[2022] PBSA 8

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Application for Set Aside by Drake

Application

1. This is an application by Drake (the Applicant) under rule 28A(1) of the Parole Board Rules 2019 (as amended) ("the Rules") to set aside a decision of the Parole Board dated 5 October 2022 declining to release him. The decision followed an oral hearing on 4 October 2022. The application is made on the ground that the decision would not have been made but for an error of law and that it is in the interests of justice to set it aside.

2. Rules 28A(4) and (5) of the Rules, so far as relevant to this application, provide that a decision maker appointed by the Parole Board may set aside an eligible decision (as set out in rule 28A(1), (2) and (4)) if the decision maker is satisfied that the decision would not have been made but for an error of law and that it is in the interests of justice to set aside the decision.

3. I have considered the application on the papers. These are: (1) the dossier, now running to some 338 pages including the decision letter; (2) the application to set the decision aside, dated 20 October 2022; and (3) some further information which I have sought from the Parole Board Secretariat and which is summarised in paragraphs 9 and 10 below. I have also listened to part of the audio recording of the oral hearing: see paragraph 8 below.

Background

4. On 25 March 2021 the Applicant, then aged 19, was sentenced to 3½ years detention in a young offenders' institution for 3 offences of robbery. On 2 November 2021 he was released automatically at the half way point of his sentence with licence conditions including residence at an approved premises. On 11 November 2021 he was recalled to prison. His sentence is due to expire in July 2023.

5. The index offences of robbery involved threats to spray members of the public with acid in order to steal from them. The Applicant has a lengthy history of previous offending including earlier convictions for robberies and attempted robberies as well as violence and harassment. He was recalled following alleged threats to others at the approved premises.

The Grounds of the Application

6. The application is made on the following grounds which I can summarise from the representations made by the Applicant's representative. (1) During the hearing the

panel chair requested further information to be provided after the hearing, viz confirmation of most recent drug testing and the results, and a full list of work undertaken by the Applicant. (2) At the end of the hearing, the panel chair requested the Applicant's legal representative to make closing submissions in writing following receipt of this information, and the legal representative agreed to do so. (3) However, following the hearing the panel chair proceeded to take the decision without receiving written closing submissions from the Applicant's legal representative – indeed before the information had been added to the dossier or forwarded to the Applicant's representative, and perhaps without receiving the information. (4) It was an error of law to take the decision without closing submissions from the Applicant's legal representative; if that error of law had not been made the decision would not have been taken. It would similarly be an error of law if the decision was taken without receiving the information.

Current parole review

7. The current referral was directed to an oral hearing by a single member. The hearing took place on 4 October 2022. Evidence was given by the Prison Offender Manager ("the POM"), the Community Offender Manager ("the COM") and the Applicant himself.

8. I have listened to the recording of the last few minutes of the hearing. At the conclusion of the hearing the panel chair requested the legal representative for the Applicant to make her closing submissions in writing (recording, 2:29:40). The principal reason given was that the panel chair had a following hearing for which she wished to ensure she was ready; but the panel chair also noted that further information was awaited from the POM. The legal representative agreed to provide written closing submissions. There was no discussion as to the time within which the written closing submissions were to be provided.

9. Following the hearing at 17.22 on 4 October 2022 the POM sent an email containing the further information. The case manager forwarded the email to the panel chair at 07.53 on 5 October and also asked PPCS to add the email to the dossier. The panel chair acknowledged receipt of the email at 09.00. It is clear that she read it, for she refers to it specifically in her decision. The further information was not uploaded to PPUD until 6 October. It was not forwarded to the Applicant's representative by email. I am therefore satisfied that the Applicant's representative did not have access to it on 5 October.

10. The panel's decision was issued at 13.29 on 5 October 2022, having been sent by the panel chair to a case manager at about 90 minutes earlier. The decision does not record the agreement that written closing submissions would be provided after the hearing; nor does it record that any written closing submissions had been received. No representations were received from the Applicant's representative before the panel's decision was issued.

11. The panel, while acknowledging recent improvement in the conduct of the Applicant, considered that he posed a high risk of serious harm to the public and that the current risk management plan was not adequate to manage that risk.

The relevant law

12. The decision not to release the Applicant was taken under rule 25(1)(b) of the Rules. Such a decision is a final decision and is eligible for the set aside procedure: see rule 28A(1) and (4) of the Rules. I have been appointed as decision maker for the purposes of this application. I may decide the application for myself or I may delegate the role of decision maker to the chair of the panel which made the decision: see rule 28A(12).

13. An application under rule 28A(1) must be brought within 21 days of the decision: see rule 28A(6)(b). That requirement has been satisfied in this case.

