

[2022] PBSA 7

Application for Set Aside by Hall

Application

1. This is an application by Hall (the Applicant) to set aside the decision dated 22 August 2022 made by an oral hearing panel not to direct his release.
2. I have considered the application on the papers. These are the oral hearing decision, the dossier, the application for set aside and a copy of a Prisoner Formal Complaint form (COMP1) dated 10 September 2022.

Background

3. The Applicant received a sentence of imprisonment for public protection on 13 June 2006 following conviction on five counts of sexual activity with a female child under 16. His tariff is reported to have passed on 13 December 2008. He has been recalled twice on this sentence. This is his second review since his second recall.
4. The Applicant was aged 33 at the time of sentencing. He is now 49 years old.

Application for Set Aside

5. The application for set aside is dated 14 September 2022 and has been drafted and submitted by the Applicant.
6. It comprises two letters. The shorter seeks confirmation that the substantive application has been received (and this has been acknowledged by the Parole Board in a letter of 6 October 2022). It also makes complaints about the Applicant's legal representative which are not for me to deal with. The substantive application runs to eight handwritten pages. It pleads error of law and error of fact.
7. This submission is supplemented by information in the COMP1 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 Respondent to consider whether it would be appropriate to direct his release.
9. The case proceeded to an oral hearing on 9 August 2022 before a three-member panel comprised of two judicial members and a psychologist specialist member. The Applicant was legally represented throughout. Oral evidence was given by the Applicant's partner, his Prisoner Offender Manager (POM), his Community Offender



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Manager (COM) and an HMPPS psychologist. The panel did not direct the Applicant's release.

The Relevant Law

10. 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.
11. 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)).
12. 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 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.

Error of law

13. An administrative decision is unlawful under the broad heading of illegality if the panel:
 - a) misinterprets a legal instrument relevant to the function being performed
 - b) has no legal authority to make the decision
 - c) fails to fulfil a legal duty
 - d) exercises discretionary power for an extraneous purpose
 - e) takes into account irrelevant considerations or fails to take account of relevant considerations; and/or
 - f) improperly delegates decision-making power.
14. The task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the panel. The instrument will normally be the Parole Board Rules, but it may also be an enunciated policy, or some other common law power.

The reply on behalf of the Respondent

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

Discussion

Eligibility

16. The application concerns a panel's decision to direct release following an oral hearing under rule 25(1)(a). The decision was subject to the reconsideration mechanism afforded by rule 28, but with no such valid application for reconsideration having been received within 21 days, it became final on 12 September 2022. The application relies upon the ground in rule 28A(5)(a). It is therefore an eligible decision which falls within the scope of rule 28A.

Error of law

17. It is first argued that the panel failed properly to apply the statutory test for release which, it states, is found in section 28(6)(b) of the "1998 Act" and provides that the Parole Board should order release when "*it is no longer necessary for the protection of the public, through the risk of committing further specified offences, that the Prisoner need continue to be confined*".

18. This is not an accurate statement of law. The test for release in this case is found in section 28(6)(b) of the Crime (Sentences) Act 1997 which provides that "*The Parole Board shall not give a direction [for release] unless the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined*". This test is correctly referenced in the referral from the Respondent and in the decision of the panel.

19. The remainder of this submission goes on to argue that the panel has misapplied the legal test, since a low assessed risk of serious harm must surely satisfy that test. This submission fundamentally misunderstands the role of the Parole Board as an independent assessor of risk. If release were simply predicated on a set of actuarial scores there would be no need for hearings. The panel has not erred in law and this ground fails.

Error of fact

20. The application moves on to state five alleged errors of fact (and, impliedly, that a direction for release would have been made but for any of these alleged errors).

21. The first point raised concerns the Applicant's risk of absconding. The Applicant provides evidence of a temporary release failure from an open prison in 2014 and contends that a licence breach that triggered a recall is not the same as an abscond. Regardless of whether the Applicant did, or did not, in fact abscond from an open prison, it is plain from the panel's decision that any such risk of abscond was only material to its decision not to recommend open conditions and, as such, falls outside of the scope of rule 28A.

22. The second point raised concerns alleged failings of the Applicant's legal representative during the hearing and alleged procedural failings of the panel chair who, it is said, forbade him from speaking. Nothing in this point relates to a factual error, and it must automatically fail.

23. The third point concerns the extent of the Applicant's knowledge of a proposed employment opportunity in the community. It is said that the panel asked the Applicant's COM if his lack of knowledge was evidence of deceit, and the COM says it was. The Applicant argues he did not have an opportunity to give his own evidence on the point. The panel may ask any question it wishes to satisfy itself of a prisoner's level of risk (rule 24(2)(b)) and any such procedural failings fall outside rule 28A. Even if I had found this to be an error of fact, it would have been far from an error so egregious as to have changed the panel's decision which is based on many factors.
24. The fourth point concerns the panel's view that his POM "*judged that he still minimised his index offending and showed high levels of self-justification*". While the Applicant sets out reasons why he disagrees, disagreement does not prove an error of fact on the part of the panel. The decision records the POM's evidence; disagreeing with it does not make it factually incorrect as a matter of law.
25. The final point first takes issue with the panel's note that he had shown a "*flagrant disregard*" for restrictions in relation to internet access to chat rooms. This relates to a finding of a panel of the Parole Board that considered the Applicant's case in 2012 and is part of the current panel's exposition of the Applicant's parole history. Again, this falls into the category of disagreement with the finding of a previous panel which that panel was entitled to make on the evidence before it at the time. A similar analysis applies to the next points relating to the Applicant being in possession of tobacco on return from day release and breaching conditions relating to contact with his mother.
26. There is insufficient evidence for me to find that the panel has erred in fact and, in any event, nothing to persuade me that any of the points raised by the Applicant would, if true, have been sufficiently material for the panel to have changed its decision.

Decision

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

Stefan Fafinski
4 November 2022