considering alternatives) that risk had escalated to the point that recall was appropriate. While the police concluded that there was insufficient evidence for a realistic prospect of conviction beyond reasonable doubt, it does not follow that the panel must disregard that evidence. To do so would be to suggest that unconvicted matters have no place in a parole review and overlook that a panel may make a finding of fact on according to the lower civil standard of proof: that is, on the balance of probabilities.

40. In para. 4.12, the panel notes it has read the transcripts of the recorded conversations at the time of the recall and drew "*its own conclusions*". It was open to the panel to decide whether to doubt the validity of the victim's statement and it chose not to do so. This was an interpretation of the evidence the panel was entitled to make.

41. Para. 4.2 could be read as the panel making a finding of fact. I do not know whether it intended to do so, but even if it had and that finding was in error, I must still consider whether the panel's decision would have been different but for any such error.

42. If the panel had said "*There is evidence to suggest [the Applicant] contacted [the victim] whilst on licence"* and "*Having read the transcript of the conversations, the panel did not doubt the validity of the victim's statements"* then I still do not see how its conclusion regarding the test for release would have been different. The panel did not simply base its conclusion on the recall matter alone: it notes a lack of victim empathy, a lack of internal controls and understanding, and its view that the Applicant remained fixated on his victim.

43. In conclusion, I find no error of fact in the decision, and, as set out above, even if I had found the matters argued did amount to one or more such errors, I am not satisfied any would have changed the panel's decision.

44. This ground fails.

Error of law

45. It is also submitted that there is an error of law in the decision as, if the test for release had been properly applied by the panel, then it would have released the Applicant (who contends he meets the test).

46. This is plainly nonsense. To find otherwise would mean that any prisoner who disagreed with a panel's risk assessment could say that the legal test was incorrect. The test is set out accurately in the decision and the panel has addressed it properly. The Applicant may well consider he is safe to be released, but the panel determined otherwise by reference to the correct test.

47. This ground fails.

Decision

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

Stefan Fafinski
21 December 2022