the Parole Board

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[2023] PBSA 20

Application for Set Aside by Jones

Application

1. This is an application by Jones (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel on the papers.

2. I have considered the application on the papers. These are the dossier, the paper decision (16 January 2023), and the application for set aside (24 February 2023). This is an eligible application.

Background

3. On 13 December 2021, the Applicant was convicted of stalking involving fear or violence, having a counterfeit currency note with intent to tender it as genuine and tendering a counterfeit currency note. He received a sentence of imprisonment for 10 months in respect of the stalking offence with a further 10 months consecutive for the counterfeit currency offences. He was also made subject to a five year restraining order. He pleaded guilty to all charges.

4. The Applicant was aged 37 at the time of sentencing. He is now 38 years old.

5. The Applicant was automatically released on licence on 1 February 2022. His licence was revoked on 7 June 2022, and he was returned to custody. He received a fixed-term recall and was re-released on 20 June 2022. He was recalled for a second time on 12 August 2022. This is his first parole review since his second recall.

Application for Set Aside

6. The application for set aside has been drafted and submitted by solicitors acting for the Applicant.

7. It submits that there has been an error of law.

Current Parole Review

8. The Applicant's case was referred to the Parole Board by the Secretary of State (the Respondent) to consider whether to direct his release.

9. His case was reviewed by a Member Case Assessment panel (**MCA panel**), consisting of a single member on 25 November 2022. The MCA panel noted legal representations within the dossier dated 21 October 2022 which stated that the firm

had only just been instructed and asked for a decision to be delayed until after submissions had been made on the Applicant's behalf.

10. The MCA panel adjourned the review until 6 January 2023. In doing so, it directed an updated report from the Applicant's Community Offender Manager (**COM**) and invited legal representations in writing.

11. Written representations were received, dated 30 December 2022. These acknowledged that the Applicant's representatives had not seen the updated COM report but did not wish to introduce any further delay. The representations invited the MCA panel to direct release on the papers. In doing so, it set out its account of the relevant legal test that the MCA panel should apply: in short, the so-called *"life and limb"* test.

12. On 6 January 2023, the MCA panel adjourned the review for a further update from the Applicant's COM.

13. In doing so, the MCA panel stated the following (in response to the legal representations of 30 December 2022):

> *"The Legal Representative has made reference to the 'life and limb' element of the Parole Board's release test in the most recent Representations. It should, however, be respectfully pointed out that nature of risk to be considered with the test for release has changed (2018) as: "Serious harm covers psychological as well as physical harm, so 'serious harm' should not be limited to life and limb." It is therefore the case that it is not strictly physical 'life and limb' harm the member is considering."*

14. The MCA panel also stated:

> *"Both the Legal Rep and the COM will understand that the panel has to now evaluate risk indefinitely in light of Johnson [EWHC 1282 (Admin)] handed down on 27th May 2022) ..."*

15. Further representations were received, dated 13 January 2023 which argued that the test for release had not changed in 2018 (or at least that the legal representatives had been unable to find any statutory change or authoritative case law to that effect). It was further argued that the panel did not have to consider risk over an indefinite period. These points form the essence of the application for set aside and I will return to them in the **Discussion** section below.

16. On 16 January 2023, the MCA panel made no direction for release. In the preamble to its reasons, it noted:

> *"…the Parole Board has been issued with guidance since [Johnson] was passed which inform members that the same test has to be applied in ALL determinate cases… As it stands, members therefore have to work within the current guidance, in order to be procedurally correct.*

Submissions were also raise (sic) about the 'life and limb' element of the release test…Parole Board guidance arising since both of these legal cases was, however, superseded 2018, which the Legal Representative acknowledges they have been unable to locate in order to assimilate statutory changes."

17. The decision then adds a hyperlink to the Parole Board 'Types of Cases Guidance' (August 2022, v2.0) (the **Guidance**) and signposts the reader to sections which deal with the release test and the risk period relating to standard determinate sentenced prisoners.

The Relevant Law

18. Rule 28A(1) 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(2), 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 rules 28A(1) and 28A(2). 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(4)(a)) **and** either (rule 28A(5)):

    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 made if information that had not been available to the Board had been available, or
    c) a direction for release would not have been made 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 Respondent

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

Discussion

Error of law

22. The first submission in the application for set aside is that the test for release is as set out in **King v Parole Board [2014] EWHC 564 (Admin)** and **Foley v Parole Board [2012] EWHC 2184 (Admin)**. It argues that these authorities support the proposition that the test for release is that of risk to life and limb, and that the Parole Board guidance is incorrect and cannot supersede authoritative case law.

