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[2023] PBSA 54

Application for Set Aside by Kennea

Application

1. This is an application by Kennea (the Applicant) to set aside the decision made by a Panel of the Parole Board (the Panel) following an oral hearing resulting in a refusal to direct his release.

2. I have considered the application on the papers. These are the dossier, currently comprising 189 pages, the oral hearing decision (DL) dated 17 July 2023 and the application to set aside dated 7 August 2023.

Background

3. On 11 October 2013, following a trial, when the Applicant was 27 years old, he was sentenced to a total of 18 years imprisonment for two counts of conspiracy to rob and one count of possession of an imitation firearm with intent to commit an indictable offence ("the index offences").

4. The Applicant was released on licence on 16 November 2021, was recalled on 11 January 2022 and returned to custody two days later. This was the first review since recall. The Applicant's sentence expires in November 2030. He is now 37 years old.

5. On 11 June 2012, the Applicant and three others drove in convoy to a bank in a car and a digger, both of which had been stolen earlier. The car was used to block the entrance to the car park and the digger was driven into the wall of the bank. At the time, the bank was fully staffed. The Applicant and another man went in through the hole, armed with an imitation gun and escaped with £6,000 in cash. Some miles away, the car broke down. The men got out and hijacked a car driven by a young woman with a small child. She was threatened with a gun and then abandoned by the road.

6. The sentencing judge described this as a professionally planned and executed robbery.

7. Within a month of the robbery, the Applicant and his associates planned the second robbery, this time of a G4S van carrying cash, armed with a sledgehammer and an axe. The gang realised they were being followed by the police and threw away the weapons and abandoned the plan.

8. The Applicant was released on licence in November 2021 and recalled in January 2022 following his arrest at a nightclub.

Current Parole Review

9. The Applicant's case was referred to the Parole Board by the Secretary of State for Justice (the Respondent) to consider whether to direct his release. The review was heard on 19 June 2023 and the Applicant was legally represented throughout the hearing. The Panel made no direction for release.

Application to Set Aside

10. The application to set aside is dated 7 August 2023 and made on behalf of the Applicant by his solicitors who seek to argue that there have been a number of errors of fact. No errors of law are relied on.

The Relevant Law

11. 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.

12. 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)).

13. 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

14. In an e-mail, a copy of which I have seen, dated 11 August 2023, the Respondent states that he has no comments to add at this stage.

Discussion

15. The application concerns a Panel's decision not to direct release following an oral hearing under rule 25(1)(b). The application argues that errors of fact are made out

for the purposes of rule 28A(5)(a). No specific reference appears to be made to the interests of justice test. As the Panel's decision is now final the application to set aside would appear to be an eligible decision which falls within the scope of rule 28A.

16. I have carefully considered the application to set aside and all the documentation before me. The Applicant relies on errors of fact which I will deal with in a different sequence to that set out in the application:

a) *"The Board relied on the fact of the police report in which [the Applicant] was convicted of a drugs matter on recall. The offence with which he was ultimately convicted was one of possession of drugs which carried a financial penalty with an alternative of 1 days imprisonment. The Board appeared to conclude that despite the conviction for possession they could not rule out that that the offence was really one of supply. In ruling that they did not accept the plausibility of the account provided by [the Applicant] the Board appeared to be wrongly determining facts already decided by not only the Court but also the Prosecution."*

b) *"The Board drew attention to the fact that [the Applicant] was in possession of £700 cash however in evidence to the Board, [the Applicant] stated he had provided an explanation for the cash, that he had even asked his OMU for consent to hold the monies. He did say in evidence that the cash was for a deposit for a flat. As part of his conditions for release his OMU confirms as one of the conditions that he is entitled to have a maximum of £1000 in his possession."*

17. As the police report (dossier p.171) makes clear the Applicant was arrested by police at a nightclub in the early hours of the morning of 9 January 2022. He was found to be in possession of five small polybags containing herbal cannabis and £700 in cash. He was arrested on suspicion of being in possession of Class B drugs with intent to supply.

18. In interview he denied any knowledge of the drugs being in his pocket and was later, following forensic testing, charged with possession of Class B drugs with intent to supply.

19. At court that charge was withdrawn and he pleaded guilty to possession of a Class B drug.

20. The Applicant, who was subject to a curfew, acknowledged that he had been for a night out, had got drunk in a bar and moved on to a private party in a nightclub. He was wearing a GPS tag which he said he had covered in silver foil to preserve the battery which was low, an explanation which he acknowledged to the Panel 'sounded silly'.

21. The Applicant said that he had been given the cannabis in the nightclub and had previously been lent the £700 but he conceded as recorded by the Panel (DL 2.27), *"Standing back, he accepted how it looked, namely he was in a nightclub with his tag covered with silver foil, in possession of five bags of cannabis and £700 in cash. He said that although it looked as if he was involved in drug dealing this was not correct…"*

22. It is a matter for the Crown Prosecution Service as to how it chooses to deal with charges at court but the Panel's role is to draw its own conclusions based on the facts as it finds them to be and, on this issue, it was satisfied that the totality of the Applicant's behaviour on this occasion provided persuasive evidence that he was involved in the supply of drugs.

