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[2023] PBSA 11

Application for Set Aside by Adebisi

Application

1. This is an application by Adebisi (the Applicant) to set aside the decision made by an oral hearing panel (the panel) dated the 6 February 2023 not to direct his release.

2. I have considered the application on the papers. These are:

   a) The Decision Letter dated the 6 February 2023;
   b) The dossier, numbered to page 395, of which the last document is the Decision Letter. The panel had a dossier numbered to page 385; and
   c) The Applicant's application to set aside the decision in the form of representations from his legal representative dated the 22 February 2023.

Background

3. On the 24 September 2020, the Applicant was sentenced to a term of 3 years in custody following his conviction for possession of crack cocaine with intent to supply (the Index Offence). The Applicant's sentence expires in September 2023. He was released automatically on 24 March 2022 as is required by law and was recalled to custody on the 26 April 2022.

4. The Applicant had, on an earlier sentence, been released on licence in April 2020 having received a four year sentence of detention in 2018 for offences of s18 GBH, possession of cocaine and possession of a bladed article. The Index Offence, commonly referred to as 'county lines' drug dealing, was committed on licence within two months of his release.

5. In his interview with a probation officer for a pre-sentence report, the Applicant admitted to a history of drug misuse, which had in the past been *'out of control'* and led to him accruing significant drug debts. It was due to the debt, he had said, that he went on to commit the Index Offence. It had been suggested at the time that the Applicant had played a more sophisticated role in the chain of drug dealing, however, the Applicant had denied this.

6. Prior to release on the current sentence, there were concerns reported about the Applicant. He had failed a drug test in custody and cannabis had been found. The Applicant has admitted that he used drugs prior to release.

7. On licence on the current sentence, the Applicant provided a positive drug test result for cannabis and cocaine. He had admitted using cannabis on licence but had denied using cocaine. He offered an explanation to the panel about why he tested positive for cocaine.

8. Following his return to custody, the Applicant had engaged with the substance misuse service. A negative entry had been recorded against the Applicant in custody when he was found in an area where there was cannabis. A formal disciplinary review (adjudication) later dismissed the matter and the reason for this was detailed in the written evidence before the panel. However, the negative entry remained, reflecting what staff had reported seeing when they entered the shower area of the prison. The Applicant had denied being under the influence of drugs and had asked for a drug test to prove this. He produced a voluntary drug test at a later point which was negative, although the prison could not be sure that this proved he had not used cannabis at the time it had been found.

9. The panel considered the Applicant's case at an oral hearing on the 30 January 2023. Following the hearing, the Applicant's legal representative provided written submissions dated the 31 January 2023. The Applicant disputed his recall to prison, asked that he be re-released and noted that no suitable accommodation was in place for him, although he highlighted that his brother's home was yet to be assessed and, in the alternative, he could be considered for designated accommodation by probation.

10. In its Decision Letter of the 6 February 2023, the panel did not direct the Applicant's release. It determined that his recall had been appropriate, that he had an "*enduring problem with drug misuse which was a significant factor in his previous offending and that he needs to undertake further work to address his risk factors*." The panel noted that on release the Applicant had admitted to being at a party where cocaine and cannabis were freely available, which the panel considered evidenced a return to the Applicant's "*old lifestyle and associates*". The panel found that no accommodation was available and that the risk management plan would not be adequate to manage the risk he presents.

Application to Set Aside

11. In his application, the Applicant submits that:

    a) There was a typographical error at paragraph 1.2 of the Decision Letter;
    b) The Decision Letter fails to set out how the Applicant has an enduring drug problem as it relies on a sole positive drug test whilst in the community. The application argues that there was no evidence to substantiate the panel's view that the Applicant had a problem with drugs;
    c) He did not admit to smoking cannabis whilst in custody as was stated in the Decision Letter;
    d) The panel came to the conclusion that the Applicant needed to undertake further work to address his risk factors but the Applicant says that this assessment is based on reasoning that he had an enduring drug problem, for which there was no evidence to substantiate this view. The panel failed to take into account relevant factors when coming to this assessment; and

e) The panel incorrectly concluded that there was no accommodation available and the panel could have adjourned the review for the outcome of suitable accommodation.

The Relevant Law

12. 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. Rule 28A(1) also provides that the Parole Board may seek to set aside certain final decisions on the initiation of the Board Chair.

13. The types of decisions eligible for set aside are also set out in rule 28A(1). Final 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 made the decision on the papers (rule 21(7)).

14. 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 made if information that had not been available to the Board at the time of the direction had been so 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 Secretary of State (the Respondent)

15. The Respondent has confirmed that he has no representations to make.

Discussion

Ground a

16. There is a typographical error at paragraph 1.2 of the Decision Letter. It is a matter that could, if necessary, be corrected under Rule 30 of the Parole Board Rules 2019 (as amended). However, it is not an error that would, if corrected, have led to a different decision in this case.

