

[2023] PBSA 52

Application for Set Aside in the case of Russell

Application

1. This is an application by Russell (the Applicant) to set aside a decision not to direct his release following the revocation of his licence on 3 March 2023 and recall to custody. The decision dated 25 May 2023 was made by a single member panel of the Parole Board (the Panel) on the papers. It is a decision which is eligible for the setting aside procedure.
2. I have considered the application on the papers.

Background

3. On 16 September 2021, the Applicant was sentenced to a determinate period of two years imprisonment following his conviction by a jury of inflicting grievous bodily harm under Section 20 of the Offences Against the Person Act 1861. The jury found him not guilty of the more serious offence of inflicting grievous bodily harm with intent to cause such harm under Section 18 of that Act. No separate penalty was imposed for the offence of possessing Class B drugs to which he had pleaded guilty.
4. The Applicant was 58 years old when the index offences were committed and he had no previous convictions for violence. However, he was sentenced on 19 November 2018 to a community order for failing to provide a specimen for analysis after driving or attempting to driver a motor vehicle. No separate penalty was imposed on that occasion for using the vehicle whilst uninsured to which he had also pleaded guilty.
5. The index offences were committed in January 2020 during a confrontation between the Applicant and a man known to him who he struck several times over the head with a hammer causing severe injuries. On the Applicant's account, he had gone round to the victim's address in order to speak to him at the request of the victim's mother following threats the victim had made to her. The Applicant maintains that he reacted by way of self-defence to aggression by the victim and that the jury's verdict is consistent with this on the basis that the self-defence was unreasonable in its extent.
6. The Applicant is now 61. The current Parole Board review is his first following recall.

Application to Set Aside

7. The application dated 7 July 2023, has been submitted by the Applicant himself. It was accompanied by the evidential statement dated 28 January 2020 which he



provided to the police and his counsel, the statement to the Parole Board dated 9 June 2023, a letter from his trial solicitors dated 26 April 2023, his essay entitled "The Visit" published in November 2003 and emails to COMs between April and May 2023 with release addresses.

8. The Applicant submits that the Panel's decision has been based on factually incorrect information. The grounds for his application are considered in the **Discussion** section below.

Current Parole Review

9. The Applicant was released automatically on licence at the half-way point of his current sentence, namely 15 September 2022. His licence was revoked on 3 March 2023 for breaching two of its conditions. These were: 5(i), to be of good behaviour and not to behave in any way which undermines the purpose of the licence period; and 5 (ii), not to commit any offence. The Applicant was accordingly returned to prison on 6 March 2023.
10. Under the terms of his licence, the Applicant initially resided at Probation Approved Premises. With the approval of his Community Offender Manager (COM) which was required by the terms of his licence, he moved on to a private address in [location A]. The Applicant then asked for permission to move to [location B].
11. The Applicant is reported to have regularly attended his supervision appointments. According to his COM, he continued to minimise his behaviour and to demonstrate a lack of victim awareness, with the sessions being largely devoted to his request to move to [location B].
12. On 8 January 2023, the Applicant was arrested by police on suspicion of driving under the influence of a controlled drug. The manner of his driving had caused the police to stop the vehicle. He was found to be in possession of cannabis. He had no driving licence.
13. The Applicant was driving in [location B] when stopped and he provided the police with an address in that area as his current address. He failed to disclose his arrest to the probation service and, when they were notified by the police on 2 March 2023, it was decided that his licence should be revoked.
14. Following recall, the Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether or not to direct his release.
15. The Applicant has explained to his COM that he did not stay overnight at the address he provided to the police and that when stopped he was on a return journey to the [location A] address. In a post recall meeting with his COM, the Applicant apologised. He explained that he had been taking his property to the [location B] address in anticipation of being given permission to live there. He denied his driving had been erratic and he could not recall the arrest. He accepted that he had smoked cannabis.

16. When asked about his whereabouts between the date of the licence revocation and handing himself in he said he had been at the [location A] address. Although he denied to his COM having been in part of his exclusion zone, he later told his Prison Offender Manager that he had in fact been there.
17. At the time of the COM's Part B Report dated 24 March 2023, the Applicant was still under investigation for driving under the influence of drugs and the police were awaiting the result of laboratory blood tests.
18. The Panel noted that the Applicant did not appear to challenge the recall and it concluded that the recall was justified.
19. Since returning to custody, there have been no issues about the Applicant's conduct and compliance.
20. The OASys Report assessed the Applicant as presenting generally a low risk of re-conviction, and specifically a low risk of both violent and non-violent re-offending. In the decision document the Panel concluded that these assessments were an underestimate. The Panel accepted the COM's assessment that the risk of serious harm to the public, in particular to men he feels aggrieved by or elderly people or patients, was high. It accepted the view that both the index and recall "offences" indicated erratic behaviour with little consequential thinking. The Panel described the index offence as a serious attack. The Applicant's account of his actions were of concern and the Panel concluded that the circumstances of the recall suggested that the Applicant does what suits his needs, regardless of the rule of law.
21. The COM was not convinced that the Applicant would comply with a further period of time on licence in the community and had not been open and honest with probation. The Panel concluded that the index offence had been serious and showed a capacity for and a justification of violence. It was not convinced that the Applicant had the internal controls to comply with a further period on licence or that the risk management plan was robust enough to manage his risk in the community.

