

[2023] PBSA 70

Application for Set Aside by Coates

Application

1. This is an application by Coates (the Applicant) to set aside the decision (the Decision) made by an oral hearing panel (the panel) dated 12 September 2023 not to direct the release of the Applicant on the basis that the Decision would not have been made but for an error of fact.
2. I have considered the application on the papers. These are the Decision, the dossier, an application to set aside the Decision dated 4 October 2023 and the reply to the application from the Public Protection Casework Section (PPCS) on behalf of the Secretary of State (the Respondent) in an email dated 12 October 2023, which stated that the Respondent has no comments to add at this stage. I have also reviewed the Parole Board Guidance on Setting Aside dated August 2022.

Background

3. On 28 June 2019, the Applicant received a determinate sentence of 7 years imprisonment for an offence of conspiracy to burgle. The sentence was later reduced to 6 years imprisonment on appeal.
4. On 20 March 2020, the Applicant received a determinate sentence of 5 years imprisonment for offences of possession of firearm with intent to cause fear of violence, possession of a prohibited weapon (a Stun gun), taking a vehicle without the owner's consent and assault of an emergency worker.

Application for Set Aside

5. The application to set aside the Decision is dated 4 October 2023 and has been drafted and submitted on behalf of the Applicant by his Solicitors.
6. In the application to set aside the Decision, it is submitted that the Decision not to direct the release of the Applicant would not have been made but for errors of fact or law in that the Decision:



- (a) suggests that the Applicant may have committed a knife point robbery within weeks of being on licence (Ground 1).
- (b) suggests that there was limited evidence that the Applicant had engaged in risk reduction work to address risk factors relating to negative associates, criminal identity and pro-criminal attitudes (Ground 2).
- (c) states that the Applicant continues to fall under suspicion for substance misuse (Ground 3).
- (d) states that when the Applicant was arrested, items linked to possible money laundering were found in the same room as where the Applicant was indicating that he continued to associate with criminal peers and that there is evidence to suggest that links to criminal gangs have been retained (Ground 4).

Current parole review

- 7. The Applicant's case was referred to the Parole Board by the Respondent to consider whether to direct his release. The case proceeded to an oral hearing on 6 September 2023 before a panel comprising of one member of the Parole Board.
- 8. After an oral hearing, the panel ordered in the Decision that the Applicant should remain in custody.

The Relevant Law

- 9. Rule 28A(1)(a) 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(1)(b), the Parole Board may seek to set aside certain final decisions on its own initiative.
- 10. The types of decisions eligible for set aside are set out in rule 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)).
- 11. 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)):
 - 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 given if information that had not been available to the Board had been available, or
 - c) a direction for release would not have been given 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

12. In reply to the Application to set aside the Decision, PPCS stated in an email dated 12 October 2023 that the Respondent has no comments to add at this stage.

Discussion

Eligibility

13. The application concerns a panel's Decision to refuse to direct release following an oral hearing under Rule 25(1) (a). The decision is therefore an eligible decision which falls for consideration within the scope of Rule 28 A (4) (a)

Analysis of Claims

14. The first issue to be considered is whether the Panel made an error of fact or law, and this requires consideration of the four grounds relied on in the application to set aside the decision.

15. First, in respect of Ground 1 (the contention is that the decision erroneously suggested that the Applicant may have committed a knife point robbery within weeks of the being on licence), it is correct that the Decision suggested that the Applicant may have committed a knife point robbery, but that suggestion was not an error of fact or law as there was evidence to indicate that the suggestion was correct, because the Decision explains that:

(a) the victim of the alleged knife point robbery named and identified the Applicant as "*the main culprit*".

(b) the victim stated that the Applicant having left his van had approached the victim's vehicle and searched it while holding a knife and then stole from the victim his Apple Air Pods and £40.

(c) the Applicant was reported to have then got back into the van and left before returning a few moments later to give the victim back the keys to his car and saying, "*don't be snitching*".

(d) there was CCTV footage which supports the victim's account.

(e) although the Applicant denied committing this knife point robbery, he could not explain why the victim would have said that he had robbed him, and the panel was not convinced by the Applicant's account.

(f) there was not sufficient evidence to determine the extent of the Applicant's involvement in the knife point robbery especially as after he was charged with committing a knife point robbery the complainant did not attend court and was not supportive of the prosecution. The Decision explained that it was not clear if the case against the Applicant was dismissed or if the Applicant was found not guilty.

(g) there was therefore much evidence that the Applicant may have committed the knife point robbery even though the Panel considered that there was insufficient evidence to determine the full extent of the Applicant's involvement. The panel considered that *"the worst case scenario was that he had committed a knife point robbery within weeks of release"*.

