

[2023] PBSA 38

Application for Set Aside by Moxon

Application

1. This is an application by Moxon (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 19 May 2023), and the application for set aside (dated 5 June 2023).

Background

3. On 10 February 2021, the Applicant received a total determinate sentence of imprisonment for 29 months following conviction for wounding/inflicting grievous bodily harm. A five-year protection from harassment order was imposed. He also received a consecutive sentence of imprisonment for four months for burglary and theft (non-dwelling) and one month concurrent for theft (shoplifting). The latter two offences were committed while on bail. He pleaded guilty to all charges. His sentence expires in July 2023.
4. The Applicant was aged 33 at the time of sentencing. He is now 36 years old.
5. The Applicant was automatically released on licence on 5 October 2021. His licence was revoked on 10 June 2022, and he was returned to custody on 22 June 2022. 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. An oral hearing took place on 21 April 2023 before a single-member panel. Oral evidence was taken from the Applicant's Prison Offender Manager (**POM**), his co-working Community Offender Managers (**COM**) and the Applicant. The Applicant was legally represented throughout the hearing.
10. The hearing was adjourned as the COMs were unable to identify an approved release address. The Applicant's legal representative took instructions, and the hearing was adjourned to allow further options for suitable accommodation to be pursued. The decision notes that it was agreed that the review would be concluded on the papers when that information was to hand.
11. Adjournment directions were issued on the same day. These show that the case was to be reviewed on 19 May 2023 and concluded on the papers. A direction was set for an addendum report by the COM to be provided by 19 May 2023 (the **addendum report**). The directions also note that "[o]n receipt of that addendum report, [the Applicant's legal representative] is invited to submit written representations".
12. In its decision, dated 19 May 2023, the panel did not direct the Applicant's release. It notes that there remained no viable release accommodation and that the only option for the Applicant, if released, was to present himself as homeless to the Local Authority for emergency accommodation.

The Relevant Law

13. 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.
14. 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)).
15. 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

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

Discussion

17. It is argued that the panel made an error of law in making its decision after receiving the addendum report without considering the Applicant's legal representations.
18. In consequence, it is argued that this had the effect of denying the Applicant a fair hearing, denying him the opportunity to put his case to the panel, and preventing the panel from taking all relevant information into account when the final determination was made.
19. These are all aspects of procedural unfairness which are not grounds upon which a decision can be set aside. Unhelpfully, the application for set aside does not say specifically what law it claims has been applied erroneously, and it is not for me to find the legal basis upon which to consider the application.
20. I could therefore simply dismiss the application as being inadequately argued. However, in fairness to the Applicant, I am treating the application as a potential breach of his Article 6 rights under the European Convention on Human Rights as implemented into domestic law via section 1 of the Human Rights Act 1998. Section 6(1) of the 1998 Act provides that it is unlawful for a public authority (in this case the Parole Board) to act in a way which is incompatible with a Convention right.
21. I have further investigated the timeline of events involved in this review and discovered as follows:
- a) The addendum report was dated 15 May 2023. It was sent to the Public Protection Casework Section (acting on behalf of the Respondent) on 22 May 2023.
 - b) The decision was sent to the Parole Board Case Manager by the panel chair on 23 May 2023 and issued to all parties the same day.
 - c) There is no record of any legal representations having been received.
22. It follows that the date of 19 May 2023 on the decision must be incorrect. The decision refers to the addendum report which was not received until 22 May 2023.
23. It is argued that the panel failed to consider the Applicant's closing submissions. This is not quite true. There is a difference between disregarding or ignoring submissions that have been made and failing to provide an opportunity for any such submissions to be made.
24. In issuing its decision so promptly after receiving the addendum report, I find that the panel did deprive the Applicant of a reasonable timeframe in which to make legal submissions. Once it realised the deadline for submissions had passed without the addendum report having been received, it should have given the Applicant a reasonable time to respond after the addendum report had been disclosed.
25. I therefore find there to have been an error of law in this case.

26. In order for the decision to be set aside, the error has to be such that the decision not to release the Applicant would not have been made but for that error.

27. I find that, even if the Applicant had made closing submissions, the panel would have justifiably reached the same conclusion, for the following reasons:

- a) The addendum report states that there was no capacity for the Applicant to be accommodated and monitored within suitable designated accommodation;
- b) The Local Authority could not confirm specific accommodation without a fixed date, and, in any event, the proximity of the Applicant's sentence end date was such that it was unlikely that this would happen before release; and
- c) The COM's view was that, without suitable accommodation, it was likely that the Applicant would reintegrate with former anti-social peers and his risk of reoffending would increase.

28. In the face of this, it is difficult for me to envisage anything that the Applicant's legal representative could have said on his behalf that would have changed the panel's view. A lack of suitable accommodation has been identified as the most relevant criminogenic factor in the Applicant's case, and the only likely viable option available to the panel on the evidence before it was to release him homeless.

29. Therefore, notwithstanding the error of law, the application for set-aside is not made out.

Decision

30. The application for set-aside is refused.

Stefan Fafinski
26 June 2023