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[2024] PBSA 54

Application for Set Aside by Clarke

Application

1. This is an application by Clarke (the Applicant) to set aside a decision (the Decision) made by a three-member panel dated 10 June 2024 not to direct his release. The decision was made by the panel after an oral hearing conducted remotely on 3 June 2024.

2. On 1 July 2024 the Applicant made an application for Reconsideration of the Decision under Rule 28(1) of the Parole Board Rules 2019 (as amended by the Parole Board (Amendment) Rules 2022 (the Parole Board Rules). That application (the Reconsideration Application) was considered by Sir Stephen Silber and refused in a decision dated 25 July 2024 (reported at [2024] PBRA 138) (the Reconsideration Decision)) whereupon the Decision (of the panel) became final.

3. Accordingly, the Applicant then had a further 21 days within which to make an application to set aside the Decision under rule 28A of the Parole Board Rules.

4. I set out the relevant law more fully below, but it is sufficient at this stage to summarise that a final decision not to release may be set aside under rule 28A of the Parole Board Rules provided:

    a) it is in the interests of justice to do so (rule 28A(3)(a)) and
    b) under rule 28A(4) the decision not to direct release would not have been given or made but for an error of law or fact.

5. The present application was made on 8 August 2024 (the Application), it is an eligible case and was made in time.

6. I have considered the Application on the papers. These are the Decision, the Application containing the representations made on behalf of the Applicant (the Representations), the Dossier now consisting of 462 pages and representations on behalf of the Secretary of State (the Respondent). I have also seen the reported Reconsideration Decision to which I am much indebted.

Background

7. On 29 October 2001, the Applicant was sentenced to life imprisonment for having a firearm with intent to commit an indictable offence and on that occasion, he also received concurrent sentences of 3 months' imprisonment

for affray and 12 months' imprisonment for theft. In view of a previous conviction in 1992 for possession of a firearm and an attempted robbery his 2001 conviction resulted in the imposition of a two-strike automatic mandatory life sentence with a tariff expiry date of 29 April 2005.

8. The Applicant has been released from custody on 5 occasions by the Parole Board after hearings and his licence has been then subsequently revoked on each occasion as follows:

    a) he was released on 3 December 2009 and his licence was revoked on 20 October 2010;
    b) he was released on 8 May 2012 and his licence was revoked on 10 May 2013;
    c) he was released on 22 January 2014 and his licence was revoked on 11 February 2014;
    d) he was released on 22 July 2014 and his licence was revoked on 28 July 2020; and
    e) he was released on 8 July 2021 and his licence was revoked on 28 April 2023.

9. The Applicant was aged 30 at the time of sentencing. He is now 52 years old.

Application for Set Aside

10. The Application and Representations were drafted and submitted on behalf of the Applicant by his legal representatives.

11. Subject as follows, the Grounds upon which the Application is based are the same as those upon which the Applicant sought Reconsideration of the Decision under Rule 28 of the Parole Board Rules, namely as follows:

    a) it was irrational for the Panel to conclude that there was further core offender behaviour work for the Applicant to complete when he had already completed a significant amount of work (Ground 1) and
    b) there was procedural unfairness as the Applicant disagrees with some of the information contained within the Decision (Ground 2).

12. In the present application, in order to bring the matter within rule 28A, both these grounds were presented as errors of fact. In relation to Ground 1 it is not entirely clear what is the error of fact relied on but, from the context of the Representations, I have assumed it to mean in relation to Ground 1 an error of fact in that the panel ignored, or failed to give due weight to, the fact that the Applicant had already completed a considerable amount of work in custody and thus resulted in a further error in the "*irrational decision*" that work still needed to be done in custody. In relation to Ground 2, the specified errors of fact relied on were those identified in three specific areas mentioned below (although described as "*numerous*") resulting in "*procedural unfairness*". Such were the submissions in relation to the Reconsideration Application and repeated also in the present application.

Current parole review

13. The Applicant's case was referred to the Parole Board by the Respondent on 23 May 2023.

14. Oral evidence was given to the Panel by the Prison Offender Manager (POM), the Prison Psychologist, the Community Offender Manager (COM), and the Applicant, who was legally represented at the hearing. The panel did not direct the Applicant's release.

The Relevant Law

15. 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.

16. 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)).

17. 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.

18. As noted above, this case is concerned with rule 28A(4)(a) (decision not to direct release).

The reply on behalf of the Respondent

19. On 20 August 2024 I received representations on behalf of the Respondent opposing the Application which are reflected below.

Discussion

Ground 1

20. Although the Representations repeat the argument for Reconsideration in that the decision not to release was irrational in view of the completion by the Applicant of a significant amount of work in custody, as mentioned I have had to assume that for present purposes that the error of fact relied upon was the failure to pay sufficient weight to this resulting in an error in conclusion (namely that further work in custody was required).

