

[2023] PBSA 69

Application for Set Aside by Stuart

Application

1. This is an application by Stuart (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated 30 August 2023 not to direct the release of the Applicant.
2. I have considered the application on the papers. These are the dossier of 682 pages; the oral hearing decision reasons (the decision) and the application for set aside dated 14 September 2023. I have also reviewed the Parole Board Guidance on Allegations dated September 2023. Although this guidance was issued after the decision was finalised, I deem it appropriate to use in this case, and I explain my reasoning under the section about the relevant law.

Background

3. On 19 December 2017 the Applicant received a determinate sentence of 6 years' imprisonment following conviction for causing grievous bodily harm with intent. His sentence will expire in December 2023.
4. The Applicant has a number of previous convictions, including several relating to violent offending. He was aged 30 at the time of sentencing. He is now 36 years old.

Application to Set Aside

5. The application to set aside is dated 14 September 2023 and has been submitted by the Applicant's legal representatives.
6. The Applicant relies on the ground that there is an error of law or of fact in relation to the decision, and that the decision not to direct release would not have been made had the panel not made their error. It is submitted that the errors relate to the following:
 - a) The application states that the panel unlawfully considered allegations of both harassment and violent disorder (from the time he was released on licence), where neither matter was proceeded with by the police/CPS.



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- b) That the panel wrongly considered three unproven adjudications about his custodial conduct since return to custody.
- c) By way of completeness, the application also submits that the panel went against the recommendations of the Applicant's Prison Offender Manager (POM) and Community Offender Manager (COM) that his risk could be managed in the community. This last point is only linked in as much as the two professionals considered the allegations when making their recommendations. Going against the recommendations of professionals is not a ground for the set-aside process.

Current Parole Review

7. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether it would be appropriate to direct his re-release following the revocation of his licence. The Applicant had been released automatically on licence by the Secretary of State on 12 February 2021, and recalled to custody on 13 January 2022. He was returned to custody on 24 January 2022. The reason for his recall was following an incident investigated as violent disorder on 12 January 2022 during which the Applicant was seriously injured and taken to hospital. It appears that following the recall his COM was informed about a harassment matter in relation to his former partner.
8. A single member panel of the Parole Board considered the Applicant's recall case on 4 April 2022 (Member Case Assessment (MCA) process) and directed an oral hearing. Also directed were further reports, including a report from the police about the matters for which the Applicant had been arrested, amongst other things asking for details of the allegations and whether or not a charging decision had been made.
9. I note that shortly after these initial MCA directions a Duty Member of the Parole Board considered and granted an application for non-disclosure of some material to the Applicant on the grounds of the interest of safety and welfare of another person. The Applicant therefore has not seen this material, however his legal representatives have, and of course so has the panel. A 'gist' or summary of the material that the Secretary of State has considered to be disclosable to the Applicant is included in the dossier.
10. By July 2022, date unclear, it first appeared that both matters, one of violent disorder and one of harassment, had been discontinued (but see below). The Applicant's case was considered by the Secretary of State for Executive Release (release not considered by the Parole Board), however this was not granted. It was listed for an oral hearing in August 2022. I note however that in August 2022, these matters were in fact still ongoing and the panel chair adjourned the hearing in order to obtain further information about the ongoing investigations. The case was adjourned till a review in January 2023.



11. In January 2023 the panel chair reviewed the new information (much of it police investigation information) and adjourned the hearing again. This is because of information in the dossier that the police file was now with the Crown Prosecution Service (CPS) for a charging decision. Directions were set for any developments with respect to the allegations, and the hearing was listed for 17 May 2023. At that hearing the police service witness informed the panel that new information had been sent to the CPS regarding the allegation of violent disorder and therefore there was no outcome regarding the charging decision. The hearing was adjourned again. The hearing finally took place on 23 August 2023 and this was effective.
12. The reason that I have given detail about the process leading to the effective hearing is because it makes it clear that efforts were made by the MCA and then the panel chair to obtain as much information as possible about the matters under investigation. Additionally, a police service witness, an officer familiar with the matters, was directed to attend the hearing.
13. At the hearing on 23 August 2023, the panel consisted of three members including a judicial chair and two independent members. This was the first review of the Applicant's case following the recall. The Applicant was legally represented. Oral evidence was taken from the Applicant's POM, COM and the police service witness. The Applicant also gave evidence. Following the hearing, the panel did not direct the Applicant's release.
14. I note that at this hearing the police service witness indicated that the violent disorder matter was still ongoing. The reason for this as reported in the decision letter was that although the CPS had returned a decision not to charge, the police team in the case decided that this decision should be challenged. That challenge was ongoing at the time of the August hearing. The panel made this clear in the letter and also ensure that, as a result, the police service witness did not hear the evidence given by the Applicant about the allegation(s) in order to protect his right not to incriminate himself.