23. It is true that no guidance can supersede authoritative case law. The choice of the word 'supersede' by the MCA panel is a poor one. However, it would only follow that

the panel misdirected itself on a matter of law if the Guidance it applied was inconsistent with statute and case law. I must therefore consider whether the Parole Board Guidance currently in force is contrary to **King** and **Foley**.

24. In order to do so, it will be necessary to recap on the evolution of the test used by the Parole Board.

The evolution of the 'life and limb' test

25. The first mention of 'life and limb' forming part of a risk test arose in **R(Benson) v Secretary of State for the Home Department (The Independent, 16 November 1988)** in which the Divisional Court considered the nature and level of risk by reference to which the Parole Board should measure whether continuing detention was justified. In **Benson**, Lloyd LJ said (summarising Lane CJ in **R v Wilkinson (1983) 5 Cr App R (S) 105, 108**):

> *"If risk to the public is the test, risk must mean risk of dangerousness. Nothing less will suffice. It must mean there is a risk of…repeating the sort of offence for which the life sentence was originally imposed; in other words, risk to life or limb."*

26. The 'life and limb' test was formulated here in respect of prisoners who had already been sentenced to imprisonment for life, in other words, the most serious offenders who had most likely already caused serious harm to life or limb. In **Benson**, Lloyd LJ went on to include 'non-violent but persistent rape' within the category of 'life and limb'. This is consistent with the test being concerned with life sentenced prisoners, as the most serious rape offences can attract a discretionary life sentence.

27. The approach in **Benson** was endorsed by the Divisional Court in **R(Bradley) v Parole Board [1991] 1 WLR 134**. Here, the court was concerned with the extent of the risk relevant to sentencing and to release on licence in respect of a prisoner serving a life sentence. Insofar as the release stage is concerned the court said that risk 'must indeed be 'substantial' ..., but this can mean no more than that it is not merely perceptible or minimal' (at **146**).

28. The Divisional Court's analysis of the extent of risk needing to be 'more than minimal' was approved by the Court of Appeal in **R(Wilson) v Parole Board and Another [1992] QB 740** in respect of a prisoner serving a discretionary life sentence.

Secretary of State Directions to the Parole Board: 'serious harm'

29. The Secretary of State was given the power under s 32(6) Criminal Justice Act 1991 to issue Directions to the Parole Board on matters that it must take into account in the discharge of its duties:

> *6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the [Crime (Sentences) Act 1997]; and in giving any such directions the Secretary of State must have regard to—*

(a) the need to protect the public from serious harm from offenders, and
(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.

30. Although this section has since been repealed, it has been repeated verbatim in s 239(6) Criminal Justice Act 2003 (the **2003 Act**).

31. It is clear from this that Parliament's intention was, and is, for the Parole Board to consider the risk of serious harm to the public in general.

32. 'Serious harm' was defined within s 224(3) of the 2003 Act (relating to dangerous offenders) as 'death or serious personal injury, whether physical or psychological'. This section has since been repealed and replaced by s 306(2) Sentencing Act 2020 which adopts the same definition. Although both these definitions relate to the assessment of dangerousness in sentencing, it is not unreasonable for me to use them in the assessment of risk of serious harm on release.

33. Therefore, drawing the statutory provisions together, any Directions given by the Secretary of State to the Parole Board must be consistent with the Board's role in protecting the public from the risk of death or serious personal injury, whether physical or psychological.

The Secretary of State's 2004 Directions

34. The Secretary of State issued s 239(6) Directions to the Parole Board in 2004 (the '**SoS Directions 2004**') in relation to prisoners sentenced to life imprisonment as follows:

> *"The test to be applied by the Parole Board in satisfying itself that it is no longer necessary for the protection of the public that the prisoner should be confined, is whether the lifer's level of risk to the life and limb of others is considered to be more than minimal."*

35. These Directions are consistent with the statutory framework set out above, except they do not include psychological injury within the implicit definition of 'serious harm'. They, do, however, reflect the 'more than minimal' element from **Benson**, **Bradley** and **Wilson**.

36. The SoS Directions 2004 were set out in **R(Foley) v The Parole Board for England and Wales [2012] EWHC 2184 (Admin) [8]** and **R(King) v Parole Board [2014] EWHC 564 (Admin) [31]** (upon which the Applicant relies).

37. The SoS Directions 2004 were withdrawn in June 2015. There are no current Secretary of State Directions about release before the Board.

Parole Board Guidance to members: 2010 and 2013

38. The Parole Board also issues Guidance to its members from time to time.

39. The Guidance issued in July 2010 (the '**PB Guidance 2010**') states:

> *"The test to be applied is whether the offender's level of risk to life and limb is considered to be more than minimal. There is a presumption that release will not be directed unless the evidence demonstrates to the Board's satisfaction that the level of risk is acceptable for release. The Board should refuse to direct release where it is satisfied that there exists the risk of serious violence or sexual offending, including arson, irrespective of the precise nature of the index offence."*

40. This guidance includes serious violence and sexual offending (from **Benson**) as well as arson (as an example of an act that carries risk of serious physical harm given the unpredictable nature of fire).

