

[2024] PBSA 72

Application for Set Aside by Ghalib

Application

1. This is an application by Ghalib (**the Applicant**) to set aside a decision (**the Decision**) not to direct his release made by a single member panel following a hearing on 9 October 2024 and delivered on 10 October 2024.
2. I have considered the application on the papers. These are the dossier (some 253 pages plus a letter from the Applicant's wife dated 8 April 2023 at the date of panel hearing and now some 269 pages), the Decision, the application for set aside plus attached documents consisting of a further apparently signed letter from the Applicant's wife dated 30 October 2024 (the October 2024 letter), a redacted copy of a police occurrence logs 13-14, 19, and 23 August 2023 (the police log entries) and an unsigned statement dated 19 August 2023 on the face of it by the Applicant's wife (the August 2023 Statement).

Background

3. On 29 July 2016, the Applicant received a determinate sentence of 12 years following conviction for conspiracy to transfer prohibited weapons and ammunition to which he had pleaded not guilty. The sentence expiry date is in February 2028.
4. The Applicant was aged 36 at the time of sentencing. He is now 44 years old.
5. He was automatically released on licence on 26 January 2022. His licence was revoked on 11 August 2023, and he was returned to custody on 23 August 2023. This is his first recall on this sentence, and his first parole review since recall.
6. The basis of the recall decision was, in a nutshell, that the Applicant had breached a number of his licence conditions mainly in respect of allegations by his wife that he had assaulted her in a vehicle outside his place of work. The brief circumstances surrounding this alleged assault were as follows: at the beginning of August 2023 (while the Applicant was on release), the Applicant's wife discovered that her husband, the Applicant, had been having an affair. She drove to his place of work to confront him. They argued and, according to the contemporaneous statements she made to the Police on 7 August (supported later apparently by a signed statement), alleged he had assaulted her (which he denied). (There was also apparently an allegation of rape at her home, but apart from being recorded in the Decision, nothing turns on this and the matter was not pursued.) Within days of the alleged assault, as recorded in the dossier and confirmed by the police log entries, the Applicant's wife attended the Police on 14 August 2023 to provide a retraction



statement made at her interview and drafted for her by the police but which I have not seen. (It had been requested by the panel, but the request was addressed initially to another Police force who passed the buck onto another Police force).

7. She also provided an apparently signed retraction statement to her solicitors dated the 19 August 2023 which I have also not seen, that produced being only an unsigned statement bearing that date (the August 2023 Statement referred to above). The October 2024 letter also confirms the retraction and also complains that she should have been allowed to attend the panel hearing as a witness.
8. As to that, despite repeated opportunities to do so, no application or request seems to have been made to the panel for her attendance as a witness before or at the hearing (nor, when the retraction statement made to the police was not produced despite the requests, was any application made for an adjournment for the production of the document or for the wife's attendance).

Application for Set Aside

9. The application for set aside has been drafted and submitted by solicitors and counsel representing the Applicant who also represented him at the panel hearing.
10. The basis of the application is that there has been an error of fact and of law.
11. Specifically, the gist of the submissions are as follows:
 - a) As to the errors of fact: it is submitted that the panel made an error of fact in proceeding on the basis that there was no retraction statement, that it was only the Applicant that contended his wife had said she had fabricated the allegations of assault and that all the Applicant's wife had expressed was a desire for him to return home, not a formal retraction of the allegations.
 - b) As to the errors of law: it is submitted that "*despite the purported observance*" of the principles set out in in **Pearce v The Parole Board [2023] UKSC 13** and the consequential Parole Board Guidance on Allegations, the panel failed to evaluate the allegations (of assault) in accordance with those principles (and consequently failed to reach a conclusion favourable to the Applicant and failed to have regard to the consequences of such a decision on the Applicant).
 - c) But for these errors, it is submitted, the panel would have reached a different decision, namely, to release the Applicant.
 - d) It is in the interests of justice to set aside the Decision.