The Relevant Law

15. Rule 28A(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022) 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.
16. The types of decisions eligible for set aside are set out in rules 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)).
17. 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):

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- a) a direction for 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
 - 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 after the direction was given, had occurred before it was given.

18. **Caselaw:** The application cites the case of **Newton v The Parole Board [2022]**. The relevant caselaw is the judgement in the case of **Pearce [2023] UKSC 13** on appeal from **[2022] EWCA Civ 4**, and it is the approach to unconvicted allegations suggested in this case that I have used. Parole Board members were advised to follow the principles in the case of **Pearce** by the time of the Applicant's hearing. While the Guidance that was issued following the case of **Pearce** was published after the decision in this case, I have used it to assist me in my deliberations. The Guidance on Allegations was published in September 2023 and is a public document.

The Reply from the Secretary of State

19. In accordance with the rules, the Respondent was asked if he had any representations to make within seven days. On 7 October the Public Protection Casework Section (PPCS), representing the Respondent, indicated that they had no submissions to make in relation to the application.

Discussion

20. **Relevance:** The first matter I had to consider was whether the allegations (from community and custody) were matters that were relevant for the panel to consider. Clearly, they were. In order to assist, I will summarise these allegations and some of the evidence relating to them here.

21. Allegations about criminal activities in the community while on licence:

- a) **Allegation of harassment against a former partner:** The allegation was that the Applicant breached his licence conditions by threatening to kill her and showed her 'gun fingers'. The decision indicates that there was in the dossier evidence of historic police call-outs in this relationship. The complainant subsequently withdrew her complaint and the matter was discontinued by the police. The Applicant was asked about this at the hearing and denied any wrongdoing, stating this was a malicious accusation. There is an issue here where he admitted seeing her and the child that they share in an area that was inside his exclusion zone, however, the decision letter notes that the Applicant stated that he did not realise that area was within his exclusion zone and the evidence from the COM was that there was no evidence he had been given his updated exclusion zone.



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b) **Allegation of violent disorder:** It is reported in the decision letter that on 12 January 2022 (and extensively in the dossier) that the Applicant was involved in a confrontation that resulted in him being very seriously injured. There is no question that he was a victim of crime during this event, however the question as to his role as a possible perpetrator in the confrontation is in dispute. There is CCTV evidence, some of which (in stills from the evidence) is available in the dossier, and there is both written police evidence in the dossier and the evidence of the police service witness at the hearing. The decision letter records that the Applicant was in a car driven by an associate, and the car parked near a group of youths. The car was within the Applicant's exclusion zone. The Applicant's associate, followed by the Applicant, were alleged to have approached the group and there was a verbal altercation following which the Applicant was said to have thrown a bottle at one of the youths. He then turned to run and was chased and stabbed. The Applicant denies the above described circumstances, although he admitted to being within his exclusion zone and with the associate, giving the panel an explanation about the reason he was there. The decision letter records that his evidence was that he was attacked by a gang of youths, and he told the panel that he knew the person(s) who had stabbed him but denied he had any grievance with them. It is noted that he has refused to give a statement to the police despite the impact of the serious injuries on his physical health. As stated earlier, this matter may still be under investigation.

22. Allegations made against the Applicant while in custody since recall:

- c) An unproven adjudication in relation to a positive body scan for an unauthorised article.
- d) An unproven adjudication following a cell search of the Applicant's cell. Prohibited articles found included a mobile phone, charger, drug paraphernalia, bank details and cigarette papers.
- e) An unproven adjudication that the Applicant was seen fighting with other prisoners.

23. As I have indicated, all these matters are clearly relevant either to risk or to the management of risk. Therefore, I find that it is appropriate that they were considered by the panel.

24. **Finding of (any) facts:** I now turn to whether the panel made any actual findings of fact in relation to all or any of the above allegations.

