the Parole Board
working with others to protect the public

[2024] PBSA 11

Application for Set Aside by Johnson

Application

1. This is an application by Johnson (the Applicant) to set aside the decision not to direct his release. The decision was made by a panel after an oral hearing on 7 August 2023. This is an eligible decision.

2. I have considered the application on the papers. These are the dossier (consisting of 229 pages), the oral hearing decision (dated 21 January 2024), and the application for set aside (dated 1 February 2024). The application also contains an email from the Applicant's Community Offender Manager dated 23 January 2024. I have also been provided with a Stakeholder Response Form (**SHRF**) dated 26 January 2024.

Background

3. On 16 June 2017, the Applicant received a determinate sentence of imprisonment for eight years following conviction for conspiracy to supply a controlled drug (heroin). He also received a concurrent eight year sentence for conspiracy to supply cocaine.

4. The Applicant was aged 38 at the time of sentencing. He is now 44 years old.

5. The Applicant was automatically released on licence on 20 July 2020. His licence was revoked on 10 May 2022, and he was returned to custody on 13 May 2022. His sentence ends in July 2024. This is his first parole review since 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 fact.

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. The case proceeded to an oral hearing on 7 August 2023 before a single-member panel. The panel heard evidence from the Applicant, his Prison Offender Manager (**POM**), and his Community Offender Manager (**COM**). The Applicant was legally represented throughout the hearing. The Respondent was not represented by an advocate.

10. The review was adjourned after the hearing for certain matters to be concluded, one of which was the address at which the Applicant would reside if the panel directed his release. The COM was clear that the Applicant could not be managed in the community without a release address. He also confirmed that the Applicant was not eligible for a placement in designated accommodation. At the time of the hearing no release address had been confirmed.

11. The Applicant proposed a family member's address, but this was not supported by his COM.

12. The Applicant then proposed a former partner's address. The COM later reported that the former partner was no longer willing to assist.

13. The Applicant then proposed a third address. On 19 December 2023, the COM assessed it as suitable for release.

14. However, on 8 January 2024, the COM subsequently reported that the occupier had changed her mind and could no longer have the Applicant staying at the address. The occupier reportedly said that she was having a family member to stay for a period of time and was not sure when the situation will change. As a result, she would not be able to accommodate the Applicant upon release as previously planned.

15. On 9 January 2024, the Applicant's legal representative submitted that he had heard from the occupier who asked him to inform the Probation Service that she had made other arrangements, and they could proceed with the original proposal for the Applicant to stay at her address if released. The legal representative told the occupier to inform the Applicant's COM and she confirmed that she had done so.

16. The panel did not direct the Applicant's release. The decision noted that, although the Applicant's legal representative had indicated that the occupier had changed her mind, it was for the COM to confirm the availability and suitability of release accommodation and no further information had been provided (by the COM). The panel did not see the benefit of adjourning again, and, given there was no confirmed release address, then risk could not be managed in the community.

17. The application encloses an email from the COM dated 23 January 2024 (after the decision not to release was issued) which confirmed that he had received a message from the occupier on 8 January 2024 stating that her address was available. The COM states that since the legal representative had notified the panel, then he assumed that this would be sufficient to clarify that the release address was available. The same information is then repeated in the SHRF of 26 January 2024.

The Relevant Law

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.

The reply on behalf of the Respondent

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

Discussion

22. It is argued on behalf of the Applicant that there has been an error of fact upon which the panel has relied in making its decision not to release the Applicant: specifically, that the panel was incorrect in stating that there was no confirmed released address.

23. At the time the panel made its decision not to release the Applicant, the suitability of the proposed release address had been confirmed to the panel by the COM (on 19 December 2023), but its availability had not been confirmed by the COM. The Applicant's legal representative had informed the panel that the occupier had changed her mind and had informed the COM. The COM, however, did not confirm this to the Parole Board until after the decision had been made. The last written evidence of the COM before the panel (8 January 2024) stated that the address was not available.

24. It was open to the panel to seek clarification of this from the COM, particularly given that the re-availability had been raised by the Applicant's legal representative. It chose not to do so.

25. In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, the Court of Appeal held that a material mistake of fact giving rise to unfairness was a ground on which to quash a decision on judicial review. Although the set aside rule is not

judicial review *per se,* it nevertheless provides a mechanism by which a decision by a public law body may be scrutinised and potentially set to one side. Given that clear analogy, I consider that the case law pertaining to mistake of fact in judicial review is equally applicable to the case before me.

26. *E* set out four conditions which must be satisfied for a successful challenge on the basis of mistake of fact:

   a) The mistake is one as to an 'existing fact' (including a mistake as to the availability of evidence on a particular matter);
   b) The fact or evidence must be 'established' in the sense that it is 'uncontentious and objectively verifiable';
   c) The appellant (or his advisors) must not have been responsible for the mistake;
   d) The mistake must have played a 'material' but not necessarily decisive part in the decision-maker's reasoning.

27. In the present case:

   a) The fact of the availability of the proposed release accommodation existed before the decision was made. Evidence was available from the Applicant's legal representative and could have been made available from his COM if the panel had asked, or the COM realised that merely telling the legal representative would have been insufficient for the panel not to discount that evidence.
   b) There was no contention regarding the availability of accommodation at the point the decision was made. There is no dispute between the parties. Its availability was objectively verifiable via the COM.
   c) The Appellant was not responsible for the mistake. Quite the opposite: the Appellant's legal advisor took steps to bring the fact to the attention of the panel.
   d) The reasons given for the decision are clear that the unavailability of a release address was at least material (and, given the previous efforts of the panel to ascertain one, probably decisive).

28. Following the test set out in *E,* I do find there to have been a material error of fact in this case. Moreover, as already stated, I find that the decision would not have been made but for this error.

29. Finally, I must consider whether it is in the interests of justice for the decision to be set aside.

30. I am satisfied that it is in the interests of justice for the panel's decision to be set aside. A Parole Board direction for no release cannot be made on the basis of an error of fact. Justice requires decisions (particularly ones in which an individual's liberty is at stake) to be made based on factual evidence.

31. The test for setting the decision aside is therefore made out.

Decision

32. For the reasons set out above, the application for set-aside is granted.

Stefan Fafinski
13 February 2024

3rd Floor, 10 South Colonnade, London E14 4PU www.gov.uk/government/organisations/parole-board
info@paroleboard.gov.uk @Parole_Board 0203 880 0885

INVESTORS IN PEOPLE | Bronze