

[2023] PBSA 74

Application for Set Aside by Bennett**Application**

1. This is an application by Bennett (the Applicant) to set aside the decision made by a Member Case Assessment (MCA) member of the Parole Board (the Panel) upon consideration of the papers resulting in a refusal to direct her release.
2. I have considered the application on the papers. These are the dossier currently comprising 146 pages, the decision letter (DL) dated 7 September 2023 and the undated application to set aside which was received on 24 October 2023.

Background

3. On 12 December 2014 the Applicant was sentenced, upon her guilty pleas, to a total of nine years imprisonment for conspiracy to supply heroin and possession of identity documents with intent ("the index offences"). No separate penalties were imposed for two counts of possession of crack cocaine with intent to supply, possession of crack cocaine, driving whilst over the prescribed limit for alcohol and document offences.
4. The Applicant has a criminal record of convictions for 33 offences including possession and supply of Class A drugs, dishonesty, battery and failing on several occasions to comply with court and community orders.
5. The index offences concerned her involvement in large scale drug supply in 2013 and 2014. The Applicant admitted making around £6k per week through dealing drugs, which she used to fund her own drug use and her preferred lifestyle. The sentencing Judge noted that she continued to deal after her arrest and whilst on bail and, once on remand in custody, she directed her sister from prison to continue the dealing.
6. There are four convictions subsequent to the index offences. In May 2018 she was found in possession of an unauthorised item (a mobile phone sim card) inside a prison and subsequently sentenced to 6 weeks imprisonment.
7. Later that year she was found to be in possession of cocaine, a Class C drug with intent to supply and an unauthorised item, all again within a prison, and she was eventually dealt with for these matters in March 2020 by way of further sentences of imprisonment.



8. The Applicant was initially released on licence automatically in February 2019. In March 2019 she committed two offences of driving with the proportion of drugs in her body being over the prescribed limit together with document offences for which she was in due course dealt with in the Crown Court in March 2020 on the same occasion that she was sentenced to 14 months imprisonment for failure to comply with the Serious Crime Prevention Order (SCPO) which had been imposed as a result of the index offences.
9. By this time she had already been recalled to prison in July 2019, after which she remained unlawfully at large for seven months. She was re-released by direction of a Panel of the Parole Board in September 2021 and recalled for a fixed term on 30 March 2023 due to poor behaviour in the community.
10. The Applicant was released for the third time on 27 April 2023, to reside at Approved Premises (AP). She was recalled five days later on 2 May 2023 having failed to comply with conditions of her licence in that she failed to attend sign-ins on 28 April 2023 and 29 April 2023, was late for her sign-in on 1 May 2023, was late for her curfew on 3 occasions and did not complete a drug test as requested. On 1 May 2023 the Applicant was described by AP staff as appearing to be under the influence of an unknown substance and on 2 May 2023 she was found to have pregabalin tablets having not disclosed that she had a prescription for pregabalin.
11. This was the first review since her third recall. The Sentence Expiry Date (SED) is given as February 2024.

Current Parole Review

12. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct her release. The review was considered on 7 September 2023 by the Panel which had the benefit of the dossier which at that stage ran to 136 pages and included detailed representations from solicitors on behalf of the Applicant. The Panel made no direction for release.

Application for Set Aside

13. The Application for Set Aside is dated 24 October 2023 and made on behalf of the Applicant by her solicitors who seek to argue a single issue which is said to amount to an error of law.

The Relevant Law

14. 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.
15. 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)).

16. 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

17. By e-mail on 1 November 2023 the Respondent confirmed that he had no comments to add in relation to the application.

18. The application concerns a decision not to direct release by a paper panel (rule 19(1)(a) or (b)). The application argues that an error of law has been 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.

Discussion

19. I have carefully considered the application to set aside and all the documentation before me.

20. The Applicant submits that *"in declining release, the decision maker relied on the inference that [the Applicant's] risk of serious harm had increased, as she has resumed substance misuse in the community"* and, in reliance on the words of Lord Reed when giving the leading Judgment in the well-known case of Osborn, Booth & Reilly [2013] UKSC 61 that:

'... the board has to evaluate the material placed before it by the Ministry and reach its own objective judicial decision. The board should therefore have no predisposition to favour the official version of events, or the official risk assessment, over the case advanced by the prisoner',

the Applicant argues that, *"In making their decision, the parole board member accepted the official version of events, namely that [the Applicant] was under the*

influence of unprescribed pregabalin, and was therefore misusing substances whilst on licence."

21. The passage quoted derives from a section of the Judgment in which the Court is providing general guidance as to the circumstances where fairness requires an oral hearing. It might therefore be suggested that a failure to follow such guidance does not amount to an error of law, although it might perhaps, provide grounds for a challenge of another sort.
22. However, in this case, it is clear that the Panel considered (and in my view properly applied) the principles set out in *Osborn* when finding that there was insufficient information available to make a decision on the papers and that an oral hearing would allow "*matters under discussion*" to be aired through the taking of evidence, in particular, in relation to the recall and the question of excess medication.
23. However, the Panel, having decided upon the need for an oral hearing, felt itself constrained by the Parole Board guidance that determinate recall cases with an SED such as the Applicant's should be concluded on the papers rather than being directed to an oral hearing.
24. It is noteworthy that the Panel therefore carefully confined itself in coming to its decision not to direct release to issues which were not the subject of challenge such as the Applicant's acknowledged breaches of basic requirements of supervision including two deliberate breaches of her curfew and the possession of pregabalin tablets which she had not disclosed.
25. Further, it is concerning that it is suggested that the Panel "*accepted the official version of events, namely that [the Applicant] was under the influence of unprescribed pregabalin*" since the Panel clearly declined to make a finding that the Applicant had resumed "*substance misuse in the community*" confining itself instead to noting that, "*It is suspected that she has resumed substance use.....*"
26. It is of course a bold submission that a judicial body has demonstrated "*a predisposition*" and I am satisfied that the Panel in this case has not done so.
27. In concluding the review on the papers in accordance with the relevant guidance, the Panel was able to draw on the history, the Applicant's criminal record and the nature of the index offences, her behaviour whilst on licence on two previous occasions, her admitted breaches of conditions during her very brief period on licence, the withdrawal of her bedspace at the AP and the fact that core risk reduction work remained outstanding.

Decision

28. 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 law and the application to set aside is refused.

PETER H. F. JONES
09 November 2023