14. Rule 28A(4) provides that the decision maker may set aside such a decision if satisfied that (1) one of the conditions in rule 28A(5) is applicable and (2) it is in the interests of justice to do so.

15. The condition on which the Applicant relies is set out in rule 28A(5)(a) which so far as relevant provides:

> *"(a)the decision maker is satisfied that a direction given by the Board for, or a decision made by it not to direct, the release of a prisoner would not have been given or made but for an error of law …."*

16. The Parole Board Rules do not contain any definition of the phrase "error of law". In this case the type of error alleged is procedural unfairness. I am satisfied that it is an error of law for the Parole Board to take a decision in a manner which is procedurally unfair. It is commonplace in the UK legal system for an appeal to be limited to a question of law: see, for example, section 11(1) of the Tribunals Courts and Enforcement Act 2007 (the Upper Tribunal) and section 11(1) of the Employment Tribunals Act 1996 (the Employment Appeal Tribunal). There is no doubt that an appeal will lie to either of these bodies on the ground that the hearing below was procedurally unfair. I am satisfied that the concept of "error of law" should be applied in the same way in rule 28A(4).

17. I have mentioned this point specifically because rule 28 of the Parole Board Rules, which deals with the right to apply for a reconsideration (not applicable to a determinate sentence of the kind which the Applicant is serving in this case) as amended in 2022 sets out three separate grounds for reconsideration: error of law, procedural unfairness and irrationality. In my view procedural unfairness and irrationality are types of error of law; they were, until 2022, the only grounds for reconsideration; and the reference separately to error of law in rule 28 is explained by its addition as a ground in 2022.

18. The concept of procedural fairness is rooted in the common law. A decision will be procedurally unfair if there is some significant procedural impropriety or unfairness resulting in a manifestly unfair or flawed process. The categories of procedural unfairness are not closed; they include cases where laid-down procedures were not followed, or a party was not sufficiently informed of the case they had to meet, or a party was not allowed to put their case properly, or where the hearing was unfair or the panel lacked impartiality. The concept applies only if a procedural error results in unfairness. If an error did not result in unfairness (for example, if it was corrected or not of any real importance) then the concept does not apply.

The reply on behalf of the Respondent

19. The Respondent has indicated that no representations are to be made in respect of this application.

Discussion

20. The first question is whether there was an error of law on the part of the panel. As explained above, if the decision was taken in breach of the requirements of procedural fairness, it will be infected by an error of law. I have set out above my findings as to what occurred at the end of and after the hearing. I am satisfied that the Applicant's legal representative, having been asked to provide written closing submissions, was not given a fair opportunity to do so. No deadline had been agreed for the provision of closing submissions; further information was being awaited; and the decision was issued less than 24 hours after the hearing. Rule 24(9) of the Rules requires a fair opportunity to be afforded to make closing submissions; and it is reinforced by the Board's Guidance on Oral Hearings (2021) at paragraphs 5.62 to 5.66.

21. The next question is whether the decision not to release the Applicant would have been made but for that error of law. It is clear that it would not have been. The panel chair would have had to afford a fair opportunity to the legal representative to make submissions before she could contemplate reaching a decision. Only then would she have been able to reach a decision.

22. The next question is whether it is in the interests of justice to set the decision aside. I am satisfied that it is. Justice requires that the Applicant should have a fair hearing of his case, including a fair opportunity to make closing submissions.

23. Given my findings it is plainly desirable that I should decide the application for myself rather than remit it to the panel chair.

Decision

24. For the reasons I have given I am satisfied that the application should be granted.

25. I am required by rule 28A to decide whether this case should be remitted back to the original panel or whether it should be considered afresh by another panel. I am satisfied that the case should be considered afresh by another panel. I think it likely the failure to wait for submissions was no more than an oversight by a conscientious and busy panel chair sitting alone without a colleague to remind her; but fairness requires that the case be heard afresh by a panel which has not announced a decision in clear terms adverse to the Applicant.

26. The following further directions are now made:

(a) The re-hearing should be expedited (but allow time for the report directed in (e) below).
(b) The original decision must be removed from the dossier and must not be seen by the new panel.

(c) The new panel should be told that this is a re-hearing but not made aware of the reasons why it was ordered.

(d) The new panel should also be advised that the fact that this is a re-hearing should not in any way affect their decision. It is a complete re-hearing.

(e) There should be an addendum report by the COM 6 weeks prior to the hearing setting out details of the Applicant's custodial conduct and progress, providing a summary of any recent interaction between the POM and COM and the Applicant, and providing an updated risk assessment and risk management plan.

David Richardson
17 November 2022