the Parole Board
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[2024] PBSA 62

Consideration of Set Aside in the case of Dewar

Application

1. The set aside process was initiated by the Parole Board Chair under rule 28A(1)(b) of the Parole Board Rules 2019 (as amended) on 12 September 2024. It falls to me to decide whether to set aside the decision made by on the papers by a single-member Member Case Assessment (MCA) panel dated 1 August 2024 to direct the release of Dewar (Prisoner). This is an eligible decision.

2. I have considered the application on the papers. These are the dossier, the oral hearing decision, a stakeholder response form (SHRF) dated 16 August 2024, an email from the Parole Board duty member to whom the SHRF was assigned dated 9 August 2024, an email from that duty member to the Parole Board Setting Aside team dated 20 August 2024 and the email from the Parole Board Chair dated 12 September 2024 initiating the set aside process.

Background

3. On 4 May 2007, the Prisoner received a sentence of imprisonment for life following conviction after trial for murder. He was also convicted of battery and received a four month concurrent determinate sentence (now served). His tariff was set at 16 years less time spent on remand and expired in July 2022.

4. The Prisoner was aged 27 at the time of sentencing. He is now 44 years old.

5. The index offence was described by the sentencing judge as an "*unprovoked and brutal attack by a number of young people who had been drinking all day and were in belligerent mood*". The Prisoner was the oldest of the group and was said to have played a "*full part*" in the attack and "*shown no remorse*". The battery conviction related to another instance of "*unprovoked violence that took place during that night*".

6. The Prisoner has a number of previous convictions for violence including common assault, battery, aggravated vehicle taking and assault occasioning actual bodily harm (ABH). According to a 2019 psychological risk assessment within the dossier, the ABH reportedly took place in 1995. The Prisoner punched his partner in the face after an argument. He is reported to have been under the influence of substances at the time and has limited recollection of the domestic violence incident.

7. He has also been convicted of driving a motor vehicle with excess alcohol.

8. The Prisoner's release was directed following an oral hearing held before a two-member panel (comprising a judicial chair and a psychiatrist specialist member) in March 2023. By this stage in his sentence, he had progressed to open prison conditions and reportedly had completed a number of releases on temporary licence, although he had failed one breath test for alcohol while in the community. The releasing panel identified alcohol as a key risk factor, together with poor emotional management, inappropriate relationship management and poor mental health (including auditory hallucinations telling him to kill someone who was "*messing*" with his parole).

9. He was released on licence on 24 April 2023. His licence was revoked on 21 April 2024, and he was returned to custody the following day.

10. The Recall Report (dated 21 April 2024) states that recall was initiated after the Prisoner had been charged with intentional strangulation of his partner and was under investigation for other offences. It is reported that they had been drinking at a pub but started arguing in the street on the way back to their temporary accommodation at a hotel. A member of the public called 999 and stated that "*a drunk male…was following a distressed female and he was concerned for her safety*". A second witness approached the couple, and the female told him (when separated from the Prisoner) that he had "*grabbed her by the throat and pinned her to the floor, to the point where she struggled to breathe*". The hotel manager also described witnessing previous controlling behaviour, including the Prisoner "*smashing up [his partner's] phone in jealous outbursts after accusations of cheating*".

11. The Post Recall Risk Management Report (dated 13 May 2024) shows that, in the professional opinion of the Prisoner's Community Offender Manager (COM), he could not be safely managed in the community. It notes that the Prisoner was due to appear in Court on 28 May 2024 in relation to the charge of intentional strangulation. The COM states that "*the circumstances around the recall have highlighted some concerns about [the Prisoner's] alcohol use. Whilst [he] was presenting as compliant with supervision, he failed to disclose his level and frequency of alcohol use. Substance misuse has been identified as a risk factor…".*

Current Parole Review

12. The Prisoner's case was referred to the Parole Board by the Secretary of State to consider whether to direct his release (or, if release was not directed, to advise the Secretary of State whether he should be transferred to open conditions).

13. Written legal representations (dated 19 June 2024) on behalf of the Prisoner note that the Prisoner denied the allegations which led to his recall. He indicated a not guilty plea to the charge and the case was dismissed at the Crown Court on 28 May 2024. The reasons that the case was dismissed were not given. The Prisoner accepted he was drinking but contended that his alcohol use was not problematic (and as such, did not disclose it fully to probation). He acknowledges that he had experienced periods of low mood and drank to manage those feelings. The representations invited the Parole Board to direct re-release on the papers with

licence conditions in place to include alcohol monitoring by tag (for one year after release) and referral to alcohol treatment programmes.