16. In reaching the conclusion that the decision did not erroneously suggest that the Applicant may have committed a knife point robbery within weeks of being on licence, I have not overlooked the fact that the Applicant was found not guilty of that offence of committing a knife point robbery. Significantly that verdict shows that those who delivered that verdict could not be sure that he had committed the knife point robbery but that they had a reasonable doubt that he may or may not have committed the knife point robbery. In other words, the verdict that that the Applicant was not guilty of committing the knife point robbery is not inconsistent with a conclusion that he may have committed the knife point robbery.
17. The second ground of criticism is the suggestion that there was limited evidence that the Applicant had engaged in risk reduction work to address risk factors relating to negative associates, criminal identity and pro-criminal attitudes (collectively hereinafter referred to as *"the specified risk reduction work"*). This allegation was made in the Decision, and I have concluded that this criticism of the Applicant by the panel cannot be justified for three reasons which individually or cumulatively showed that there was much more than limited evidence that he had engaged in the specified risk reduction work.
18. First in 2000, the Applicant had completed a programme which he explained related to gang membership and learning how to avoid being influenced by others and getting involved in criminal activity.
19. Second, in May 2022, he completed a training course addressing decision making and better ways of thinking. The Decision recorded that the Applicant had informed the Panel that he had learned about problem solving skills, such as recognising that he had a problem, identifying the cause of it and possible solutions as well as recognising *"his red flags"* and his *"green flags"*,
20. A third reason why this criticism of the Applicant cannot be accepted is that the Applicant's Community Offender Manager stated that the Applicant had completed all core risk reduction work, and he considered that any further risk reduction work *"could be safely completed [by the Applicant] in the community"*. For all these reasons there was evidence that the Applicant had engaged in risk reduction work and had completed all core risk reduction work, and so it was an error to conclude that that there was limited evidence that he had engaged in risk reduction work.
21. Turning to Ground 3, this is the contention that the decision erroneously states that the Applicant continues to fall under suspicion for substance misuse. This statement was made, and the issue is whether it was justified. The Applicant's Prison Offender Manager had stated that the Applicant had been subject to one random drug test in April 2023 and whilst the document did not provide the outcome the Applicant was not adjudicated. The panel was entitled to conclude that it could be inferred from the absence of any adjudication following from this test in April 2023 that it was

negative. There have, however, been two developments since then which would justify a contention that the Applicant continues to fall under suspicion for substance misuse.

22. The first development is that a Security Report dated 12 July 2023 showed concerns of substance misuse with a strong smell of cannabis and unauthorised articles being found in the Applicant's cell but by the date of the hearing on 6 September 2023 there had been no further security intelligence since that report. Nevertheless, in the light of the 12 July 2023 Security Report, any statement less than 2 months after that report that the Applicant continues to fall under suspicion for substance misuse, cannot be regarded as an error of fact, especially in the light of the second development, which is that some cannabis was found in the room in which the Applicant was arrested and very significantly, he admitted that he owned the cannabis although he denied using cannabis during his period on licence. In those circumstances, there can be no criticism of the contention that at the time of his recall, the Applicant continued to fall under suspicion for substance misuse.
23. Fourth, Ground 4 is the contention that the Decision incorrectly stated that when arrested items linked to possible money laundering were found in the same room in which the Applicant had been arrested thereby indicating that he continued to associate with criminal peers. This contention was made in the Decision. It is said that it is not factually correct or fair to criminalise these peers when no further charges have been brought against them. No evidence was outlined to the panel to confirm that the individual in whose property he was arrested from had any criminal background. Furthermore, the Applicant was under investigation for money laundering, but the decision explains that "*a police report confirms that there was no evidence linking [the Applicant] to any crime relating to the seizures and there was no further action*". This shows that the statement in the decision was wrong.
24. So, I find that there have been errors of fact in the Decision in respect of Ground 2 and Ground 4, but that does not mean that the application to set aside must therefore automatically be granted. The reason for that is that before such a decision to set aside can be granted I have to be satisfied that the decision not to release the Applicant "*would not have been given but for an error of law or fact*" (Rule 28A (4)(a)). That provision requires consideration of whether the panel would have reached a different decision but for these errors.
25. I have concluded that the panel would not in that situation have reached any decision other than to refuse to release the Applicant if the errors which I have found established or indeed if all the errors relied on by the Applicant had been established.
26. There are numerous factors which individually or cumulatively have led me to the conclusion that the panel would have refused to release the Applicant in those circumstances if the errors of fact in Grounds 2 and 4 had not been made or indeed any errors of fact in respect of the other Grounds had been made. Those findings include the Panel's findings in relation to the Applicant that:
- (a) he had previously committed serious offences which required organisation and planning.

(b) he has been identified as linked to organised criminal gangs and he was young when these associations started, but that *"there is evidence that links have been retained"*.

(c) he has completed a training course addressing decision making and better ways of thinking, but the Applicant attracted negative entries after its completion and evidenced some poor decision making during his time on license *" becoming involved in a serious incident and choosing to be UAL [unlawfully at large] for over 2 weeks."*

(d) the Applicant's evidence at the hearing to the panel *"provided evidence of minimization, a lack of empathy and little responsibility for his past, present or future"*.

(e) the panel was *"concerned that given [the Applicant's] continued associations, [his] risk could escalate quickly in the community [and] the panel [was] not confident that [any of his warning signs could] be acted on with sufficient speed to manage the risks then presented by [the Applicant] at this time"*.

(f) the panel who had the advantage of seeing and hearing the Applicant give evidence concluded that:

(i) the Applicant's *"pro-criminal attitudes and associations to be [his] primary risk factors"*.

(ii) it *"was not confident that [the Applicant] possesses the internal management skills to successfully manage his risk factors in the community in the long term"*.

(iii) it was *"also concerned that the proposed [risk management plan] lacked external management and monitoring that would be present if the plan included an Approved Premises placement, GPS [Global Positioning System] trail monitoring and the IOM [Integrated Offender Management] involvement"*.

(iv) the Applicant *"poses a high risk of serious harm and that there is a high likelihood of further offending"*:

(v) it is *"not confident that the proposed risk management plan would be able to manage [the Applicant's risks] in the community at this time"*:

(vi) *"there is a high likelihood of further offending, including violent offending"* and that

(vii) *"given the evidence presented in the dossier and during oral evidence ... it is necessary for the protection of the public that [the Applicant] remains confined"*.

27.I should stress that my conclusion is that the panel would not have reached any decision other than to refuse to release the Applicant even if (contrary to my conclusions) all the errors relied on by the Applicant had been established and that is because of the matters which I have set out in paragraph 25 above.

Decision

28.I therefore conclude that the application must be refused.

Sir Stephen Silber
25 October 2023