

[2023] PBSA 88

**Application for Set Aside by the Secretary of State for Justice
in the case of Charles****Application**

1. This is an application (the application) pursuant to Rule 28A of the Parole Board Rules 2019 (as amended) (the Parole Board Rules) to set aside a decision dated 20 November 2023 (the Decision) made by a Parole Board Panel (the Panel) to refuse to direct the release of the above named prisoner (the Applicant). The application was made in a written document dated 7 December 2023 and received by the Parole Board on 8 December 2023 (the Written Representations).
2. The Decision was made by a single member panel following a remote oral hearing by video link on 13 November 2023.
3. The grounds on which the application is made is said to be on the basis of an error of law or fact (see Rule 28A (4) (a)).
4. It is not entirely easy to determine or follow exactly what is the basis of the application and the reasoning behind the arguments (which really amount to a disagreement with the conclusion of the Panel) but as I understand it the essential submissions as set out in the Written Representations are as follows:
 - a) Generally: The Panel's decision not to release the Applicant was because the Panel remained concerned that his longer term risk was unlikely to be addressed by doing work with probation in the community, on the basis that risk reduction work did not appear to be a priority for the Applicant and there was not enough time before his SLED (Sentence/Licence Expiry Date) in February 2024 to complete such work. It was submitted that the Panel did not apply the correct legal test and that its findings were unjustified for the following reasons set out below
 - b) As to the alleged error of law: the Panel's role, it was submitted, was not to determine where risk reduction work can most effectively be done, but to determine whether the Applicant poses a more than minimal risk of causing serious harm. Given, it was said, that the Panel decided that the Applicant could be safely managed in the community with a risk management plan (RMP), that satisfied the public protection test but instead the Panel's finding



“that he would complete risk reduction work to a higher standard in custody rather than the community does not go directly to the risk assessment.”

- c) As to the alleged error (or errors) of fact:
- i. The Community Offender Manager (COM) (it is said) confirmed that there was no risk reduction work to be completed prior to release. To refuse release on the basis that risk reduction work must be done in custody was “*nonsensical*”. No work had been suggested by the COM, and no work was likely to be completed prior to the Applicant’s SLED.
 - ii. No reason was given as to why risk reduction work was less likely to be effective in the community than in custody.
 - iii. There was nothing to suggest that the Applicant having to work and complete risk reduction courses were mutually exclusive. It was also submitted that as accommodation was linked to the Applicant’s risk of serious harm, it was “*counter-factual*” to suggest that release at his SLED, when he would be homeless, would reduce his risk of serious harm compared to release on licence, when he will be in an AP (presumably a reference to Approved Premises).
 - iv. The Panel failed to consider that the Applicant would remain subject to Post Sentence Supervision (PSS) until February 2025.
5. I have considered the application on the papers. These are (1) the dossier of 205 pages (2) the Decision, and (3) the Written Representations forming the basis for the application.
 6. It was also indicated on behalf of the Secretary of State (the Respondent) on 18 December 2023 that he did not wish to make any additional representations.

Background

7. The Applicant was born on the 13 March 1988 and is accordingly now aged 35 years. He has an offending history dating back to 2004 (when aged about 16) including offences of violence, harassment, driving/vehicle related, breaches of court orders and public order.
8. On 2 September 2022 (when aged 34 years) he was sentenced to 1 year and 10 months imprisonment for a number of offences (the index offences) involving assault occasioning actual bodily harm, battery, and a number of driving offences involving dangerous driving, driving whilst unfit through drink, with no insurance and whilst disqualified, all committed on 19 March 2022 following an incident in a pub when the Applicant lost control with an ex-partner who was the victim of the assault. (This resulted in the Applicant being made subject to a restraining order until September 2027). The battery offences were in respect of two female victims who attempted to intervene in the assault on the ex-partner in order to assist her, and the other offences involved a 100 mile an hour chase by police following the earlier incidents in the pub.
9. Further offences then came to light or were committed after the index offences which led to him being sentenced on 11 January 2023 to 30 weeks imprisonment for two

breaches of the restraining order plus a conviction for criminal damage committed on 10 December 2020. His SLED is recorded as February 2024, but as the Panel noted, he also remains effectively then subject to a further period of PSS which expires in April 2024 (and not February 2025 as suggested in the Written Representations) but, again as the Panel noted, during which further period he could not be recalled.

10. The Applicant was first released on home detention curfew on 9 November 2022 but was recalled when it was ascertained he was not residing as directed. He eventually returned to custody on 11 January 2023 after being unlawfully at large for almost two weeks.
11. He was released again under the automatic release provisions on 25 April 2023 but returned to custody on the 22 May 2023, due to failure to adhere to curfew deadlines and to keep in communication. It was felt he had returned to drug and alcohol misuse. The Panel found the recall appropriate in the circumstances.