14. The Prisoner's case was reviewed by a single-member (MCA Member) panel on 5 July 2024 and adjourned until 1 August 2024. The MCA Member noted that re-release was not recommended, but the recommendation was written without the benefit of the legal representations and before the case against the Prisoner had been dismissed. A brief update from the COM was directed. The MCA Member indicated that, if further information was provided, they may be able to conclude the case on the papers.

15. In response to the direction, the COM submitted a Release and Risk Management Report (dated 25 July 2024). In this report, the COM's professional opinion was that the Prisoner could be safely managed in the community. The COM noted that the case against him had been dismissed, that his custodial conduct since recall had been positive, and that his community employment had been held open for him (and this was a protective factor). The Prisoner admitted that he had been drinking daily, but not heavily, and drank out of boredom or to cope with low mood. He had "*started to drink brandy, but quickly realised this was not helpful, so returned to drinking wine or beer".*

16. The Prisoner had completed relapse prevention workbooks in custody, to good report. He had indicated a willingness to address his alcohol use. He would be subject to an alcohol abstinence monitoring tag on release (amongst other external controls). He intended to seek support for mental health issues.

17. In a decision dated 1 August 2024, the MCA Member directed the prisoner's release on the papers. The decision was not issued until 16 August 2024; the reasons for the delay are not known.

18. As the Prisoner is serving a life sentence, the decision to direct his release was provisional for 21 days from the date that it was provided to the parties to permit an application for reconsideration under rule 28 of the Parole Board Rules. In the absence of any such application, the decision would therefore have become final on 6 September 2024.

19. The Prisoner's legal representative subsequently submitted a Stakeholder Response Form (SHRF) later in the day on which the provisional decision was issued. This requested a discretionary reduction of the 21 day reconsideration window under the power conferred by rule 9 of the Parole Board Rules to "*the minimum period possible"*. The application noted that, since there was no victim engagement in the case, a reduction in the window would not prejudice their right of challenge. Moreover, it was submitted that earlier release would permit prompt re-engagement with employment, thereby giving structure and routine to ease the Prisoner's transition back into the community.

20. The Public Protection Casework Section (PPCS) on behalf of the Secretary of State opposed the application, since the 21 day window also gave them the opportunity to consider the case fully and decide whether to make their own application for reconsideration. The PPCS argued that the application was not exceptional and noted

the Prisoner's employment would remain available regardless. It was submitted that the window should only be reduced for the effective management of the case or in the interests of justice. (As an aside, the PPCS failed to mention the third limb of rule 9 which also allows a time limit to be altered "*for any such purpose as [a] panel chair or duty member considers appropriate*" which gives unfettered discretion to the Parole Board decision maker).

21. The SHRF was sent to a Duty Member (in line with standard Parole Board operational procedures). On 20 August 2024, the Duty Member refused the application, essentially for the reasons advanced by the PPCS.

22. There being no later application for reconsideration by either party, the decision to direct the Prisoner's release became final on 6 September 2024 (under rule 19(4)).

23. However, on 20 August 2024 the Duty Member who had considered the SHRF contacted the Parole Board's Setting Aside Team to raise concerns with the decision to direct the Prisoner's release. The Duty Member rehearsed the key points of the history of the case, particularly noting that the MCA Member had made no investigation into the allegations which led to the Prisoner's recall and consequently no attempt to make findings of fact or to determine what weight (if any) should have been placed on the allegations in assessing risk. The Duty Member gave some examples of documents that may have been helpful in determining further detail about the recall allegations (including police reports and witness statements). Moreover, the Duty Member noted that the MCA Member did not seek clarification of the reason why the charges had been dismissed at court.

24. The Duty Member acknowledged that their request that the case be considered for set aside was not one that had perhaps been envisaged within the set aside rule. They further acknowledged that Parole Board members are independent decision makers and that it is possible for different members to reach different conclusions after reviewing the same paper evidence. Nonetheless, they considered that if the MCA Member had directed further evidence to be added to the dossier regarding the recall allegations, the decision to release would not have been made and the case would have been directed to an oral hearing. Ultimately, they expressed their concern that (in their view) the Prisoner's risk might not be manageable in the community or that additional measures might be needed to manage his risk. As such, they were worried that the Parole Board may suffer reputational damage should the Prisoner go on to commit a serious further offence.