23. I find that this was an exercise of judgement and the Panel made no error of fact.

c) *"The Board relied heavily on the intelligence submitted at the hearing that [the Applicant] was dealing in drugs when in fact there was no basis for this premise. The POM [Prison Offender Manager] in evidence stated that there was no evidence to support this. In particular he had no adjudications nor cell searches nor negative MDT to support this. On the contrary an experienced POM gave in her account to the Board that [the Applicant] was a model inmate and one of the better ones.*

She also did not rule out that the Intelligence could have been malicious. The Parole Board reliance on flawed intelligence which was factually incorrect caused them to reach a flawed conclusion".

24. The Panel had before it a considerable amount of security intelligence indicating that the Applicant had been involved in drug dealing in prison since his recall and he frankly acknowledged that it looked as though he was involved in drug dealing which he denied and described as a 'coincidence'.

25. The Panel noted the evidence and opinion of the POM who said that she would have expected cell searches.

26. Again, the Panel's role was to consider all the evidence and reach its conclusions. It found that the Applicant's behaviour leading to his recall was consistent with the "*considerable high grade security intelligence*" suggesting that he was involved in drug dealing in prison while also concluding that, in general, the Applicant had not been open and truthful with the Panel and that his evidence in relation to a paper found in the possession of another prisoner was not credible.

27. This was an exercise of judgement and I do not find that the Panel made an error of fact.

d) *"The Board begin[s] with saying that [the Applicant] is NOT heavily convicted and then go[es] on to state that he has a lengthy problem with alcohol. The 2 statements are at odds and there is no evidence to support that he has a lengthy problem with alcohol. The facts are that [the Applicant's] record is short displays and no evidence of alcohol related offending aside from one conviction dating back to 2012 in relation to driving with excess alcohol, nor is there any such suggestion in the Prison intelligence to support The Board erred in taking on board the true facts".*

28. There is nothing inherently contradictory in an offender being lightly convicted and yet having a problem with alcohol.

29. In fact, in addition to the Applicant's two convictions (not one as asserted in the application) for driving with excess alcohol, the Applicant has undertaken alcohol awareness work in prison and accepted in evidence to the Panel that he needed to

be more vigilant when he did drink and that he made wrong decisions when intoxicated (dossier 2.13). In addition, on the night of his recall he went to a bar where, on his account, he got drunk.

30. The suggestion that the Panel erred on this point is misconceived and without merit.

e) *"The Board confirms that his OMU was recommending release and it follows that any recommendation is based on the test being met. Clearly consideration had been given to the RMP [risk management plan] as it was even mentioned by the report by the PPCS [Public Protection Casework Section] in which they state that the "OM [Offender Manager] has reviewed the OASYS report and there are no changes to the RMP". The Board have distorted her answer that that she was saying that the test was not met and this have factually erred in reaching this conclusion".*

31. The Applicant here makes the serious allegation that the Panel has been guilty of distortion. In fact, the Panel gave careful consideration to the recommendation of the Community Offender Manager ("COM") for release and appears to have gone to great lengths in its questioning to ascertain her exact position.

32. The COM based her recommendation for release on what she felt were the advantages in releasing the Applicant on licence and the fact that he had spent a considerable time in custody since his recall and there was no further risk reduction work available to him in prison.

33. The Panel, of course, has to apply the statutory test for release and it seems that, when asked directly to confirm whether she was saying the Applicant met that test, contrary to the Applicant's assertion, the COM said she was not saying he met the test for release.

34. I find no error of fact here but for which the decision not to direct release would not have been made.

f) *"The Board erred on the facts of the POMS decision. They were of the view that the POM declined to give a recommendation and this is factually incorrect. The POM said it was not within her remit to give an indication and not that she was not recommending release...in fact she was not able to recommend anything as she did not have the capacity to do that."*

35. The hearing took place in June 2023 when there was no prohibition against the POM providing the Panel with a recommendation and, indeed, it was quite proper for her to be asked whether she had a recommendation.

36. Her evidence was that, in her view, the Applicant's risk could be managed in the community but she declined to give a recommendation and gave her reasons for not doing so (dossier 2.10) for which the Panel expressed themselves to be grateful.

37. Accordingly, the statement at dossier 4.9 that the POM declined to give a recommendation is entirely factually correct.

Decision

38. I have carefully considered the application to set aside and the matters relied on. For the reasons I have given I find that this is an application which is without merit and I am satisfied that the Applicant is unable to demonstrate that the Panel fell into error as to fact and the application to set aside is refused.

Peter H. F. Jones
23 August 2023