21. The submissions of the Respondent and the conclusion of Sir Stephen Silber on the Reconsideration Application (see above), with which I respectfully agree, was that the Decision was not irrational for the following reasons (more fully, of course, set out in the reported decision referred to above):

    a) By the time of the Decision the panel properly and fairly recognised and accepted that the Applicant had already completed a vast amount of core offender behaviour work and programmes in custody.
    b) Nevertheless, the panel also concluded, after reviewing the evidence, that the Applicant's lack of insight into his risks (particularly as regards intimate partner violence) emphasised the necessity for completion of further work to address this, especially those risks involved within his relationships, which work could not be undertaken within the community.
    c) There was plenty of material before the panel both written and oral, in particular from the professionals involved (the POM, COM and prison psychologist), that the Applicant should remain in custody to complete further outstanding treatment requirements, all of which enabled the panel to conclude as it did.
    d) No evidence or submissions were found to show that the conclusions were irrational.

22. As previously stated, I agree with these conclusions and the reasoning more fully set out in the Reconsideration Decision and I accept the representations made on behalf of the Respondent to the same effect. I have also said it is nowhere clearly stated what is said to be the error of fact relied on unless it be the failure to give due weight to the work already done. The fact that the Applicant had already completed a number of programmes and work by the time of the panel hearing was not overlooked or ignored by the panel.

23. Moreover, it is crucially not suggested how the error of fact (if there was one) affected the interests of justice (for the purposes of rule 28A(3)(a) referred to above) save possibly in the suggestion it led to an irrational decision, but which point, I repeat, was dealt with by Sir Stephen Silber in the reported Reconsideration Decision.

24. There was also a suggestion that Article 5 of the European Convention on Human Rights and Fundamental Freedoms (right to personal liberty and security) was also engaged, preventing the Applicant from completing the further work in the community. Article 5 is, of course, qualified in that detention under lawful and proper authority can be justified. The substance of this submission (namely that the Applicant should not have to remain in custody) was dealt with in the Reconsideration Decision and summarised above. There is no injustice in the Decision on this Ground 1.

25. Likewise, I am by no means satisfied that the panel's decision would have been any different but for the alleged errors. I conclude, therefore, that this Ground does not support a case for setting the Decision aside.

Ground 2

26. As with the Reconsideration Application, the Applicant relied on three specific matters referred to in the Decision with which he disagreed.

27. The first of the three specified matters of which complaint was made related to one of the matters which had led to the Applicant's recall on 28 April 2023 because of his conduct in relation to a female. The Decision records that two days previously the Applicant had engaged in a verbal altercation with one of his former partners before he hit her "*to the face and then hit her head against the door multiple times causing her to lose consciousness".* The police became involved, and the Applicant contested the allegations of assault, explaining that "*he was found not guilty of hitting the door against the head of one of the women multiple times causing her to lose consciousness and that he was not arrested nor charged with any public order offence*". CCTV footage was also later discovered but the Applicant disputed that the CCTV footage showed him assaulting anyone. The panel noted that the Applicant disputed the CCTV evidence and noted he disputed being violent to the female in question (subsequent charges producing a not guilty verdict as no evidence was offered). The panel also noted, however, that he was convicted of affray and possession of cannabis.

28. The second of the three specified matters of which the Applicant complained related to the statement in the Decision that his father engaged in a gang culture. He explained in the Representations that he had since informed the prison psychologist of this. There is apparently a memo that the prison psychologist sent to the Applicant apologising for this and stating that she has amended her report to reflect this but "*the amendment [did] not impact on [the Applicant's] assessment of risk/formulation*". In any event, like Sir Stephen Silber concluded in the Reconsideration Application and as the Respondent submits, I cannot see how the fact that the Applicant's father was or was not involved in gang culture many years ago is of any relevance in determining in any way the risk posed by the Applicant in intimate relationships at the present time nor do I begin to see how, if there was an error recognised in this respect (and the panel noted that the Applicant disputed the allegation), it impacted the overall justice of the case or in any way affected the conclusions reached by the panel as set out in the Decision.

29. The third of the specific matters complained of was that the Decision recorded that the Applicant was given a mandatory life sentence for the index offence whereas it was an automatic two-strike life sentence (see above). Again, I do not see how the use of the term "*mandatory*" in this context (as opposed, say, to "*automatic*") can be said to be an error, still less how it affected the actual outcome of the panel hearing.

30. All three matters were rejected in the Reconsideration Decision as examples of procedural unfairness on the basis that even if the evidence in relation to these matters had to be excluded there was still much evidence to show and support a conclusion that the Applicant could not then be safely released. By the same token, if there was an error of fact in any of the three specified matters then it resulted in no injustice to the Applicant in the conclusion not to direct his release for the justification of which there was already ample material and evidence before the panel even if these three matters are ignored. The result would not have been any different.

Decision

31. For the above reasons, the application for set aside is refused.

HH Roger Kaye KC
29 August 2024