

[2023] PBSA 61**Application for Set Aside by Malik****Application**

1. This is an application by Malik (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 25 July 2023. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 16 August 2023), and the application for set aside (dated 23 August 2023). I have also listened to the audio recording of the hearing.

Background

3. On 21 December 2005, the Applicant received a determinate sentence of imprisonment for 25 years following conviction for conspiracy/being concerned in an offer to supply a class A drug (heroin). The trial judge's sentencing remarks note that the conspiracy involved 130 kg of heroin, equivalent to 74 kg of pure heroin.
4. The Applicant was aged 34 at the time of sentencing. He is now 52 years old.
5. He was automatically released on licence on 23 December 2021. His licence was revoked on 17 August 2022, and he was returned to custody the following day. This is his first recall on this sentence, and his first parole review since recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.
7. It submits that there has been an error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.
9. The case proceeded to an oral hearing on 25 July 2023 before a single-member panel. The panel heard evidence from the Applicant, a stand-in Prison Offender Manager (**POM**), and his Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing.



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10. The panel did not direct the Applicant's release.

The Relevant Law

11. 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.

12. 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)).

13. 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

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

Discussion

15. It is argued on behalf of the Applicant that there has been an error of law. It is submitted that the panel considered at the hearing that it was unable to reach a final decision in the case without further information being requested. It is said that an adjournment was agreed but that the decision was then made and issued without the new information having been received or considered. Therefore, it is submitted that subsequently dismissing the adjournment and its reasons as immaterial was perverse, unjust, and unfair.

16. The application was vague as to the precise error of law that it claims has occurred. I sought clarification. The Applicant's legal representative clarified that the application was made on the basis of procedural unfairness and as such the Applicant's Article 6 rights under the Human Rights Act 1998 had been infringed.

17. The decision itself makes no mention of an adjournment and does not refer to any newly directed information. Oddly, the decision does not contain the usual information concerning the routes of challenge open to the parties. This may account for the application appearing initially to conflate aspects of reconsideration under

rule 28 (which is not available) and set aside under rule 28A (which is), although the Applicant's legal representative should have been clear on the available route of challenge as this is readily apparent simply by reading the Parole Board Rules.

18. Having listened to the entirety of the hearing, it is clear that the panel chair did, in fact, adjourn the hearing for further information. A timeframe of three weeks was mentioned, and the panel chair said that written directions would be issued and closing legal representations would be invited on the Applicant's behalf before the decision was made.

19. It is also clear that the decision was made and issued without any such directions being issued, any further information being received and any written legal representations on behalf of the Applicant.

20. I am certain there is nothing more invidious here than an unfortunate administrative oversight on the panel chair's part. However, it remains that the Applicant was deprived of a fair opportunity to present his case. The Applicant contends this is a breach of his Article 6 right to a fair hearing, and, in the circumstance of this particular case, I agree. As such, the panel did err in law. This is not to say that, as a general principle, every procedural error will give rise to an error of law.

21. An error of law is not, in itself, the end of the matter. The error must be such that the decision not to release the Applicant would not have been made but for that error and it must be in the interests of justice for the decision to be set aside. I am satisfied that the situation in this case is such that it would be contrary to the ordinary rules of natural justice for me to conclude otherwise.

Decision

22. The application for set-aside is granted.

Stefan Fafinski
15 September 2023