25. The decision to initiate the set aside process may only be taken by the Parole Board Chair.

26. On 12 September 2024, the Parole Board Chair noted the Parole Board's primary role is to protect the public, and, given the concerns expressed by the Duty Member, initiated the set aside process.

The Relevant Law

27. Rule 28A(1)(a) of 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.

28. 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)).

29. 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 parties

30. The Prisoner has submitted further representations dated 19 September 2024 which will be covered in the **Discussion** section below. The Secretary of State has offered no further representations and the deadline for representations has now passed.

Discussion

31. This is an unusual case, and the referral from the Parole Board Chair is silent as to which of the potential grounds for challenge has been engaged. I shall therefore consider each in turn. Paraphrasing the statutory wording for convenience, these are:

    a) new information had become available, or
    b) there had been a change in circumstances relating to the Prisoner, or
    c) there had been an error of fact, or
    d) there had been an error of law.

32. It is submitted on behalf of the Prisoner that there is no new information that has come to light since the decision was made and that there has been no change in circumstances relating to the Prisoner. I agree. There is no new information that is relevant to the Prisoner's review nor the decision to direct his release before me. Similarly, the Prisoner's circumstances have not changed.

33. It is further submitted on behalf of the Prisoner that there has been no error of fact. I also agree. Failure to make a finding of fact is not the same as making an error of fact.

34. The only ground that remains is error of law.

35. As a preliminary matter, and for the sake of completeness, I note that the release decision states that the review was "*concluded under Rule 21 of the Parole Board* (sic)". This is a clear error of law. Rule 21 applies to cases which have already been directed to an oral hearing under rule 19(1)(c) or rule 20(5). The decision to direct the Prisoner's release was made on the papers before any direction to an oral hearing and was therefore made under rule 19(1)(a). A direction under rule 19(1)(a) remains eligible for set aside (in the same way that a decision under rule 21(7) would have been). However, in my view, this is a misunderstanding of the relevant law by the MCA Member and, albeit significant, it is not material to the decision to direct the Prisoner's release. As such, it does not provide a basis on which I can set aside the release decision.

36. It is submitted on behalf of the Prisoner that there is no rule or legal precedent which requires that the recall allegations can only be explored via an oral hearing.

37. In *R(Pearce and another) v Parole Board for England and Wales* [2023] UKSC 13, the Supreme Court set out the approach panels of the Parole Board should take towards allegations as follows (at [74]):

> *If an allegation could, if true, affect the Board's risk assessment, the Board's task, so far as it can on the information which has been made available to it or which it is able to obtain, is to explore the nature of that allegation and its surrounding circumstances in order to make such findings of fact as it can about either or both on the balance of probabilities. By this means the Board gives due consideration in its assessment both to the public interest and to the prisoner's interests and acts with procedural fairness.*

38. In other words, if an allegation is potentially relevant to risk, a panel should make reasonable enquiry and make findings of fact to the civil standard of proof if it can do so.

39. Of course, not all reasonable enquiries will adduce sufficient additional information for a panel to make a finding of fact. However, the Supreme Court stated (at [78]):

> *It does not, however, follow from the Board's inability to make a finding as to the truth of an allegation in a particular case that the allegation is irrelevant and must be disregarded… the Board may use an allegation or allegations to test the credibility of the prisoner's account of his behaviour and, as a result of his responses, reach conclusions favourable or adverse to the prisoner without reaching a concluded view on the veracity of those allegations.*

40. Panels, therefore, have a responsibility to make reasonable enquiries into allegations that are potentially relevant to risk and, if unable to make a finding of fact on the balance of probabilities, may still give weight to those allegations as appropriate in its evaluation of all evidence before it. In these circumstances, a prisoner must have the opportunity to state their own position (procedural fairness) and any weight attributed must be reasonable (in the public law sense of rationality).

41. In this particular case, then, the first question is whether the allegation which led to the Prisoner's recall was potentially relevant to risk. I find that it was, for the following reasons:

    a) The index offence involved the violent murder of a man while the Prisoner was drunk.
    b) The Prisoner has previous convictions for violence, including an incident of assault occasioning actual bodily harm against a partner while under the influence.
    c) The Prisoner admitted to drinking daily in the community to deal with boredom and low mood.
    d) The allegations of intentional strangulation took place after the Prisoner had been to the pub with the alleged victim.
    e) Alcohol misuse is a well-documented risk factor.