The Application for Set Aside

12. I have set out above the substantive grounds of the application.

Current parole review

13. Following the Applicant's return to custody on the second occasion his case was referred in the usual way to the Parole Board. The Panel sat remotely via video link. The Applicant was professionally represented.
14. Evidence consisted of the dossier (some 205 pages) and oral evidence from the Prisoner Offender Manager (POM), the Community Offender Manager (COM), and the Applicant himself.
15. The Panel, in the Decision, set out a careful and detailed investigation and analysis of the index offences, of the Applicant's conduct and behaviour in custody, the appropriateness of his recall (above), and assessment of his past, present and future risk.
16. A number of historic risk factors were identified: domestic abuser, association with pro-criminal peers, reckless lifestyle, misuse of drink and drugs, temper control issues, rigid thinking, emotional immaturity, sense of grievance, defeatist attitudes, minimising his offending, lack of understanding of the harm his offending has on others, tendency to put his own needs above the needs and rights of others.
17. The Panel also noted positive factors that might reduce risk: not drinking to excess or misusing cocaine, employment, or constructive use of time (he was a self-employed sign fitter and appeared to enjoy his work), non-association with like-minded peers, addressing pro-criminal attitudes, and residing at approved premises (AP) to reduce risk. The Panel further also noted that the Applicant presented with a very positive, amenable, and affable persona.

18. As to post index offence conduct, the Panel noted adjudications for fighting in June 2022, his breaches of the restraining order at the end of 2022, his unlawful at large absence, his failure to adhere to curfew; all referred to above. The Panel however also carefully noted the evidence of his improvement in behaviour since his second return to custody, with no custodial concerns, adjudications, negative entries, or adverse reports. Indeed, he had received a number of positive entries and reports.
19. Also noted was the fact that he had not completed any accredited offending behaviour work prior to release, that he had self-referred with the substance misuse team whilst in prison (but not the mental health team) and had completed some in-cell workbooks. His COM told the Panel that there was no risk reduction work for the Applicant to complete prior to his release though, as the Panel also noted, this did not appear to accord with his sentence plan objective to engage with programmes to address in custody his problem solving and consequential thinking skills, emotional management, and victim empathy. Warning signs of likelihood of his increased risk levels were identified: positive drug and alcohol tests, not engaging, not returning to the AP and changes in presentation and attitudes.
20. He was assessed as posing a high risk of harm to known adults (especially to past and potential future partners), a medium risk to the public, and low risk to staff. The COM was concerned that should he drink alcohol, risk could escalate quickly.
21. The Panel also conducted a detailed analysis of the RMP. Accommodation was a concern linked to the Applicant's risk of serious harm and reoffending. A place at AP had been secured about 7-8 miles from his family but was not available until 9 January 2023 (sic; presumably meaning 2024). He would be expected to attend weekly supervision sessions with probation, allow home visits from his COM, and engage in 1:1 work to address his use of violence. He would remain subject to a period of PSS until 25 April 2024 (above) and to the restraining order until September 2027. Additional licence conditions were all noted.
22. Concerns were also noted about whether the Applicant could be safely managed in the community if he did not agree to some licence conditions. If he did not agree to all the licence conditions the COM felt his risk could not be safely managed in the community. However, she also indicated she would be prepared to work with the Applicant (if necessary, in the evening - when the probation office was open at certain times - in order to facilitate his employment) until his PSS expired in April 2024 even though the period from potential taking up the place at the AP (January 2024) to the SLED (February 2024) was only just over a month. In conclusion, as to the RMP, *"The POM and COM were of the view that the RMP is robust and can manage [the Applicant] in the community."*
23. The Panel also remained concerned about the Applicant's internal controls and ability to self-manage risk. Despite his apparent ability and motivation to work on his risk he struggled with his emotions and mental health. His positive presentation (above) could quickly disappear into a negative and defeatist attitude and even to violence if under the influence of drink or drugs and faced with conflict. He appeared to lack resilience required to manage his emotions, and consequently to self-manage his compliance and risk. He had not engaged with the mental health team.