Current parole review

12. The Applicant's case was, following his recall, referred to the Parole Board by the Secretary of State (**the Respondent**) to consider whether or not to direct his release.

13. As previously noted, the case proceeded to an oral hearing on 9 October 2024 before a single member panel. The panel heard evidence from the Applicant, his Prison Offender Manager (**POM**) and his Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing.

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

The Relevant Law

15. 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.

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. The submissions on behalf of the Applicant rightly referred to the recent decision and guidance on dealing with allegations of fact made against a prisoner before the Parole Board. The High Court has been required to consider on a number of occasions the issue that lies at the heart of this application, namely, how the Parole Board should treat allegations of misconduct or criminal offending which have not been proved either in civil proceedings or in the criminal courts.

19. The law regarding how a panel should approach the use of allegations in its decisions is now settled and is as stated by the Supreme Court in the case of **Pearce** (below). Parole Board members are further assisted by Guidance prepared by the Board, the most recent version of which (version 2.0) is dated September 2023, published following the Judgment in **Pearce**.

20. The relevant conclusions reached by the Supreme Court in **Pearce**, given the nature of the challenge made to the Panel's approach may be summarised as follows:

- a) The function of the Parole Board is not to find a prisoner guilty or innocent of any criminal offence or other misconduct. Its function is to assess the risk

that would be created if the prisoner is released on licence or, as it was put in **Pearce**, to address whether the safety of members of the public requires that the prisoner should remain confined. In so doing, the panel must have regard to the consequences of its decision on the interests of the prisoner, and the hardship he may suffer if he no longer needs to be confined in order to protect the public.

- b) The Board is not bound by the rules of evidence which apply in a criminal trial. It is entitled to take hearsay into account (and does so routinely) together with other evidence or information regarding misconduct or criminal offences. It must also take into account information or evidence regarding the good conduct of a prisoner, whenever it took place. Therefore, in making what has been described as a “*global assessment of risk*” a panel’s assessment is bound to have regard to all the relevant information placed before it provided that the prisoner is given a proper opportunity to respond. Therefore, there is no limit placed on the Board as to the nature and character of the information it takes into account in assessing risk, provided that the Board in all respects act fairly.
- c) The weight to be given to the evidence or information received is and remains a matter entirely for the Board. If weight is to be given to an allegation of criminal or other misbehaviour the panel’s first task is to examine the facts and consider if it is able to make a finding on the truthfulness or otherwise of the allegation. If, as often happens, a panel is not able to make such a finding, it should then examine the facts and consider if it can make findings as to the surrounding circumstances of the allegation which may or may not point to behaviour by the prisoner that is relevant to the assessment of risk giving it as much weight as it considers appropriate following an assessment of all of the information before it.
- d) At all times a panel must proceed with considerable caution which includes giving the prisoner the opportunity of making submissions on how the panel should proceed.

The reply on behalf of the Respondent

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

Discussion

22. It is plain from the Decision that the panel had the principles in **Pearce** referred to above and the Parole Board Guidance on Allegations well in mind in reaching its decision. This is not in dispute.

23. It is argued that the panel did not investigate the facts to enable it to make findings on the truthfulness of the allegations, that it did not have the retraction statement (despite requesting it), that it appeared to accept the COM’s “*unevidenced*” suggestion that the Applicant’s wife had spoken of being pressured by family to withdraw her complaint and failed to investigate suggestions of coercion or control

and failed to have regard to the consequences of the decision not to release on the Applicant.

