

[2024] PBSA 22

Application for Set Aside by McGowan

Application

1. This is an application by McGowan (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 12 March 2024. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, and the application for set aside.

Background

3. On 2 December 2020, the Applicant received two concurrent sentences of 48 months imprisonment following conviction for possession of class A drugs (heroin and cocaine) with intent to supply. He received a consecutive sentence of imprisonment of 1 month for theft. The Applicant pleaded guilty to all three offences. At the same time, the 18 month suspended sentence in respect of an earlier conviction for unlawful wounding was activated to the extent of 11 months. The total period of imprisonment was accordingly 5 years.
4. The Applicant was aged 32 at the time of sentencing. He is now 36 years old.
5. He was automatically released on licence on 8 February 2023. His licence was revoked on 12 May 2023, and he was returned to custody on 23 May 2023 after being unlawfully at large for 10 days. This is his first recall under the current sentence, and his first parole review since recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by the Applicant's legal representative.
7. It is submitted that there has been an error of fact, namely that the Applicant's answers to the panel's questions were based on an "*undesirable risk management plan*". The initial plan had been for him to be released to reside in Location A at an address which his brother had found for him. However, Location A probation service decided that he needed to demonstrate a period of stability in the community first. It is submitted that the evidence he gave and his reliance on avoidance strategies was "*solely influenced by the undesirable risk management plan*" and that "*his answers would have been different if the release management plan had been different*".

Current parole review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether or not to direct his release.
9. He had been automatically released at the halfway point of his sentence on 8 February 2023. As a result of the intended address in Location A having not been approved, he was required to reside initially at a Community Accommodation Service Tier 3 (CAS3) property in Location B. The Applicant is reported to have attended the appointments with his Community Offender Manager (COM) and to have disclosed a new relationship as required.
10. However, the Applicant struggled to re-establish himself in the community, relapsing into drug and alcohol use, and suffering a deterioration in his mental health. On 15 April 2023 he was found with a ligature around his neck and was taken to hospital.
11. There were problems within the new relationship and arguments involving a police call and a scene in restaurant when his partner struck him. She apologised, invited him round but eventually spent the night with another man.
12. In the early hours of 2 May 2023, the Applicant went to his new partner's address shouted out and kicked her car, denting its nearside. He returned shortly afterwards and threw a wheelie bin through the vehicle's windscreen.
13. After a reconciliation, when they spent the night together at an hotel, the Applicant later discovered that his partner had spent a night with one of his friends. He responded by going to the friend's address where he smashed a window.
14. The Applicant absconded following the decision to recall him but eventually gave himself up, saying that he had needed time to sort himself out. He was arrested, charged with battery, criminal damage and harassment and returned to prison. In due course the Applicant pleaded guilty to two offences of criminal damage. He was sentenced to 10 weeks imprisonment for one and received a 3 year conditional discharge for the other.
15. The case proceeded to an oral hearing on 16 February 2024 before a two member panel, which included a psychologist specialist member. It was adjourned part-heard and resumed on 12 March 2024. The panel heard evidence from the Applicant, his Prison Offender Manager (POM), and his COM. The Applicant was legally represented throughout both hearings.
16. The Applicant does not challenge the decision to recall him and the panel concluded that it had been justified. Evidence was given of the extensive work undertaken by the Applicant to further address mental health and substance abuse issues. He had maintained Enhanced Status under the Incentives and Earned Privileges (IEP) Scheme. Both the POM and the COM supported the Applicant's release which, in view of the decision by Location A's probation service, would involve living in the first instance in CAS3 accommodation in Location B.

17. The panel did not direct the Applicant's release, having concluded that the current Risk Management Plan was not appropriate to the Applicant's needs and risks. The period in CAS3 accommodation in Location B appeared to be an interim plan and there were no firm move on proposals. Core risk reduction work remained outstanding.

The Relevant Law

18. 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.

19. The types of decision 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)).

20. 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

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

Discussion

22. It is argued on behalf of the Applicant that there has been an error of fact.

23. The alleged error referred to in the representations is not an error of fact. A change in demeanour because the Applicant had learned prior to the resumed hearing that his release plan had "*once again been blocked by Location A authorities*" does not equate to an error.

24. The basis upon which the Applicant gave evidence is not itself an error of fact. It simply reflected the accurate factual change of circumstance.

25.The fact that the Applicant might have provided different evidence or provided his evidence in a different manner had the change in circumstance not occurred is irrelevant. He gave his evidence in the light of the change and the representations do not identify any specific factual error.

26.No error of fact by either the POM or COM has been identified.

Decision

27.In summary, nowhere in the submissions has any error of fact been identified by the Applicant and I have been unable to find one within the panel's decision. Furthermore, this is not a case where any error of law, lack of available information or change of circumstance after the hearing applies. The application for set aside is accordingly refused.

Graham White
30 April 2024