

[2023] PBSA 43

## Consideration of Set Aside in the case of O'Neill

### 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 15 June 2023. It falls to me to decide whether to set aside the decision made by an oral hearing panel (the **Panel**) dated 28 April 2023 not to direct the release of O'Neill (the **Prisoner**). This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision, the decision in the application for reconsideration ([2023] PBRA 109), three handwritten sets of submissions from the Prisoner, and the legal representations made in connection with the unsuccessful application for reconsideration.

### Background

3. On 28 March 2006, the Prisoner received a sentence of life imprisonment following conviction for murder. His tariff was set at 15 years, less time spent on remand, and expired in July 2020.
4. The Prisoner was aged 21 at the time of sentencing. He is now 38 years old.

### Current Parole Review

5. The Prisoner's case was referred to the Parole Board by the Secretary of State in February 2022 to consider whether to direct his release.
6. An oral hearing took place on 18 April 2023 before a panel consisting of two independent members.
7. Oral evidence was taken from the Prisoner, his Prison Offender Manager (**POM**), an addictions therapist (instructed by the Prisoner's legal representative), a psychologist (also instructed by the Prisoner's legal representative), and his Community Offender Manager (**COM**). The Prisoner was legally represented throughout proceedings.
8. The panel did not direct the Prisoner's release.



9. As the Prisoner is serving a life sentence, the decision not to direct his release was provisional for 21 days to allow an application for reconsideration to be made under rule 28 of the Parole Board Rules. The grounds for reconsideration are that the decision not to direct release was irrational, procedurally unfair and/or contained an error of law.
10. On 18 May 2023, the Parole Board received an application for reconsideration directly from the Prisoner, which contained his handwritten representations (the **first representations**).
11. On 19 May 2023, the Parole Board received an email from the Prisoner's legal representative, which included formal legal submissions (dated 19 May 2023), together with two further handwritten letters from the Prisoner. The email also alerted the Parole Board that the Prisoner had said there was also a "third letter" and asked, "when that arrives, please also consider that" (the **second representations**).
12. The decision in the application for reconsideration notes that the application was undated and consisted of personal handwritten submissions from the Prisoner arguing that the decision was irrational and procedurally unfair. The application for reconsideration was refused.
13. The decision then became final.
14. In initiating the set-aside process, a report given to the Chair of the Parole Board notes that, due to an administrative error, the reconsideration assessment panel (**RAP**) constituted under rule 28 was only given the first representations. The second representations were not seen by the RAP. The second representations were seen by the Secretary of State when invited to provide any further representations regarding the reconsideration application (even though the Secretary of State declined the opportunity to do so).
15. It appears that the second representations were then referred to the RAP. The RAP indicated that the decision to refuse reconsideration may have changed if it had seen all representations from the outset.
16. Nonetheless, the decision to refuse reconsideration was, by this stage, final. The decision maker (in this case, the RAP) was *functus officio*. As such, the error could not be corrected using rule 29 (error of procedure) or rule 30 (slip rule).
17. The set-aside process was initiated and further representations were sought on behalf of the Prisoner and the Secretary of State.

## The Relevant Law

18. 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.

19. 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)).

20. 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**

21. Legal representations on behalf of the Prisoner seek release on the basis of error of law and error of fact. Further reference will be made to these in the **Discussion** section below.

22. The Secretary of State offered no submissions.

### **Discussion**

23. The error of law pleaded is the failure of the Parole Board to put all written representations before the RAP. However, while the decision not to grant reconsideration may have been affected by this, the decision not to direct release could not have been. The two decisions are separate and distinct, and it is only the decision not to direct release that falls under the set aside mechanism. There can therefore be no error of law there insofar as the decision of the oral hearing panel is concerned.

24. The application for set aside raises two matters which it claims are errors of fact.

25. The first relates to a section in the decision which reads "*In 2017, [the Prisoner] was adjudicated for slashing another prisoner and possession of a weapon*". It is argued that the Prisoner did not have possession of a weapon and did not attack another inmate.

26. A psychological risk assessment report (dated 25 August 2020) in the dossier notes the following:

*"On 13/11/2017 [the Prisoner] was placed on report for the 'slashing of another prisoner with a weapon', following also having a proven adjudication for possession of an improvised weapon (19/10/2017)."*

27. The list of adjudications within the dossier shows an adjudication on 19 October 2017 for possession of an unauthorised article.
28. The psychological risk assessment report goes on to note that that the Prisoner was not charged in relation to the matter.
29. The description of events in the decision is imprecise. Evidence suggests that it would have been more accurately worded as *"In 2017, [the Prisoner] was placed on report for slashing another prisoner, after having previously been adjudicated for possession of a weapon"*.
30. This appears to be an error of fact. However, I do not find that the panel's decision would have been different but for that error. Indeed, in its conclusion, the panel acknowledges that there had been no violence in custody for several years, and does not rely upon custodial violence to substantiate its decision.
31. The second matter raised relates to an incident while the Prisoner was in the community on release on temporary licence (ROTL). It notes that the Prisoner was the victim of a random assault. The panel accepted that the Prisoner had been the victim of a serious assault. It cannot be said to have erred on this point.
32. The application goes on to argue with the panel's conclusion that this was *"potentially offence paralleling"*. This cannot be reasonably argued as an error of fact. The panel's conclusion based on the evidence before it is not a matter of fact: it is a matter of interpretation and weighing of the evidence.

## Decision

33. I entirely accept that an unfortunate, but doubtless accidental, administrative oversight meant that the decision to refuse reconsideration could well have been procedurally unfair. However, my powers insofar as set aside is concerned relate only to the decision not to direct release: I cannot undo the decision not to grant reconsideration. Reconsideration and set aside are founded on very different grounds and, while I understand the efforts to which the Prisoner's legal representative has gone to cast their original representations based on procedural unfairness and irrationality in terms of the very different legal grounds error of fact and error of law, the revised submissions, do not, in my judgment as set out above, meet the requirements of the set aside rule.
34. The application for set aside is refused.

**Stefan Fafinski**  
**11 July 2023**