42. The next question is whether the MCA Member discharged their responsibility to make reasonable enquiries into those allegations.

43. I find that they did not. There is little primary evidence within the dossier regarding the allegations, nor the reasons for which the associated charges were dismissed at court. It would have been a relatively straightforward matter to direct primary evidence (such as witness statements and police prosecution summary) as well as clarification as to why the charges were dismissed. It would have been reasonable for the MCA Member to have done so and then, on the basis of full evidence, decided how much weight (if any) to place upon those allegations, particularly given that the Prisoner has been recalled on a life sentence.

44. Therefore, I find that the MCA Member did not apply *Pearce* correctly and this amounts to an error of law.

45. Having found an error of law is not the end of the matter. In order to set the release direction aside, I must be satisfied that the decision to direct the Prisoner's release would not have been given but for that error.

46. Obviously, I cannot say whether the information that should have been directed would have resulted in the MCA Member deciding on the papers that the Prisoner was unsuitable for release. To say otherwise would be mere speculation on my part as to what that information might have been.

47. It is submitted on behalf of the Prisoner that any absent information would not be "*of sufficient gravitas"* to result in a different decision being made.

48. I therefore do not find that the failure to direct further information would have resulted in the MCA Member deciding that the prisoner was unsuitable for release.

49. However, when a case is considered on the papers under rule 19(1), there are three possible outcomes: release, no release or direction for oral hearing. I must also therefore consider whether any undirected information would have led to the MCA Member deciding that the case should be directed to an oral hearing.

50. Turning again to the Supreme Court in *Pearce* (at [75]), when further information is provided:

> *…the Board must as a matter of procedural fairness give the prisoner the opportunity to challenge the relevant evidence or information. If the allegation is a disputed issue of fact which is likely to be material to the outcome of the risk assessment or if issues of explanation or mitigation of accepted facts are likely to arise, the Board may, if it is reasonably practicable to do so, in compliance with its duty of procedural fairness, have to hold an oral hearing to receive oral evidence and allow cross-examination and oral submissions, before reaching a conclusion as to the truth of the allegation.*

51. Although there is no rule which says that allegations must only be explored at an oral hearing, I find that if the relevant information had been directed, the requirement for procedural fairness would have resulted in the MCA Member directing an oral hearing (and therefore not making the direction for release).

52. Finally, in order to set the decision aside I must consider whether doing so is in the interests of justice. I find that it is. The interests of justice would not be served in releasing a recalled life-sentenced prisoner for whom there are allegations involving further violence while under the influence of alcohol which have not been properly explored and examined.

53. I therefore conclude that all elements required for the decision to be set aside are made out.

54. In reaching this conclusion, I find myself with some considerable sympathy for the Prisoner. His release had been directed. Had his legal representative not sought to reduce the reconsideration window, it is likely (given that the PPCS did not ultimately challenge the decision to direct release) that his release would now be in train. Unfortunate though that may be, the set aside process was initiated, and having considered the unusual circumstances of this review very carefully, I have concluded that the release decision should be set aside. It does not, of course, follow that the next panel will reach a different decision to the MCA Member, but if it does, then it will have done so thoroughly. I have no doubt that the MCA Member who made the decision that I have now set aside did so carefully and with public protection principles at the forefront of their mind.

55. Finally, I appreciate that the application of the set aside rule in this instance is most likely outside the range of scenarios envisaged when the rule was drafted; nonetheless I have had to apply it 'as is'. It should not give rise to a more general 'whistleblowing' use, whereby one member can act as a check on the decisions of another. The general principle that Parole Board members are independent decision makers whose decisions are subject to various routes of challenge set out by law remains intact.

Decision

56. For the reasons I have given, the application is granted, and direct that the decision of the panel dated 1 August 2024 is set aside.

57. I must now consider two matters under rule 28A(8). First, whether the case should be decided by the previous panel or a new panel and second, whether it should be decided on the papers or at an oral hearing.

58. I direct this case to a new panel.

59. I have also considered whether an oral hearing is necessary considering the principles in *Osborn v Parole Board* [2013] UKSC 61. For the reasons set out above, I consider that it is.

Stefan Fafinski
01 October 2024