

[2023] PBSA 48

Application for Set Aside by Hulme

Application

1. This is an application by Hulme (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel on the papers. This is an eligible decision.
2. I have considered the application on the papers. These are the dossier, the oral hearing decision (dated 21 March 2023), and the application for set aside (dated 11 July 2023). I have also seen an application for reconsideration (dated 14 June 2023).

Background

3. On 14 December 2009, the Applicant received a sentence of imprisonment for public protection (**IPP**) following conviction on five counts of sexual assault and one count of threats to kill. His minimum tariff was set at three years (less time spent on remand). He also received concurrent determinate sentences of two years for wounding/inflicting grievous bodily harm and one year for exposure. He pleaded guilty to all charges. His tariff expired in July 2012.
4. The Applicant was aged 29 at the time of sentencing. He is now 43 years old.
5. He has been recalled twice on this sentence. He was first released in October 2018 and recalled in January 2019 after polygraph testing revealed he had breached his licence condition not to enter parks. The test also indicated a level of sexual preoccupation and risk taking behaviour.
6. He was re-released in September 2020 following an oral hearing before the Parole Board but recalled in October 2022 having been arrested on suspicion of committing further exposure offences.
7. This is his second recall on this sentence and his first parole review since recall.

Application for Set Aside

8. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.
9. It submits that there has been an error of fact.



Current Parole Review

10. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) in November 2022 to consider whether to direct his release or, if release was not directed, to advise the Secretary of State whether he should be transferred to open conditions.
11. On 21 March 2023, a Member Case Assessment (MCA) panel consisting of a single member considered the Applicant's case. It made a provisional decision of no direction for release (and no recommendation for open conditions).
12. Legal representations (dated 24 April 2023) were made with submissions seeking an oral hearing.
13. The application for an oral hearing was considered by a Duty Member on 1 June 2023. The application was dismissed. In doing so, the Duty Member noted that the matters from the time of recall were ongoing, and the outcome would be material to the risk assessment. The Duty Member concluded that listing an oral hearing before the outcome of the police investigation was known would be premature and refused the request for an oral hearing accordingly. This decision was issued to all parties on 2 June 2023.
14. The Duty Member decision also states:

"The paper decision is therefore final, and your current review is now concluded in accordance with the Parole Board Rules – not applicable for reconsideration eligible cases."
15. Further legal representations (dated 14 June 2023) were submitted. These begin by stating that the Applicant wished to seek reconsideration of a decision *"dated 2 June 2023...by a panel of the Parole Board. This followed [the Applicant's] MCA application for an appeal for not directing an oral hearing. The Parole Board had confirmed that the reconsideration period expires...on 23 June 2023."*
16. This application was dismissed as being ineligible for reconsideration.
17. The set aside application of 11 July 2023 was then submitted.

The Relevant Law

The scope of the set aside rule

18. 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.
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.

Errors of procedure

21. Rule 29 (a) provides clarification of the process following an error of procedure (by either party or the Parole Board itself). Any such error does not invalidate any step taken in the proceedings unless a panel chair or duty member, directs otherwise, either on the application of a party or in the course of conducting the proceedings. Rule 29(b) provides that the panel chair or duty member may make a direction or take any other step considered appropriate.

The reply on behalf of the Respondent

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

Discussion

23. Before considering the substantive application for set aside, I must first consider the timeline of events after the provisional MCA decision was made.

24. A negative decision made on the papers is provisional. Under rule 20(1) of the Parole Board Rules 2019 (as amended), a prisoner may apply in writing for a panel at an oral hearing to determine the case. Any such application must be served within 28 days (rule 20(2)).

25. The decision was issued on 23 March 2023. Therefore the 28-day window for an application for an oral hearing to be made closed on 20 April 2023.

26. On the face of it, the initial application for an oral hearing was late and should have been dismissed at that point as being out of time.

27. However, for reasons that are unknown to me, the application for an oral hearing was, in fact, considered on 1 June 2023. The Duty Member decided that the case should not be determined at an oral hearing (the rule 20(5) decision).

28. In fairness to the Applicant, I do not find that either the error made on behalf of the Applicant in making late representations, or the error made by the Parole Board in accepting those representations and making a decision based upon them, has invalidated any aspect of the procedure (and therefore do not direct otherwise under rule 29). The net result of the errors essentially extended the window for the application for an oral hearing to be made.
29. On 1 June 2023, the Duty Member dismissed the application for an oral hearing. At this point, the decision not to direct release (the rule 19(1)(b) decision) remained provisional (under rule 28(2)(a)) since the Applicant is serving an IPP sentence to permit an application for reconsideration to be made within 21 days. The decision to refuse an oral hearing was issued on 2 June 2023 and therefore the deadline for any such reconsideration application was 23 June 2023.
30. The statement in the Duty Member decision that the initial MCA decision was final was incorrect, but fortunately this did not dissuade the Applicant's legal representative from seeking reconsideration.
31. A reconsideration application was made in time on 14 June 2023. This application made it clear that it sought reconsideration of the decision issued on 2 June 2023 (the rule 20(5) decision) which followed the Applicant's unsuccessful application for an oral hearing.
32. Decisions made under rule 20(5) are not eligible for reconsideration and the application was correctly refused on that basis.
33. The MCA decision of 21 March 2023 therefore became final on 23 June 2023.
34. As a final decision made under rule 19(1)(b), the MCA decision is eligible for set aside under rule 28A.
35. The application submits that there has been an error of fact. The matters on which the Applicant was recalled resulted in no further action being taken by police. It appears the Applicant's legal representative advised the Parole Board of this on 25 May 2023.
36. While it is true that the decision made by the Duty Member (the rule 20(5) decision) appears to have been taken in ignorance of this fact, the only decision which could possibly be set aside is the original MCA decision of 21 March 2023. It cannot be said that this decision was based upon an error of fact, as it appears the police decision to take no further action was taken after the MCA decision was made.

Decision

37. The application for set-aside is refused.

Stefan Fafinski
27 July 2023