- a) **Harassment:** The decision letter notes that there was a retraction by the alleged victim in this case. Although the panel clearly asked questions about this incident and the historical matters in the dossier, I cannot see where they make any



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findings about this in the decision letter. What the decision letter does indicate is that it is 'concerned' about the relationship with this former partner and how the Applicant was going to manage contact with his son. In my view this concern, given the information in the dossier, was reasonable.

- b) **Violent disorder:** On reading the decision, I can see that the panel made no finding of fact as to whether the Applicant was engaged in violent disorder. However, the panel did make findings in relation to some of the circumstances of the described events. These findings are that the Applicant got out of the car to lend support to his associate (who was being attacked), and that he threw a glass bottle at the youths, thus precipitating the attack against him. These matters are disputed by the Applicant. What the Applicant has accepted is that he was at that time within his exclusion zone. In relation to their findings, the panel also indicates that in their view the Applicant did not exercise 'proper thinking skills' when taking matters at their lowest. The decision further states that the panel considered the behaviours attached to the findings were of an offence paralleling nature, taking into account the circumstances of the index offence. The decision letter also states that the panel had doubts about the explanation that the Applicant had given to the panel as to why he was in that area at all given it was in his exclusion zone.

In my view the panel took great care in obtaining material about this incident, and taking evidence from all concerned, including a police witness and of course the Applicant. Rather than focusing on whether or not the Applicant had engaged in direct violence, the decision letter shows that the panel focused on the Applicant's judgement in becoming involved in the situation with the youths, in seeking to support his associate at that time and in throwing the bottle. There is a CCTV still showing the Applicant with a bottle, and in the decision letter it is reported that he appears to admit he may have been holding one when he emerged from the vehicle. In my view, taking into account the evidence before them, the panel's findings were reasonably arrived at.

25. In relation to the three unproven allegations, the conclusion in the decision letter indicates that the panel does appear, without stating as much, to have made findings on these allegations. The conclusion states that the recent security material "*clearly point to [the Applicant's] continuing use of substances as well as a violent incident in custody*". Furthermore:

- c) No findings of fact appear to have been made about the positive body scan matter.
- d) I consider that the finding in relation to continuing use of substances is reasonable. The panel took into account the unexplained (although for some reason unadjudicated) findings of drug paraphernalia (the Applicant told the panel that he had been out of his cell, leaving it unlocked, and implied anyone could have placed the unauthorised material in his cell) but more importantly, and not referred to in



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the application, the Applicant refused to provide a sample for a mandatory drug test just before the hearing. The decision letter reports that the Applicant told the panel that it was early in the morning, he felt unwell (and it is acknowledged that he suffers extensive issues following the attack on him when he was in the community) and felt unable to provide a sample for the test. The panel noted that no alternative had been suggested by the Applicant at the time. Considering both these issues, I do not find it unreasonable that the panel had concerns about recent continued drug misuse.

- e) In relation to the fight in custody, the panel used some caution in making its finding, referring to it to as a 'violent incident'. From the information in the dossier and the evidence recorded in the decision letter, taken from the witnesses and the Applicant, that there was a 'fight' does not appear to be in dispute. The reason given by the Applicant was self-defence. However, I note that on the same day there were two incidents reported with the same prisoner. While there may have been mitigating circumstances in the fights, I consider it reasonable for a panel, given the circumstances of his offending history and the findings in relation to the violent disorder matter, that a panel would have concerns about any further evidence of violent behaviour. I further note that the reason not to adjudicate, provided by the Applicant was not because the incident did not occur, but because following the first fight, the two prisoners were re-located in cells near each other. This, according to the Applicant, was accepted as a mistake made by the prison and it was for that reason there was no adjudication. This is not the same as the matter being investigated and found not proved.

26. Finally, I ask myself if the decision letter fully explained the reasoning of the panel. I acknowledge that with respect to the custodial fight(s), the panel could have explained more clearly where they made any findings.

27. Having stated that I do not find that the panel put so much weight on their findings regarding the custodial violence that without those findings, a decision to release would have been made. It is clear that the concerns of the panel focused on the circumstances that led to recall and the custodial matters were additional concerns.

Decision

28. For the reasons I have given, the application is not granted, and the decision of the panel dated 30 August 2023 is final.

Chitra Karve
18 October 2023



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