41. The PB Guidance 2010 was also set out, alongside the SOS Directions 2004, in **R(Sturnham) v Parole Board and Another [2013] UKSC 23 [8-9]**.

42. The Parole Board issued new Guidance in 2013 (the '**PB Guidance 2013**') on the test to be applied by panels of the Board when considering whether to direct the release after recall to custody of a prisoner serving a determinate sentence of imprisonment as follows:

> *"In order to direct release, the Board should be satisfied that it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb)."*

43. In **R(King) v Parole Board [2016] EWCA Civ 51**, the Court of Appeal held that the PB Guidance 2013 was lawful.

44. However, in **King**, Sales LJ then went on to say (at [48]):

> *"Finally, I would like to register that…the precise content of the statutory public protection test was not the subject of debate before us. It is not obvious to me why the board employs the "life and limb" approach when applying the statutory test. On the face of it, the public might require protection if, for example, an incorrigible fraudster were released early in circumstances where there was a significant risk he would again prey upon the public, even though he represented no threat to life and limb. I express no view about this aspect of the board's guidance because it was not in issue before us."*

45. It is clear from this comment that the 'life and limb' test was not under direct consideration by the Court of Appeal.

Parole Board Guidance to members: 2018

46. In December 2018, the Parole Board issued guidance (the '**PB Guidance 2018**') concerning the public protection test:

"3.7 When applying the public protection test, panels need to consider that:

1. the nature of risk is 'risk of serious harm';
2. serious harm covers psychological harm as well as physical harm. Serious harm is not limited to life and limb; and
3. any risk that is 'greater than minimal' should be considered by the panel."

47. There are three considerations that panels are guided to consider here.

48. The first (risk of serious harm) is consistent with s 239(6) of the 2003 Act.

49. The second (nature of serious harm) is consistent with the statutory definition of serious harm in s 306(2) of the Sentencing Act 2020 (death or serious personal injury, whether physical or psychological).

50. It is also consistent with Sales LJ's comment in **King** which suggests that harm should constitute more than the physical harm suggested by the ordinary use or the phrase 'life and limb'. Although *obiter* it is nonetheless persuasive. Its logic is clear, and there is no reason why it should not be applicable, particularly given the statutory broadening of serious harm beyond the physical.

51. There are no current Secretary of State Directions about release before the Board: therefore, the Secretary of State is no longer requiring the Board explicitly to consider the 'level of risk to the life and limb of others'.

52. The third (level of risk), is consistent with **Benson**, **Bradley** and **Wilson**.

Application for set-aside

53. Based on the analysis above, I do not find that the PB Guidance 2018 is incompatible with **King**. For completeness, neither do I find it incompatible with **Foley**.

54. While the MCA panel erroneously used the word 'supersede', I do not find that it applied the incorrect test.

55. In order to direct release, panels must look to the possibility of serious harm, either physical or psychological, being caused to the public. There must be more than minimal risk to the physical or psychological health of the public (including victims). However, the Parole Board now refers to the risk of serious harm rather than 'life and limb' to ensure that psychological harm is captured and given equal weight with physical risk to life or limb.

56. I find no error of law on this point.

Other matters raised in the 30 December 2022 representations

57. Although the application for set-aside offers the single ground dealt with above, it also refers to the written submissions previously submitted for the first instance review.

58. I do not have to deal with them here as they were raised in relation to the initial decision not to direct release, but for completeness, I make the following observations:

    (a) It is conceded that psychological harm is a relevant consideration for the Parole Board, but given **Foley**, **King** and **Sturnham,** it is argued that there would need to be a risk of "*very serious psychological harm"* which the Applicant did not present. This is incorrect. Notwithstanding any argument over the meaning of 'life and limb' it is clear that the risk must be 'serious' and not 'very serious'.

    (b) It is also argued that the Parole Board should not have considered risk indefinitely based on **R(Secretary of State for Justice) v Parole Board [2022] EWHC 1282 (Admin**) (commonly referred to as **Johnson**, the interested party to proceedings). It draws distinctions between the application of **Johnson** to determinate sentenced prisoners and extended sentenced prisoners. It argues that the Parole Board's interpretation of **Johnson** is wrong. The Parole Board's (and my) position is that it is not. The matter of whether the Parole Board's interpretation is, in fact, correct, would be a matter for the High Court.

Decision

59. For the reasons I have given, the application for set-aside is refused.

Stefan Fafinski
13 April 2023