24. The Panel was told that the Applicant's family and working were key factors in his life and important to him, but the Panel noted, neither had prevented him offending in the past. He told the Panel that his priority would be to work to get enough money for independent accommodation, to see his children and attend the gym for his ongoing emotional wellbeing. However, despite these "laudable goals", given the location of the AP in relation to his work and children the Panel could not see how he would be in a position to prioritise and complete any work with his COM or with substance and misuse and mental health services to address his risk, even if it could be done in the evening, especially given the shortage of time between the AP becoming available in January 2024 and the end of the period of PSS in April 2024. He had failed to complete any offending behaviour work on his previous releases and the Panel did not believe that would be any different if the Applicant was released in January 2024.
25. The Panel carefully noted and balanced in some detail the pros and cons for and against release. The Panel's view was that in the context of no evidence of causing serious harm to any member of the community whilst on his last release, the Applicant could be managed in the short period from January (when the AP would be available) to his SLED in February 2024 (a month). But that was not the end of the matter, the Panel had to consider the longer term and the risk in that longer term was unlikely to be addressed by his doing work with probation on licence or during his period of PSS (i.e. to April 2024). He had, while in custody, not completed any accredited offending behaviour programmes and had not engaged with the mental health team (which the Panel considered important). He continued to present a high risk of serious harm to his former partner. There simply was not enough time to undertake the necessary work to assist with his longer-term risk. He would not be able to manage his risk or desist from serious reoffending in the longer term. He presented as a high risk of absconding. The last time he had done so he had reoffended.
26. The Panel "was, therefore, not satisfied that it is no longer necessary for the protection of the public that [the Applicant] should be confined" and, accordingly did not direct his release.

The Relevant Law

27. Rule 28A(1)(a) of 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.
28. 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)).
29. 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 Response of the Secretary of State

30. I have mentioned above that the Respondent elected to make no additional representations.

Discussion

31. In my judgment this application is entirely misconceived. A decision of a panel of the Parole Board must be read, intelligently, fairly, and as a whole. It is not a lease, a will, or other legally carefully drafted transaction to be analysed with the care and skill of an ancient Chancery draftsman. The application is really an attempt to reargue the case.
32. A Parole Board panel acts in a well-recognised judicial capacity, albeit tasked with undertaking an inquiry or investigation. The legal test is, nevertheless, clear: the Parole Board must be satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined: see, for example, **Pearce [2023] UKSC 13**. It is clear that the Panel asked itself the right questions and applied the right test: see above para. 26. Moreover, as noted by the Panel, given the Applicant was subject to a determinate sentence, risk beyond the SLED had to be considered (see, for example, **Johnson [2023] EWHC 1283 (Admin)** and **Dich [2023] EWHC 945 (Admin)**).
33. The Panel did not decide the Applicant could be safely managed in the community (quite the contrary). What the Panel considered was that in the context of there being no evidence of him causing serious harm to any member of the public whilst on his last release and given the RMP proposed he could be managed in the short period between January and February 2024 (see above, para. 25), the Panel accepted he could be managed in this short period. But as stated above, the Panel was also bound to consider, and did consider the risk in the longer term. The submission that the Panel's finding that the Applicant could complete risk reduction work to a higher standard in custody rather than in the community did not go directly to the risk assessment was, in my judgment, completely unjustified. The Panel addressed at length the subject of risk assessment and concluded that the Applicant remained a risk from which the public needed protection in the longer term. Such latter considerations as part of the application of the legal test were entirely proper, justified and with more than ample evidence to justify the Panel's conclusions. I can detect no error of law on the part of the Panel.
34. As to the alleged errors of fact, there is, in my judgment, nothing in these:

- a) The Panel noted that the COM had confirmed there was no risk reduction work for the Applicant to complete prior to release, but also noted this did not appear to accord with his sentence plan (above, para. 19). Moreover, the Panel did not refuse release on the basis that risk reduction work must be done in custody; it refused release because the Applicant had not satisfied the Panel as to the legal test (above);
 - b) As to the suggestion that risk reduction work could be done in the community and no reason was given as to why this was less likely to be less effective in the community than in custody, this, argument, again, in my judgment is entirely misconceived. The Panel addressed the assessment of risk overall and had to consider and make a, no doubt anxious judgment, on the Applicant's ability and willingness to address his risks. It concluded, for perfectly sound reasons, he would not, or would at the very least struggle to do so such that the risks would not be reduced in the time available.
 - c) As to the role of work and accommodation, the Panel pointed out the problems caused by the location of the AP, the history of offending and non-compliance and, having seen, heard and assessed and evaluated his evidence, was entitled to infer that he would not be able to complete any effective risk reduction course work in the time available.
 - d) As to the submission that the Panel had failed to consider the Applicant was subject to PSS until February 2025, this, too, seems to be a confusion with the period of PSS to April 2024 which the Panel did consider.
35. It must also not be forgotten that the Applicant gave evidence and was legally represented throughout. He thus had every opportunity of being heard, assessed, and making representations. Standing back and looking at the Decision as a whole, it seems to me to be soundly based on the material before it, reached conclusions on the evidence it was entitled to find either as primary facts or properly to infer and after careful analysis and reasoning. After very careful consideration it is plain that the Panel was not satisfied the legal test had been met. There was ample material to justify that conclusion. There was no error of law or fact or injustice in the conclusion. The fact remains that the Applicant must be released on his SLED even if the risks he presents then persist.

Decision

36. In these circumstances the application for set aside is accordingly refused.

HH Roger Kaye KC
22 December 2023