

[2023] PBSA 51

## Application for Set Aside by Roxburgh

### Application

1. This is an application by Roxburgh (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 31 May 2023. The hearing adjourned for further information and was considered on the papers on 3 July 2023. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 7 July 2023), and the application for set aside (dated 27 July 2023). I have also seen the outcome of a programme needs assessment (**PNA**) dated 29 June 2023, and an email from the Applicant's legal representative dated 28 July 2023 which refers to the PNA.

### Background

3. On 16 June 2017, the Applicant received a determinate sentence of 42 months following conviction for wounding/inflicting grievous bodily harm to which he pleaded guilty. On 1 August 2017, he was sentenced to imprisonment for a further 16 months (consecutive) and 16 months (concurrent) following conviction on two counts of unauthorised possession of a knife or offensive weapon in prison. He was also convicted of criminal damage on 18 January 2018, receiving a further six week sentence. On 15 October 2018 he was convicted for assault occasioning actual bodily harm and received a further sentence of imprisonment for 20 months (consecutive).
4. The Applicant was aged 23 at the time of sentencing. He is now 29 years old.
5. He was automatically released on licence on 8 December 2020. His licence was revoked on 17 June 2021, and he was returned to custody on 28 June 2021. This is his first recall on this sentence, and his first parole review since recall.

### Application for Set Aside

6. The application for set aside 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



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8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.
9. The case proceeded to an oral hearing on 31 May 2023 before a three-member panel, which included a psychiatrist specialist member. The panel heard evidence from the Applicant, his former Prison Offender Manager (**POM**), his Community Offender Manager (**COM**), an HMPPS psychologist, and a psychologist commissioned on behalf of the Applicant. His new POM was also in attendance, but there is no record of her having given evidence on the face of the panel's decision. The Applicant was legally represented throughout the hearing.
10. The review was adjourned for information relating to an incident which is said to have taken place on 14 May 2023. This information was provided together with further legal representations on the Applicant's behalf.
11. The panel did not direct the Applicant's release.

## The Relevant Law

12. 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.
13. 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)).
14. 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

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

## Discussion

16. It is argued on behalf of the Applicant that there has been an error of fact where the absence of information could have affected the panel's decision.

17. As the decision in question is one which did not direct the release of the Applicant, any submissions concerning the availability of information must fail. Rule 28A(4)(b)(i) is clear that new information is only a ground for set aside if the decision of the panel is a release decision.
18. The application attached the outcome of a PNA dated 29 June 2023 which it is said was not made available by the Prison Service to the panel at the oral hearing on 31 May 2023. Of course, it would have been impossible for the PNA to have been made available to the hearing, but it could potentially have been before the panel when it considered the case on the papers following the adjournment. Despite this, it cannot be said that the panel made an error of fact based on the evidence before it at the time it made its decision. A panel cannot make an error of fact relating to information of which it is unaware.
19. The Applicant subsequently claims that the content of the PNA is factually incorrect. That may well be so, but it is not a matter that has any relevance, given that the new information falls outside the boundaries of the set aside criteria for a negative decision.
20. Finally, it is questioned why the panel preferred the evidence of the prison psychologist over the independent psychologist. The approach taken by a panel in weighing of evidence cannot constitute an error of fact.

## Decision

21. The application for set-aside is refused.

**Stefan Fafinski**  
**3 August 2023**