

[2023] PBSA 1

Application for Set Aside by Osbourne

Application

1. This is an application by Osbourne (the Applicant) to set aside the decision not to direct his release made by a panel following an oral hearing.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (8 November 2022), and the application for set aside (28 November 2022). I have also read an application for reconsideration (also dated 28 November 2022) and the decision in which that application was refused (**Osbourne [2022] PBRA 178**).

Background

3. On 17 January 2007, the Applicant received a sentence of imprisonment for public protection following conviction for arson reckless as to whether life was endangered to which he pleaded guilty. The minimum term was set as 27 months less time spent on remand and this tariff expired on 4 February 2009.
4. The Applicant was aged 21 at the time of sentencing. He is now 37 years old.

Application for Set Aside

5. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.
6. It submits that there has been an error of fact relating to the length of time for which designated accommodation would have been available to the Applicant upon release: specifically, 12 weeks, rather than eight. An email from the Manager of the designated accommodation dated 25 November 2022 is provided in support of this submission.
7. These submissions are supplemented by written arguments to which reference will be made in the **Discussion** section below.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in December 2018 to consider whether to direct his release. This was the Applicant's fourth parole review.



9. The case proceeded to an oral hearing on 10 August 2022 before a three-member panel comprising a psychiatrist chair, an independent member, and a second psychiatrist 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), his previous COM, the prison psychologist and a psychologist instructed by the Applicant's solicitors. The Respondent was not represented by an advocate at the hearing.

10. The risk management plan presented to the panel was founded on a maximum stay of eight weeks in standard designated accommodation. Neither psychologist considered a maximum eight-week stay in standard designated accommodation placement to be sufficient. The hearing was adjourned, and the COM was directed to make further enquiry to see if the risk management plan could be bolstered in any way.

11. In a report of 30 September 2022, the COM noted as follows:

- a) A longer residency was not available; the Covering Manager at the accommodation having confirmed that *"due to significant bedspace demands across the...estate, a bedspace of longer residency would not be available due to the challenge of continuing to meet the demands of pending arrivals and confirmed releases, and the ongoing volume of referrals"*.
- b) Two other potential accommodation options were unable to accept referrals: one because the Applicant did not meet the admission criteria, and the other because it did not have a room suitable for offenders convicted of arson.
- c) The **I**ntensive **I**ntervention and **R**isk **M**anagement **S**ervice (IIRMS) would be able to accept a referral, but the estimated waiting time was around six months and the IIRMS would need to undertake up to six months in-reach motivational work in custody prior to release.

12. The only accommodation option before the panel therefore remained as an eight-week stay in standard designated accommodation.

13. This information was shared with the Applicant and his legal representative to establish whether the hearing needed to convene for further oral evidence to be heard. On 31 October 2022, legal representations were received seeking a conclusion on the papers.

14. The panel made no direction for release.

The Relevant Law

15. 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.

16. 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)).

17. 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.

The reply on behalf of the Respondent

18. The Respondent has offered written representations dated 30 December 2022 in response to this application.

19. The Respondent submits the following:

- a) The COM has confirmed that it was her "*clear understanding that the length of the placement was 8 weeks*". The Senior Probation Officer (SPO) has also confirmed this to be correct.
- b) Earlier referrals were also made during the parole review and case notes made by the Manager at the designated accommodation note that "*the length of stay...may only be for six weeks*" (27 April 2021) and "*the length of stay...may only be for eight weeks*" (20 October 2021).
- c) Prior to the changes implemented to manage the COVID pandemic, the maximum residence period at standard designated accommodation was 12 weeks (not minimum) and, as of week commencing 19 December 2022, referrals to standard designated accommodation were accepted for eight-week placements.
- d) No standard designated accommodation offers a minimum placement of 12 weeks.
- e) If the position regarding the referral had changed since the COM made enquiries in September 2022, then the COM had not been made aware of this.

Discussion

Eligibility

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

Reconsideration

21. The provisional decision not to direct release was subject to an unsuccessful application for reconsideration. In this it was argued (amongst other things) that it was procedurally unfair for the panel to have concluded that eight weeks in designated accommodation was insufficient when the "more robust" plan would have only managed his risks for a further four weeks.

22. This was unsuccessful. **Osbourne [2022] PBRA 178** notes (at para. 27):

"...the panel was plainly looking for a risk management plan which would manage the Applicant's risk indefinitely: it was looking for a whole range of provision for him, as recommended by the psychologists and the COM. One essential component was a period in [designated accommodation] followed by appropriate moving-on accommodation. The panel was entitled to find that the short period in [designated accommodation], which was all that could be found, was not sufficient; and it was entitled to derive support for this view from the psychological witnesses".

Error of fact

23. Although I have noted the reconsideration, I emphasise that this is a separate application brought on different grounds and under a separate provision of the Parole Board Rules, and I therefore deal with it on its own merits.

24. The Applicant submits that the panel was presented with incorrect information in respect of the release plan: specifically, that the designated accommodation was, in fact available for a minimum period of 12 weeks.

25. In support of this, he submits an email (dated 25 November 2022) from the Manager of the designated accommodation which states:

"...I can confirm that in 2023, [the designated accommodation] will be allowing for residents who meet the criteria to reside for a minimum of 12 weeks. I can confirm that [the Applicant] is on our pending list and would be able to stay for at least 12 weeks".

26. It appears, then, that the position from 25 November 2022 is that the designated accommodation would be available for a minimum of 12 weeks. This is at odds with the Respondent's position of 30 December 2022 that no standard designated accommodation offers a minimum 12-week placement.

27. However, given the clearly expressed submissions of the Respondent (and noting the corroboration by the SPO), I am satisfied that, at the oral hearing on 10 August

2022, and at the time the updated report of 30 September 2022 (both of which predate the email from the accommodation Manager) the COM had no basis on which to believe that there was anything other than an eight week stay available. There is no evidence to say that, at that time, the COM was in error. Therefore, at the time that the panel made its decision, there was no error of fact in the COM's evidence and no error of fact in the panel's decision.

28. A panel cannot be said to have made an error of fact by not considering information that was not actually before it. An error of fact can only be made on the information in front of the panel at the time of the decision – a panel cannot err as to facts of which it is unaware.

29. Even if there had been an error of fact, that would not be sufficient for the application to be granted. I would also have to consider whether any error would have affected the panel's decision not to direct the Applicant's release. On that point, it is submitted that if the panel had been provided with the correct information "*release could have been directed*". Maybe that is so, but that would not reach the high threshold set within rule 28A which requires that the direction not to release the prisoner would not have been given but for the error of fact. I agree with the analysis set out in the reconsideration decision that the panel was looking for a risk management plan which would manage the Applicant's risk indefinitely and that a further four weeks in designated accommodation would not have inexorably led to a release direction.

Decision

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

Stefan Fafinski
10 January 2023