24. I do not accept these and similar submissions nor do I accept that there was any error of law or fact in reaching the Decision for the following principal reasons:

- a) First, as foreshadowed above, whilst I accept that the police statement made by the Applicant's wife to the effect that she retracted her allegations was not produced, despite the opportunity to make representations at the case management directions stage (and, no doubt, at the hearing), no application was made to produce the wife as a witness, none of the documents submitted with the application for set aside were produced at the hearing and no adjournment was requested for further evidence. The panel accordingly had to act on the evidence before it in accordance with the principles and guidance referred to previously.
- b) Second, the August 2023 statement is unsigned though I am prepared to accept the thrust of it (as well as the substance of the October 2024 letter) as coinciding with information already in the dossier at the time of the hearing (as to the submissions on behalf of the Applicant fairly concede), namely that the Applicant's wife had retracted her statement as to the allegations, had explained why she had fabricated them (her anger at her husband's affair), and no longer supported any prosecution of her husband based on these allegations. The dossier also drew attention (in the OASys for March 2024) to the issue of possible coercion and control of the wife to withdraw or retract her statement. Thus, the panel was well aware from the dossier, from these statements, from the nature of the Applicant's case, and from the lack of prosecution following the allegations of assault, that the wife no longer supported her original statement and no longer stood by her allegations of assault against the Applicant.
- c) Third, the Decision noted that the COM had spoken with the wife at the time of the Applicant's recall (although it was accepted that she had never met the wife in person) and that she had then confirmed what she had alleged and had also spoken of being pressured by family and friends to withdraw the complaint. I do not regard this as "*unevidenced*" but well within the material the panel was entitled to take into account and weigh in the balance in accordance with the principles and guidance above.
- d) Fourth, the panel was thus faced with a stark issue of unproven allegations on the one hand, withdrawn or retracted on the other. Indeed, the panel expressly stated that it "*was not persuaded it could or should discount the allegations*" (thus being thoroughly aware of the issue).
- e) Fifth, reading the Decision fairly, as one must, in my judgment the panel not only had these principles and guidance well in mind it applied them and on the face of it conducted a fair and balanced investigation of the material before it and had also well in mind its duty of fairness to the Applicant and the likely consequences of its decision to the Applicant if release was refused. True it is that this latter was not expressly spelt out, but it is clear the panel

considered overall its duty of fairness to the Applicant. To this end it had the assistance of legal representatives for the Applicant who I have no doubt presented the case on behalf of the Applicant fairly and forcefully. The panel, not unreasonably, placed greater weight on the fact that the allegations as initially made were contemporaneous. It also accepted the likelihood of a controlling influence from the Applicant towards the wife (supported by evidence from the COM as to the Applicant's calls from custody plus that no prosecution for the alleged assault had ensued due to the wife's lack of support).

- f) Sixth, it must also be born in mind that the panel is not making findings on the criminal burden of proof, but only on the civil, i.e. that it was more likely than not that the assault happened.
- g) Seventh, the panel expressly noted the critical risk was towards the wife and future partners. It attached weight to the allegations leading to recall. It noted the Applicant's history as well as his good conduct in custody, but despite the POM and COM supporting release (as duly noted in the Decision) it also accepted the assessment of the Applicant as presenting a high risk of serious harm to the public and very high risk of serious harm to known adults (in effect the wife). It thus implicitly and indeed expressly accepted the COM's assessment of there being a very high risk of serious harm towards the wife (who it was not persuaded would be afforded likely protection under the proposed risk management plan about which the panel was less than enthusiastic) and further found that there remained a high risk of offending in relationships.
- h) Eighth, the fact that the Decision does not, in terms, identify a formal retraction of the allegations by the Applicant's wife seems to me neither here nor there. The panel was, as I have said, well aware that the wife no longer supported or persisted in the allegations. There was thus, in my judgment, no fundamental error in this respect.
- i) Ninth, I am not, in any event, at all persuaded that but for the alleged errors of fact or law the panel would have come to any different decision. The panel was aware the wife had withdrawn or retracted her complaint. It may not have had the police retraction statement before them, but the substance was there and clear. Had it been before them I am not persuaded the decision would have been any different.

Decision

25. Accordingly in my judgment there was no error of fact or error of law in the Decision and no injustice in the result. There was more than sufficient material before the panel to justify its conclusion. The application for set aside is refused.

HH Roger Kaye KC
18 November 2024