Ground b

17. I have read the Decision Letter and all the papers provided to me in this application. The Applicant submits that the panel relied on "*the sole positive drug test for cannabis and cocaine while he was in the community*" in support of its conclusion

that he has an "*enduring problem with drug misuse*", and that this was an error in law (a "*Breach of Public Law Fairness*").

18. This ground isn't made out, there is no error of law or error of fact. By his own admission the Applicant accepted a history of drug misuse, that he had smoked cannabis prior to release and that he had been to a party on release where drugs were freely available. He had also admitted to cannabis misuse on licence which he had claimed was "*tolerated by staff*" (see legal representations dated the 14 June 2022).

19. On the available evidence, the panel was entitled to find that the Applicant had a problem with drugs and it is clear from the Decision Letter that the panel was not simply relying on a single positive drug test result. It is right to note that perhaps there had been a change in custody because there had been no definitive evidence of drug misuse, however, that doesn't mean that the panel should simply ignore all that had taken place prior to the recall.

Ground c

20. Paragraph 2.1 of the Decision Letter states:

"[the Applicant] was recalled to [prison] and was offered an appointment with [the Substance Misuse Service] and told the panel that he had told [the Substance Misuse Service] that he needed to do the course. However they did not accept his referral after he had said that he did not have any substance misuse issues. In fact he has admitted smoking cannabis in custody. He transferred from [a prison] to [another prison] on 19/05/2022 and engaged with [the Substance Misuse Service] and completed a number of short programmes …"

21. I accept that the Applicant had not admitted to smoking cannabis following his recall to prison. I do not accept that the reference in the panel's Decision Letter is an error of fact because in Paragraph 2.1, the panel was setting out the history of the case. At the time of his referral not being accepted by the substance misuse service he had not been accused of smoking cannabis in custody. That allegation followed around eight months later. I suspect that the panel was referring to the Applicant's acceptance of smoking cannabis prior to his release on licence. I accept that it could have been better worded, however, I am not persuaded that it is an error of fact.

Ground d

22. The Applicant submits that the panel was in error in concluding that he needed to undertake further work in custody because the assessment of this was based on the reasoning that he had an enduring drug problem. As I have outlined, the panel was entitled to conclude that he had an enduring drug problem and therefore this ground fails. The Applicant submits that the panel failed to take account of the fact that the probation officer believed that there would be little benefit to the Applicant completing offence focussed work in custody. This is simply a way of indicating that the Applicant disagrees with the panel's view. It is not evidence of an error of fact or error of law.

Ground e

23. At Paragraph 4.5 of the Decision Letter, the panel stated:

    "… *There is no accommodation available and the panel concluded that the proposed Risk Management Plan would not be adequate to manage the risk which he presents…*"

24. The facts before the panel were that a proposed address had been withdrawn, another address was considered by probation to be unsuitable and a third address was yet to be assessed. The probation officer had said that a place in designated accommodation "*would take 10 to 12 weeks for a bed to become available and even though [the Applicant] was a high-risk offender there was no certainty that he would be accepted*".

25. In its assessment of the plans to manage risk, the panel explored the proposed measures to support the Applicant in the community and the proposed licence conditions to manage him on release.

26. The Applicant submits that the panel was in error when it said that there was no accommodation available because the question about designated accommodation did not "*equate to there being a definitive no*". The Applicant submits that in the absence of approved accommodation, the panel could have adjourned for further information, although I note that he did not seek this in his written representations following the oral hearing. The Applicant goes on to say that his level of risk could have been safely managed in the community.

27. I accept that in saying there was no accommodation available, this was an error of fact. There were accommodation options and the reality was that if the panel directed release some form of accommodation would have been identified. It was open to the panel to adjourn to confirm the plans, it chose not to and the Applicant's written representations did not invite it to adjourn.

28. It is important to note that designated accommodation provided by probation would not have been simply an alternative place to live for the Applicant. It would have been determined on the identified level of risk in this case. It was open to the panel to find that such a placement would be necessary in terms of risk management. It did not make such a finding and therefore it cannot be said that designated accommodation would have been fundamental to the risk management plan.

29. It is also important to note that accommodation for the Applicant was only one element of the risk management plan, which, earlier in the Decision Letter, the panel had outlined in detail. Although I accept the error of fact outlined by the Applicant, I do not accept that it follows that this meant that the panel's analysis of the risk management plan was also in error or that the panel would have reached a different decision in this case had it corrected that error.

30. The panel had identified a need for the Applicant to address his risk factors, it had reviewed the detail of the risk management plan, which was not confined to accommodation proposals, and had concluded that the plan would be ineffective. It

was entitled to reach those conclusions and I am not persuaded that the error in terms of accommodation would have led to a different result in this case.

Decision

31. For the reasons I have given, I am not persuaded that the final decision of the panel dated the 6 February 2023 should be set aside. The application is refused.

Robert McKeon
9 March 2023