The Relevant Law

22. Rule 28A(1) 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.
23. The types of decision eligible for setting aside are listed in rule 28A(1). Decisions concerning whether the prisoner is or is not suitable for release on licence are eligible for setting aside whether made by a paper panel (rule 19(1)(a) or (b)) or by an oral hearing panel after a hearing under rule 25(1) or by an oral hearing panel making a decision on the papers under rule 21(7).
24. Under Rule 28A (4), a final decision may be set aside (a) if it is in the interests of justice to do so **and** (b) one or more of the conditions set out in sub paragraph (5) are satisfied. Those conditions are (a) the decision maker is satisfied that a direction to direct or not direct release would not have been made but for an error of law or

fact or (b) the decision maker is satisfied that a direction for release would not have been given if:

- (i) Information that was not available to the Board when the direction was given had been so available, or
- (ii) A change in circumstances relating to the prisoner that occurred after the direction was given, had occurred before it was given.

25. Rule 28A (9) provides that, where the decision maker directs that a final decision should be set aside, they must also direct that the case should be –

- (a) decided again on the papers by the previous panel or a new panel appointed under rule 5(1), or
- (b) decided again at an oral hearing by the by the previous panel or a new panel appointed under rule 6(2).

Board Guidelines

26. The current Parole Board Guidelines include the following:

"6.2 If an application to set aside a decision has been granted, the decision-maker can direct:

- a) a further oral hearing or that a decision is to be made on the papers; and*
- b) a decision is to be made by a new panel or the original panel.*

6.3 Where an application to set aside a decision to release has been granted by the decision-maker on the ground that there is new information or a change in circumstances, the setting aside panel can refer the matter back to the original panel. The setting aside panel can direct that the original panel consider the new information and make a new decision in relation to that information".

The Reply by the Respondent

27. By letter emailed to the Parole Board on 20 July 2023 by the Public Protection Casework Section (PPCS) of HM Prison and Probation Service it was confirmed on behalf of the Respondent that he has no comments to make.

Discussion

28. It has not been argued on the Applicant's behalf that there was an error of law on the part of the Panel, nor that information is now available that was not available to the Board when it made its decision, nor that there has been a relevant change in circumstances since the decision.

29. It is submitted that there has been an error of fact on the part of the Panel, namely that its decision is based on the alleged Section 18 offence and untested statements in support. The Section 18 allegation was that the Applicant went to the home of his victim armed with a weapon with the intention of causing really serious harm. It was alleged that the Applicant had gone there without the knowledge of the victim's

mother, that he was angry with the victim who opposed the Applicant's alleged financial exploitation of her and that he had been the aggressor.

30. I accept that the description of the index offence in paragraph 1.1 of the decision, namely "*According to [the victim's] statement, out of nowhere, Mr Russell struck him on the left hand side of the head with a weapon and he fell down*" is not consistent with the jury's verdict. The further statement at paragraph 1.4 that "*it is not clear what the motivation for the attack was*" is similarly inconsistent.

31. However, the jury found the applicant guilty of a serious violent offence for which a 2 year custodial sentence was imposed.

32. The Applicant further submits that the COM's interpretation of his essay entitled "The Visit" as illustrating other circumstances parallel to the index offence and the COM's assessment of his risk to elderly people are wrong. However, the Panel made no express findings of fact in respect of either matter and therefore no error of fact in respect of them falls to be determined by me.

33. The Applicant breached his licence conditions, was arrested for a serious driving offence involving drugs, and lied about his whereabouts. The risk assessment made by the Panel is consistent with the index offence having been a serious Section 20 offence, notwithstanding that the Panel proceeded on the basis of the Section 18 offence. In these circumstances, the factual error does not undermine the Panel's decision.

Decision

34. In these circumstances, I am not satisfied under Rule 28A(4)(b) that the direction not to direct the Applicant's release would not have been made but for an error of fact. The application to set aside the decision of the Panel dated 25 May 2023 is therefore refused.

HH Judge Graham White
17 August 2023